

Confidentiality and the Lawyer-Client Relationship †

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The Model Rules of Professional Conduct proposed by the American Bar Association¹ differ from the presently enforced Code of Professional Responsibility² in a number of ways. This essay focuses on the differences with regard to the scope and limits of confidentiality in the lawyer-client relationship. In general, the Model Rules permit or require more disclosure of information learned by the lawyer in the course of the lawyer-client relationship than does the Code. In Section I, I describe the differences between the Rules and the Code in the area of confidentiality. Then in Sections II and III, I make some suggestions about the moral basis, complexity and limits of confidentiality. I focus in these sections on ordinary, nonprofessional contexts and consider not only confidentiality but the more general question of the moral appropriateness of passing on information about other people, whether it has been given in confidence or not. In Section IV, I look at various accounts of the scope of lawyer-client confidentiality and criticize some of the typical arguments given for the view that very little, if anything, should be disclosed by the lawyer. I therefore favor the greater disclosure provisions of the Model Rules, although not enough is said to allow me to deserve that conclusion. My tentativeness and the fact that much here is exploratory are calculated. The discussions of lawyer-client confidentiality of which I am aware do not go very deep.³ In the hard cases in dispute there are valid competing inter-

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1. ABA COMM. ON EVALUATION OF PROFESSIONAL STANDARDS, MODEL RULES OF PROFESSIONAL CONDUCT (Discussion Draft, January, 1980) [hereinafter cited as MODEL RULES].

2. ABA CODE OF PROFESSIONAL RESPONSIBILITY (1977) [hereinafter cited as CODE].

3. Among the standard essays on this subject are: M. FREEDMAN, *LAWYER'S ETHICS IN AN ADVERSARY SYSTEM* (1975) (especially chs. 1-6); Curtis, *The Ethics of Advocacy*, 4 STAN. L. REV. 3 (1951); Drinker, *Some Remarks on Mr. Curtis' "The Ethics of Advocacy,"* 4 STAN. L. REV. 349 (1952); Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031 (1975); Freedman, *Professional Responsibility and the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966). See also Luban, *Professional Ethics: A New Code for Lawyers?*, 10 HASTINGS CENTER REP. 11 (1980); Morgan, *The Evolu-*

ests at stake: those of the client, the court, the public, the truth, *etc.* Those who discuss this issue tend simply to weigh these interests differently, backing their weightings with arguments that do not meet each other.⁴ I intend to avoid this pattern and to suggest some possible ways to move beyond it.

I. CONFIDENTIALITY—THE MODEL RULES VS. THE CODE

This section considers the major differences between the Code and the Model Rules about confidentiality. These can be divided into four groups: (a) crimes and other misdeeds, (b) perjury, (c) misapprehensions and (d) corporate misconduct.

A. *Crimes and Other Wrongful Acts*

The Code says that a lawyer *may* reveal a client's intention to commit a crime, and the information necessary to prevent it.⁵ According to the Model Rules, a lawyer *must* disclose information when necessary to prevent a client from causing death or serious bodily harm to another person.⁶ The Model Rules, therefore, make disclosure of potential violent acts mandatory, while the Code only brings it within the scope of a lawyer's discretion. The Model Rules also permit (but do not require) a lawyer to reveal information necessary to prevent other deliberate wrongful acts,⁷ where a "wrongful act" is defined as one that violates a civil or penal standard "in which knowledge of the circumstances is an element of the violation."⁸ This broadens the area of discretion laid down by the Code, for the Code permits lawyers to reveal only crimes, while the Model Rules permit the disclosure of nonpenal violations as well. Depending upon how the Model Rules are interpreted, however, the discretion of the Rules may be in some ways more limited than that of the Code. The Model Rules restrict discretion to acts that involve knowledge on the part of the agent, and so exclude revealing strict liability offenses and possibly offenses involving negligence.⁹

ing Concept of Professional Responsibility, 90 HARV. L. REV. 702 (1977); Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CAL. L. REV. 669 (1978); Note, *Client Fraud and the Lawyer — An Ethical Analysis*, 62 MINN. L. REV. 89 (1977).

4. *E.g.*, M. FREEDMAN, *supra* note 3; Frankel, *supra* note 3.

5. CODE, *supra* note 2, DR 4-101(C)(3).

6. MODEL RULES, *supra* note 1, Rule 1.7(b).

7. *Id.*, Rule 1.7(c)(2).

8. *Id.* at 6.

9. The drafters of the Model Rules do not comment on how the Rules' definition of

No provisions of the Code even discuss disclosure of past crimes and wrongful acts—that is, acts other than the ones for which the lawyer is representing the client in the current case. Such disclosure is therefore prohibited by the general rule that a lawyer shall not knowingly reveal a confidence or secret of a client.¹⁰ The Model Rules, by contrast, are presently unclear about disclosure of past acts. They do not address the issue explicitly, either in the rules or in the explanations. Yet, Rule 1.7(c)(2) provides that a lawyer may disclose information “to the extent it appears necessary to prevent or *rectify* the consequences of a deliberately wrongful act by the client.”¹¹ If such an act has been done in the past, it might be rectified were the lawyer to notify the police or the injured parties that his client was the perpetrator. Accordingly, the Model Rules seem to permit disclosure of past misdeeds. It may be that the drafters did not intend this interpretation, but meant the rule to apply only to the rectification of wrongs yet undone. If so, however, Rule 1.7(c)(2) needs to be clarified; and if not, an explicit discussion of what the rule is meant to cover would be helpful.

B. Perjury

The Code is notoriously ambiguous about whether a lawyer should reveal client perjury. Disciplinary Rule 4-101(B) says that a lawyer shall not knowingly reveal a client’s secret or confidence, but the exceptions include revealing confidences or secrets “when permitted under Disciplinary Rules.”¹² Disciplinary Rule 7-102(B)(10) provides that a lawyer receiving information clearly establishing that his client has perpetrated a fraud upon a person or tribunal must try to get the client to rectify it and must reveal the fraud himself “except when the information is protected as a privileged communication.” It is unclear whether the fraud rule is to be qualified in light of the confidence rule or vice versa. In other words, the Code leaves open whether confidences should not be revealed except when a fraud has been perpetrated, or whether a fraud may be revealed, but only when it does not reveal any confi-

“wrongful act” as violations “in which knowledge of the circumstances is an element,” *id.*, is to be interpreted. Luban argues that this definition excludes all but a “small and rather arbitrary” list of torts, since although the tortfeasor may have knowledge, knowledge is not an element of the wrong. Luban, *supra* note 3, at 14.

10. CODE, *supra* note 2, DR 4-101(B)(1).

11. MODEL RULES, *supra* note 1, Rule 1.7(c)(2) (emphasis added).

12. CODE, *supra* note 2, DR 4-101(C)(2).

dences.¹³ The latter interpretation seems more likely, but its effect is to nullify any serious duty to reveal perjury.¹⁴ The Model Rules, on the other hand, unambiguously require a lawyer to reveal client perjury, not only in civil cases, but in criminal cases as well. The only exception is in criminal cases when applicable law requires the lawyer to comply with the client's demand to offer evidence, regardless of the lawyer's belief that the evidence is false.¹⁵

C. *Misapprehensions*

The Model Rules require a lawyer in an adversary proceeding to disclose a fact adverse to his client when necessary to correct a manifest misapprehension that resulted from the lawyer's previous representations to the court.¹⁶ The exception to this parallels the exception regarding perjury: such disclosure may not be made in a criminal trial where applicable law prohibits it.¹⁷ An example of such misapprehension is found in the well-known case of *In re A*,¹⁸ where the client's testimony that his mother was "in Salem" was taken to imply that she was alive (therefore affecting the monetary aspects of a divorce settlement) when in fact she was buried in Salem cemetery. The Model Rules also require the disclosure of adverse facts during negotiation in order to correct a misapprehension resulting from the lawyer's or client's remarks.¹⁹ Again, the exception is that disclosure of a misrepresentation made by the defendant is "not required" in negotiations relating to criminal cases.²⁰ No duty to correct misapprehensions in either adversary proceedings or negotiations appears in the Code and thus would seem to be ruled out, at least whenever correction would disclose confidences or secrets.²¹ The duty in the Code to rectify a fraud upon a person or tribunal²² could be interpreted to require correcting misapprehensions, but doing so stretches the term "fraud," and, in any case, is allowed only in limited circumstances.²³

13. See Note, *supra* note 3.

14. *Id.* at 103-04.

15. MODEL RULES, *supra* note 1, Rule 3.1(b)(3).

16. *Id.*, Rule 3.1(d)(2).

17. *Id.*, Rule 3.1(f)(2).

18. 276 Or. 225, 554 P.2d 479 (1976).

19. MODEL RULES, *supra* note 1, Rule 4.2(b)(2).

20. *Id.*

21. CODE, *supra* note 2, DR 4-101(B)(1).

22. *Id.*, DR 7-102(B).

23. *Id.*, DR 4-101(C)(1)-(4).

D. Corporate Misconduct

Both the Code and the Model Rules assert that a lawyer representing an organization or corporation has as client the organization and not its officers or directors.²⁴ The Model Rules add that when the lawyer knows that a member of an organization or corporation is engaged in or intends to engage in an act that is illegal and likely to result in significant harm to the organization, the lawyer must take steps *within* the organization to prevent the harm.²⁵ Further, if the highest authority within the corporation refuses to act, and the action is a clear violation of law and likely to substantially injure the organization, the lawyer may take remedial action outside the organization. Such a step is likely to involve the disclosure of information gained from corporate officers and employees.²⁶ The Code says nothing explicit about these matters. Nevertheless, the clause in the Code that permits a lawyer to reveal his client's intention to commit a crime²⁷ would seem to imply a discretion to reveal corporate crimes as well. Nothing in the Code, however, mandates efforts internal to the corporation to prevent or stop the crime. So the Model Rules do go beyond the Code: the requirement of internal action is new and the explicit discretion to reveal a crime outside the corporation gives more solid support than the Code now provides to the lawyer who does so.²⁸

In sum, with respect to future crimes and other wrongful conduct, perjury, misapprehensions, corporate misconduct and perhaps with respect to past misdeeds, the Model Rules permit or require more disclosure of otherwise confidential information than does the Code. An additional major difference is that the Model Rules allow disclosure of relevant confidential information on legal evaluations prepared for third parties provided the client has agreed to the disclosure of facts that are necessary for fair, accurate evaluation,²⁹ while the Code simply does not consider this matter. There may be other differences, but these are the major, controversial ones.

24. *Id.*, EC 5-18; MODEL RULES, *supra* note 1, Rule 1.13(a).

25. MODEL RULES, *supra* note 1, Rule 1.13(b).

26. *Id.*, Rule 1.13(c).

27. CODE, *supra* note 2, DR 4-101(C)(3).

28. See generally Solomon, *The Corporate Lawyer's Dilemma*, FORTUNE, November 4, 1979, at 138.

29. MODEL RULES, *supra* note 1, Rule 6.2.

II. THE USE AND MISUSE OF PERSONAL INFORMATION

What should we think about these liberalized disclosure provisions of the Model Rules? Are they reasonable, in accord with sound moral requirements and consistent with the necessities of an adversary system of justice? Do they express a fair balance among a lawyer's duties to his clients, to other persons and to the demands of his own moral personality? Or do they go too far, requiring or permitting conduct of the lawyer that is either unethical or destructive of the system of justice or both? It has recently been asserted that the Model Rules would "erode basic constitutional protection by making the lawyer an agent of the state"³⁰ and would deprive troubled individuals of a needed confessional by making the lawyer's office "a listening post for the state."³¹ Furthermore, it might be charged that the Model Rules are based on the view that the end of finding out the truth in a case justifies the means. Can such charges be supported or refuted?

In order to progress toward answering these questions, it is helpful to understand confidentiality more fully, independent of professional contexts. We want to understand the moral grounds for not disclosing confidential information and the moral limits to such nondisclosure. To this end, I will often consider the situation in which a person discloses to a second person information about himself. We shall call the first person the *speaker*, the second person the *hearer* and the sort of information conveyed *personal information*. Should the hearer disclose the information to a third person, that person is termed a *listener*. When is it and when is it not morally acceptable for a hearer to convey personal information learned from a speaker to a listener? In general, how morally free is the hearer to make use of that information by disclosure?³²

To answer these questions, it is helpful to draw a basic distinction between those contexts in which the speaker conveys the information with an understanding that it will be kept confidential and those in which there is no such understanding. Surely this difference strongly affects the moral freedom to disclose the information. This difference, however, is not as strong as might initially appear. Within the context in which the information is understood

30. Koskoff, *Introduction to THE ROSCOE POUND - AMERICAN TRIAL LAWYERS FOUNDATION COMM. ON PROFESSIONAL RESPONSIBILITY, THE AMERICAN LAWYER'S CODE OF CONDUCT (Public Discussion Draft, June, 1980), reprinted in TRIAL, Aug., 1980, at 46. But see Luban, supra note 3, at 15.*

31. Koskoff, *supra* note 30, at 46-47.

32. I omit discussion of other possible uses of the information, such as for blackmail.

to be confidential, there are two kinds of cases. In one case, confidentiality is explicit because the speaker has asked for and received a promise from the hearer that the information will not be passed on. In the second case, confidentiality is implicit; no express promise of confidentiality is given, but because of the nature of the information or the relationship between the parties, there is an unspoken understanding that the information is not to be transferred. The basic distinction between contexts in which information is explicitly or implicitly understood to be confidential and those in which it is not is an important one, although it must be realized that the difference is not a sharp difference in kind, with quite different moral implications, but a matter of degree.

To see that the difference is not sharp, we might note first that information conveyed by a speaker could be used by a hearer to harm or embarrass the speaker, interfere with the speaker's interests, thwart the speaker's and others' plans, and upset or disturb or even harm other parties. There will often, therefore, be very strong moral reasons for not disclosing information even if it has not been delivered with an explicit promise of confidentiality. Second, the revelation of damaging personal information frequently carries with it an implicit understanding that the hearer keep the information confidential, unless the speaker in some way cancels or rejects this understanding. Such information is not to be passed on unless the speaker releases the hearer from an obligation not to pass it on.³³ The reason for this has to do with the underlying moral basis for confidentiality, discussed in more detail below: roughly, because the basis for confidentiality is that speakers need to express damaging information without losing control over its use, such information is typically given out with a tacit understanding that it will not be further disclosed. We respect confidentiality because of a moral requirement to respect both this understanding and the needs that underlie it. Any explicit promise to keep information confidential provides an additional moral consideration reinforcing the obligation of confidentiality, but promise-keeping of this sort is not the basic reason for the obligation. Indeed, in many cases, the request for a promise to keep something confidential is simply a way for the speaker to make sure that the tacit understanding really exists, to produce it in ambiguous con-

33. By contrast, positive, nondamaging information is typically nonconfidential unless confidentiality is requested.

texts, or to remind the hearer of its presence.³⁴ Some of these claims need refinement and qualification but their plausibility is enough to support the main point: that confidentiality is not the only reason for being careful with personal information, but a reason that appears somewhat ubiquitously in many kinds of cases involving the communication of damaging or "negative" personal information.

For these reasons, the distinction between contexts in which information is understood implicitly or explicitly to be confidential and contexts in which it is not will give us only part of the basis for knowing how to use and treat personal information. In fact, I suggest that we all accept and are more or less governed by a fairly subtle, complex and imprecise set of principles concerning what we may and may not do, by way of disclosure, with personal information conveyed to us by others. How we should use such information will be a function of a variety of factors such as the nature of the information revealed, the speaker's expectations concerning confidentiality, the consequences of disclosure, the hearer's relationship to the speaker and the potential listener, the speaker's relationship to the listener, and the likelihood that the listener will or will not in turn keep the information confidential or restrict its use in appropriate ways. As an illustration, consider a case in which a speaker imparts to a hearer some embarrassing personal information without explicitly asking that the information be kept secret. To whom might the hearer reveal the information? It would surely be incorrect to give as a general answer for every case that it might be revealed to anyone or to no one. Much will depend on the factors just listed. Very likely, it would be wrong for the hearer to disclose the information to a listener who would use it to embarrass or harm the speaker. Even if the information is not used detrimentally, or in any way at all, telling others might constitute an unjustified invasion of the speaker's privacy simply because others know the embarrassing fact.

Consider now imparting the information to a hearer who is a friend of and cares for the speaker, and one who could use the information in a way helpful to him. The appropriateness of disclosure to such a listener will depend on a number of factors: whether the friend really can help, whether the speaker would welcome the help, whether the speaker really wants (without admitting it) the

34. To be asked by a speaker to keep something confidential can be irritatingly expressive of a lack of trust, particularly when confidentiality is implicit in the context.

information to be spread around, whether the information is as embarrassing as the speaker perceives it to be, whether the listener can be trusted to use the information appropriately, *etc.* What the hearer does will raise difficult questions about when and how to help others, when to respect their autonomy and privacy, and when to intervene paternalistically—that is, for another's good, independent of or against his wishes.

Suppose, however, that the information is really not as embarrassing as the speaker supposes; his friends are not surprised to hear of it and perhaps even cherish it as interesting foibles or character traits. Would it be wrong for the hearer to reveal it, even gossip about it, at a gathering of some of the speaker's friends? Revelation is at least a minor indiscretion, perhaps a hint of betrayal. But clearly we are all quite interested in other people and we do gossip in this way; people seem too easily embarrassed, and no real harm is done, *etc.* And what about the propriety of a hearer revealing even genuinely embarrassing information to his spouse or the person with whom he shares his life? I suspect that people are not expected to keep certain sorts of information from the person with whom they are accustomed to sharing both their lives and all sorts of information. So it may be acceptable to tell certain things to one's mate that may not be told to anyone else, unless one's mate cannot keep a secret.

Let me mention one final pair of cases. Suppose the speaker reveals genuinely embarrassing personal information and extracts a promise of secrecy from the hearer. Suppose further that the speaker is the sort of person who rarely reveals such personal information and the hearer knows this. In many such cases, it may seem seriously wrong to tell even a spouse and friends, although there are obviously cases in which it would be justified. Contrast this situation, however, with a case in which the speaker is the sort of person who characteristically informs one and all of personal information others tend to guard more carefully. Then an obligation to keep the information secret or confidential may be lessened or disappear, even if a promise of confidentiality is extracted.

How one may treat personal information conveyed by another is thus a complex matter to which many different considerations are relevant. I make this point in order to put confidentiality in a broader context. The obligation of confidentiality grows out of the ordinary communication of personal information; questions concerning it are part of questions concerning the use in general of information imparted by others. Setting confidentiality against a

broader background will give us a better chance of understanding the obligation, a task to which I now turn.

III. CONFIDENTIALITY IN GENERAL

Confidentiality—the speaker's revelation of information with the explicit or implicit understanding that it will not be disclosed further—can be "attached" to many different sorts of information. I have restricted the discussion to personal information, that is, information about one's self. Other sorts of information might be kept confidential, but I am not dealing here with the questions these raise. I would now like to distinguish several different categories of confidential information and then turn to the basic reasons for confidentiality.

The first sort of information I shall call *embarrassing* information: by this I mean information that simply embarrasses or shames the speaker. Embarrassing information need not involve wrongful or illegal acts. From this, we can distinguish what I shall call *guilty* information: the information that the speaker has done something wrong which, if imparted to the appropriate listener, would cause the speaker to be sanctioned by formal punishment or by informal blame, disapproval, chastisement, *etc.* Information about a speaker's crime, a speaker's betrayal, or a child's mischievousness would all come within this category. Next, there is what could be called *dangerous* information. This is information that the speaker intends to commit some harm, injury or other damage to the interests of a third party. A fourth category I shall call *detrimental* information, which is information that could be used by a listener to bring harm to the speaker. Information that is embarrassing, guilty or dangerous might fall into this class, but information that is none of these may also be included: *e.g.*, the whereabouts of a rich man's child conveyed to a would-be kidnapper. A fifth category of information I shall call *planning* information—information about a speaker's plans, intentions, projects or purposes. The key reason for confidentiality here would be that revealing such information might cause the speaker's plans to be thwarted (or helped) by others. The sixth and last category of information I call simply *positive* information, which is information involving good or indifferent facts about a person. Such information could not be embarrassing, guilty or dangerous, but it could be detrimental or planning.

These categories are not meant to be exhaustive or exclusive, but only a good rough classification for the purposes of under-

standing the limits of confidentiality. I shall argue that the moral force of the obligation of confidentiality will differ with respect to these different types of information, after making clearer a certain conflict which I take to be inherent in confidentiality.

A person may reveal embarrassing, guilty or dangerous information to another person for a number of reasons. He may wish advice, seek sympathy, desire the human response of another person, need to express what is on his mind, to confess or admit or just share his knowledge and feelings. Of course, there are other possible motivations, such as enlisting the hearer as a confederate, but the main point is that the speaker wishes both to retain the privacy of the information and at the same time to express it to someone else. Confidentiality is the device for doing this.

This dual nature of confidentiality can be understood in a somewhat metaphorical way: when a speaker delivers information in confidence, the speaker attempts to make the hearer a part of his own self, his "extended self," with respect to the information revealed. He needs the hearer to be another person, another "ear" and mind who can register his information and respond to it; "revealing" a confidence to a wall or a dog is no substitute for telling a person. At the same time, he needs the hearer not to be another person, but to be a part of his own self so that the information will not be used except as he chooses. Dropping the metaphorical notion of an extended self, the idea is that with respect to the piece of information revealed, the hearer is not free to use it as an autonomous moral agent. The information, in effect, still "belongs" to the speaker who would not have "lent" it unless he knew he could retain control of it. I suggest that both the speaker and hearer in a situation in which information is imparted in confidence perceive the situation this way, or at least realize that this is how it is supposed to be perceived.³⁵

The situation of the hearer just presented is morally difficult, characterized by inevitable moral conflict. On the one hand, the hearer has given up moral autonomy with respect to a certain piece

35. The general obligation of loyalty and the obligation to fill the demands of the roles one plays can perhaps also be understood along these lines. To have obligations based on loyalty to someone or to some entity, or to have an obligation because one fills a role, is to consider oneself unfree to act in certain respects as an autonomous moral agent, because one is under the control of the person or agent and must act according to their wishes or choices. I cannot pursue this more general issue here. For a provocative discussion of how this may characterize the lawyer's role, see Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUMAN RIGHTS 1 (1975).

of information. On the other hand, the hearer still remains an autonomous moral agent with the capacity for moral deliberation and choice. Morally speaking, his autonomy with respect to the information received cannot be given up, or be fully given up. He remains a moral being and thus free to deliberate about what to do with the information once he has received it. The fact that it has been revealed in confidence is a powerful reason for keeping it secret, but cannot settle the issue. The hearer cannot remain a moral agent without retaining his right to consider the information in light of other factors which may, all things considered, provide even stronger reasons for revealing it.

We all implicitly realize this about confidentiality. On the one hand, we need the confidential transfer of information and the consequent inclusion of the hearer into the speaker's wider self. Yet, the presuppositions of this relationship cannot be realized simultaneously; the hearer cannot be expected to give up his autonomy. Revealing information to another is a dangerous act, involving both trust that the hearer will keep the information secret, and fear not only that he will not but that he justifiably will not, that he will perceive the situation as one in which other moral demands rightly overcome the demand to keep the information secret.³⁶ Of course, we fear also the hearer's moral weakness, temptations to reveal gossip to others for frivolous or self-serving reasons and betrayal out of neglect or malevolence. Yet, these are not the only concerns involved when we reveal information.

An Hegelian might sum up by saying that confidentiality is a concept that involves a "contradiction": the giving up of something, moral autonomy, which cannot be given up. It has two sides or "moments," surrendering and retaining independent moral choice. These are in both unity and dialectical opposition: unity because both are essential to confidentiality, opposition because they pull in different directions. The tension of the hearer's situation, of course, will be resolved in many cases, but that it may remain unresolved in hard cases is fully appropriate.

Let me summarize in different language by saying that there is a "prima facie obligation"³⁷ to keep information given in confi-

36. These other demands, incidentally, might involve not only obligations to third parties but to the speaker himself, when revealing the information would be for the speaker's own good.

37. As moral philosophers tend to use the term, to say that one has a prima facie obligation to do an act of kind X is to say that one has a moral reason for doing X such that one should in fact do X, unless there are stronger and weightier moral reasons against doing

dence secret, which is based on two things: the promise to keep it secret, whether explicit or implicit; and the need of the speaker, which underlies the promise, to express but retain control of the information. One ought, other things being equal, to honor not only the promise but the need that gives rise to it. A further reason reinforcing the prima facie obligation is the fact that in many cases, revealing the information will bring disadvantage upon the speaker and/or other parties. Such potential disadvantage provides a moral reason for guarding information even when it is not given in confidence, but it is additional reason for not disclosing confidential information. These remarks about confidentiality are not only meant to bring out the reasons underlying the prima facie obligation but also to emphasize that, as strong as these reasons may be—and in many cases they are very strong—they cannot be strong enough to remove the hearer's own moral autonomy, his right and duty to act on stronger countervailing reasons.

The difficult question that now must be confronted is the strength of the reasons on both sides. To shed some light on this, I want to compare some of the types of information mentioned earlier. With respect to guilty information—*i.e.*, information that the speaker has done some wrong for which he could be sanctioned—the need to reveal the information will often be serious and deep, deserving respect. With respect to dangerous information—*i.e.*, information that the speaker intends to harm another—the need will often be less compelling. Further, the hearer's disclosure of dangerous information will often have very good consequences, while the consequences of hearer disclosure of guilty information, though good, will be less important to society and less certain to occur. These generalizations are almost certainly too strong, even if only roughly true; however, they show that the obligation to guard guilty information is often stronger than the obligation to guard dangerous information.

On what facts are these generalizations based? Quite often, the motive to reveal guilty information is the speaker's need to confess, to share the knowledge and the burden of his guilt, to express what is on his mind and to receive sympathetic advice about what to do. These are important needs and much can be gained by

X. Such counter reasons are often said to override or overcome the prima facie obligation. A prima facie obligation needs to be contrasted with an "absolute" or "exceptionless" obligation, which may not be overridden. The talk of prima facie obligations often goes along with the view that there are a plurality of cogent moral considerations which may conflict in particular situations; in such cases, some judgment must be made as to which are weightier.

permitting wrongdoers this opportunity to express themselves. On the other hand, a speaker might reveal dangerous information from boastfulness, the expression of revenge (against the potential victim) or the desire to enlist the hearer as a confederate or keep him quiet. Such disclosure may surely come from better motives, such as seeking advice or hoping to be talked out of the wrongful act; conversely, confiding guilty information could result from boastfulness, revenge or other less admirable motives. I am inclined, nevertheless, to think that there is a typical difference between motives of the sort mentioned. In addition, there is a difference with respect to consequences. Revealing dangerous information can often, with near certainty, have very good consequences: the prevention of injury and harm. The consequence of disclosing guilty information is usually the sanctioning of the offender. In many cases, the sanction is less important to society than the prevention of impending harm. One reason for this is that the punishment of any particular offender may not matter so much if the general system of punishment is maintained. Further, the punishment may do no good if the offender is not inclined to commit other wrongs. And the offender, if allowed the opportunity to confess, may sooner or later reveal publicly his own wrong-doing and thus undergo sanctions without disclosure by the hearer. I admit that these claims are controversial and hold at best in a general way, but if correct they underlie the intuition that there are often stronger reasons for not disclosing guilty information than for not disclosing dangerous information. This intuition may well be at the basis of the fact that the Code and the Model Rules treat differently the disclosure of future and of past crimes or wrongful acts.³⁸

With respect to embarrassing information, if we focus just on consequences it may seem that the obligation of confidentiality is weakened by the fact that the consequences of disclosure will often not be very bad. On the other hand, disclosure by the hearer is unlikely to attain good consequences or prevent bad consequences, so there is little compelling reason for revelation. Consequences do not play a very important role here. What are important are the needs for self-expression and understanding, which move people to reveal embarrassing information that is not at the same time also guilty or dangerous. These needs deserve respect and thus may strengthen the obligation to keep such information confidential. Here we might also recall our earlier discussion of cases in which

38. See pp. 766-67 *supra*.

disclosure may help the speaker. In such cases, there will be reasons for disclosure, although these raise the complex issue of paternalism. Planning and positive information are difficult to generalize about since there are probably no typical needs or consequences which characterize imparting it. Finally, with regard to detrimental information, the potential harm to the speaker stands out as a strong reason against disclosure, which may be nullified if the information is also dangerous.

The point implicit in this rough survey is that it does matter what needs give rise to imparting information and what consequences will follow disclosure. The obligation of confidentiality varies in strength with these features. Keeping these needs and consequences in mind will help us make reasonable distinctions between cases.

IV. CONFIDENTIALITY IN LEGAL CONTEXTS

Turning from the ordinary contexts to the legal context, we need to tackle a cluster of issues concerning the scope of confidentiality. How much and what kinds of information revealed by the client or otherwise learned in the course of the lawyer-client relationship should come within the domain of confidentiality? We might include within confidentiality all the information revealed in the relationship. Another possibility would be to include all information the disclosure of which would be embarrassing or detrimental to the client, as the Code provides.³⁹ A further possibility would be to include all and only information that is relevant to the legal matter for which the client has sought the lawyer's aid. We might, of course, have to explore additional possibilities.

To answer these questions, we must begin by examining two ways of understanding the permissibility of disclosure in legal contexts. First, information that is permissible to disclose might be entirely outside the domain of confidentiality and be completely unprotected. Second, information that is permissible to disclose might be *prima facie*⁴⁰ confidential under the rules of professional ethics; disclosure provisions would then specify the contexts in which the confidentiality provisions may or must be overcome. On the latter understanding, the information comes within the scope of confidentiality: revealing it involves a *prima facie* wrong even

39. CODE, *supra* note 2, DR 4-101(A).

40. That is, confidential unless there are strong reasons overriding confidentiality. See note 37 *supra*.

though disclosure is justified, *all* things considered. It may seem that the distinction between these two ways of understanding disclosure is unimportant since in either case the information may be disclosed. It makes a difference, however, in the way we understand what we and others are doing. On the former understanding, there is no reason for confidentiality since the information is unprotected; disclosure does no harm and no apologies are required. On the latter view, there is a moral reason for keeping information confidential, which is quite likely strong but nevertheless is overcome. In such cases, regret, apologies and concern that one has judged properly are appropriate. The moral situation and dilemmas presented by these contrasting understandings are quite different.

It might be thought obvious that information that lawyers may disclose should be considered in the first way, as simply unprotected. This seems plausible as an account of disclosure of such information as the intention to commit a future crime or wrongful act, but consider the information on the basis of which a lawyer may be required to disclose perjury or correct misapprehensions. This information will be quite ordinary information about the case which will have been learned from the client or through the lawyer's research. The lawyer would have no occasion to disclose it, absent perjury. This information, therefore, is best understood as falling within the scope of confidentiality, but losing this status in certain contexts. This analysis is also necessary for the information a lawyer may now reveal to collect his fee or to defend against charges of wrongful conduct.⁴¹ Where the reporting of the intention to commit a crime is discretionary rather than mandatory, it too is perhaps best construed as laying down an exception to a *prima facie* rule.

When I say that information falls within the domain of confidentiality, I shall therefore mean that it is *prima facie* confidential, to be held confidential unless there are overriding reasons for disclosure. I argued in Section III⁴² that whenever information is given in confidence there is a *prima facie* obligation not to disclose it. This background obligation will exist for information in the legal context, even with respect to information the disclosure of which is completely forbidden by whatever professional standards are in force. This obligation of confidentiality is not absolute or

41. CODE, *supra* note 2, DR 4-101(C)(4).

42. See pp. 775-77 *supra*.

exceptionless since it is still possible that, morally speaking, a circumstance may obtain in which the lawyer should reveal information that is required to be kept confidential by professional standards. Of course, he may be disciplined, but his moral, as distinct from his legal or professional, obligations cannot be confined to those articulated by existing codes of professional ethics. Having said this, however, we should distinguish between information in regard to which professional standards lay down conditions in which the prima facie obligation of confidentiality may be overcome and information for which they do not. We have, then, three categories into which pieces of information may fall: (1) unprotected by professional standards, (2) prima facie protected by professional standards, but the standards lay down circumstances in which it may be revealed, and (3) absolutely protected by professional standards, though morally the possibility of exceptions must be admitted. Keeping these categories in mind, let us now turn to the question of what information should be placed within the domain of confidentiality, that is, should fall into either categories (2) or (3).

A very simple and natural view is that the information to be absolutely protected is all and only information which is *about* the matter on which the client has sought legal aid, that is, information relevant to the case for which the lawyer is representing the client.⁴³ We might call this the "particular case" view. Many find this view too weak and believe that more information should be included. But, in some ways, the particular case view may be found too strong, at least if perjury and misapprehensions are to be corrected and lawyers are to be allowed to defend themselves against charges of wrongful conduct. These circumstances involve disclosing relevant information and thus require the inclusions of exceptions to the rule that such information may not be revealed; such information will then be prima facie protected by professional standards. But before looking at this way of weakening the particular case view, we now turn to some of the reasons for thinking that the domain of confidentiality should be much broader than the simple theory suggests.

There is a social or psychological reason why we think the scope of confidentiality should be larger than the particular case view suggests. When a client receives the services of a professional, there will be occasion for them to discuss many things that are not

43. I owe this way of putting the matter to Don Scheid.

relevant to the professional matter. They may chat about family affairs or the client's work simply as a means of warming up to each other or because they are people, not just clients and lawyers in the abstract, they have developed a friendship or have come to take an interest in each other. Or their chat may just be typical small talk. The client may disclose information that the professional should not reveal to others, whether it is explicitly given in confidence or not. But this obligation of confidentiality will not result from the professional-client relationship but from the ordinary relationships of conveying information and confidentiality that become easily established between persons. Part of the reason why the scope of lawyer-client confidentiality seems to be wider than the particular case view admits is the inclusion of this added dimension of ordinary confidentiality in the relationship. In a relationship characterized by confidentiality in some areas, there is also likely to be a tendency to extend the habit of confidentiality to other areas. This extension may be sought by the client who, having found an advisor on one issue, seeks to extend this relationship to other issues. It may be acquiesced in by the lawyer because it enhances the smooth functioning of the relationship, because the lawyer enjoys the role, or for other reasons. Most likely, the extension is unconscious and undeliberate for either party. In any case, the broader confidentiality that arises in this way cannot be defended on the basis of its necessity for the working of the lawyer-client relationship. It does mean, however, that we should realize how the ways in which the lawyer-client relation is embedded in ordinary life tend to extend confidentiality.

I now return to the particular case view and the two main areas of disclosure treated by the Code and the Model Rules: the intention to commit future crimes and the disclosure of facts needed to rectify perjury or misapprehensions. Many would want to strengthen the particular case view and there are several ways in which they might do so. The most protectionist view would require absolute protection for all information learned by the lawyer in the course of the lawyer-client relationship. A somewhat more complex view would recommend absolute protection for information concerning past and future crimes in addition to information concerning the particular case at issue and reject an exception allowing for disclosure of perjury or misapprehensions.⁴⁴

44. The code of conduct proposed by the American Trial Lawyers Foundation contains two alternative proposals that are somewhat similar to this view. Alternative A allows

There is an argument typically given for protectionist views which I shall refer to as the "spread" argument and which I shall now examine. I will first state it in a way that gives it the most protectionist conclusion, that all information be protected. I shall then modify it so that it has a narrower and more plausible conclusion. The spread argument begins with the plausible premise that for the lawyer to present the best possible case for the client he needs to know everything of relevance. From this premise it infers, also plausibly, that the client must be able to tell the lawyer, in confidence, anything he knows that is relevant to the case. The next crucial premise has two versions. One version, as put by Monroe Freedman, is that the "client is not ordinarily competent to evaluate the relevance or significance of particular facts. What may seem incriminating to the client may actually be exculpatory."⁴⁵ Alternatively, it might be held not that the client lacks competence, but that whether any particular facts are relevant to the case cannot be determined in isolation. Thus, all the facts the client has in mind need to be brought out before he or the lawyer can determine which are genuinely relevant. Whichever additional premise is used, it follows that the client must be free to say in confidence anything that is on his mind, leaving assessments of relevance up to the lawyer after all the facts are brought out. If certain areas were exempted from the scope of confidentiality, the client would want to ensure that he does not reveal damaging information that falls in these areas. Since either the client is unable to assess relevance or his assessment cannot be made in isolation from all the possible evidence, the client may omit facts that are relevant for fear that they will be unprotected. Confidentiality must, therefore, apply to *all* information if the lawyer is to be able to represent the client effectively.

The crucial premise of the spread argument, however, is too strong. There are facts that anyone can see are either totally irrele-

disclosure only when required by law (after a good faith effort to test the validity of the law), when the lawyer reasonably believes disclosure will prevent imminent danger to human life, when the lawyer knows of the corruption of a judge or juror or when disclosure is necessary for the lawyer to defend himself or his associates against formal criminal charges. THE ROSCOE POUND-AMERICAN TRIAL LAWYERS FOUNDATION COMM. ON PROFESSIONAL RESPONSIBILITY, THE AMERICAN LAWYER'S CODE OF CONDUCT § I, Alternative A (Public Discussion Draft, June, 1980) (reprinted in TRIAL, Aug., 1980, at 50). The more limited Alternative B allows disclosure only when required by law (after a good faith effort to test the validity of the law) or when necessary for the lawyer to defend himself or his associates against formal criminal charges. *Id.*, Alternative B.

45. M. FREEDMAN, *supra* note 3, at 4.

vant or clearly germane to the case. All the facts—whatever these are—do not need to be revealed in order to assess the relevance of any of them. As a general claim about client capacities or the interrelations of evidence, therefore, the premise is implausible. The spread argument is not a persuasive defense of the very strong conclusion that all information should be protected absolutely.

A more plausible version of the spread argument is that the premise holds with respect to information about past and future crimes and perjurious intentions.⁴⁶ Such information, it is said, is often relevant to the case at hand, and where it is not relevant, the client is often unable to tell this correctly. If the information is not protected, clients will be careful not to convey it, relevant information will not be communicated to the lawyer and he will be unable to present the best case. The information, then, must come within the domain of confidentiality and needs to be absolutely protected by professional standards.

While more plausible, this version of the spread argument also fails with respect to the intention to commit crimes or wrongful acts. What are clearly relevant to presenting the best defense for a client are what he did, what his motives were, what the circumstances were, and so forth. It is unlikely that his future intentions will, logically, bear on these matters. There may be a client who, for psychological reasons, is unable to discuss the instant case without revealing future plans, but this is not very common. If there are compelling reasons for officially saying that lawyers have discretion to report future crimes and wrongful acts, these rare possibilities do not overcome them. The strength of the spread argument is, therefore, limited. Where the spread argument holds, the permissibility disclosure in some cases may have a "chilling effect" on the client's frankness.⁴⁷ But if other, stronger reasons support disclosure, the chilling effect may simply be a reasonable price to pay. To conclude that a certain sort of information should not be disclosed, it is not enough to show that permitting its disclosure will have a chilling effect. The chilling effect may be insignificant or rare and the arguments for disclosure may be strong and compelling. The spread argument is, at best, half an argument.

The spread argument is most plausible with respect to past crimes and wrongful acts. Such information may shed light on the circumstances of the client, his motives and aims, and may enable

46. I am sure this is the version that Monroe Freedman intends. *Id.*

47. *But see* Schwartz, *supra* note 3, at 683-84.

the lawyer to understand his actions. I have already suggested that the distinction between past and future crimes is an important one and the spread argument offers some additional support for this view.

With respect to perjury and the correction of misapprehensions, the spread argument has cogency: if a client wishes to lie or mislead, he must conceal some facts from the lawyer, and in doing so may conceal not only incriminating but exculpatory facts as well. The unambiguous treatment in the Model Rules, requiring the lawyer to report perjury and correct misapprehensions, will definitely do some chilling. But here, the ultimate resolution of the issue depends on how great the chilling effect is and on the strength of the positive arguments that can be marshalled in favor of disclosure. I am inclined to think that the positive arguments are strong and that the chilling effect may be little, especially since it can be avoided if the client gives up the intention to perjure himself, something he is not legally entitled to do in any case. I shall, however, avoid this difficult issue here. The point to be emphasized is the indecisiveness of the spread argument by itself. The limits of the spread argument need not have been emphasized if others had not written as if it were sufficient.⁴⁸

I have thus given reasons to think that the arguments underlying strengthening the particular case view can be resisted. I have also noted how the scope of confidentiality inherent in the lawyer-client relationship can be extended to other areas through ordinary confidential relations. For this reason, a lawyer needs to think about the particulars of his relationship with a client when he considers disclosing something professional standards permit him to disclose. He may violate no professional obligation by such disclosure, but he might well violate a personal obligation that has grown out of the professional relationship, even though he may, on balance, be justified. I have also suggested that the particular case view may plausibly be weakened to allow revealing perjury and the correcting of misapprehensions in the manner expressed by the Model Rules. But a great deal more needs to be said. The problem of perjury raises the question of what the lawyer may do for the client. Clearly, he may and should present the strongest case. But what is the strongest case? Although a case involving perjured testimony and manufactured evidence may be very strong, neither the lawyer nor the client is entitled to present *this* case, despite its

48. See generally M. FREEDMAN, *supra* note 3.

strength. On the other hand, they need not be confined to what they really believe, based on the evidence, is the strongest case—for this case might be quite weak. Uncounterfeit evidence may be treated with flexibility, welcome facts may be stressed, unwelcome facts may be played down and the whole may be interpreted in the most favorable light.⁴⁹ There may or may not be something arbitrary in the distinction between evidence that is perjured or manufactured and evidence that is given greater emphasis than the client or lawyer believes it deserves. Both cases involve a kind of deception. However, the line drawn at perjury is drawn in the right place, for while permitting perjury would place an impossible burden on the trier of fact, forbidding any stretching of evidence would negate a person's day in court.

V. CONCLUSION

I said at the beginning that I would not reach a solid conclusion, and I have not. We have, however, made some progress. Let me return briefly to the charges made against the Rules that they make the lawyer an agent of the state.⁵⁰ From what has been said, we can conclude that these charges oversimplify; the motive that gives rise to greater disclosure is not "big brotherhood!" It is, rather, the clear recognition of obligations to third parties and, more importantly, of something that lies at the foundation of such obligations—the lawyer's own moral autonomy.⁵¹ The stress on confidentiality and on an exclusive obligation to the client leads to an unjustifiable surrender of moral autonomy and gives rise to the amorality and impersonality of the lawyer's role which has often been noticed.⁵² It is in combating this surrender that the Model Rules are a large improvement. Perhaps the improvement has unforeseen bad consequences. The discussion of the underlying grounds of confidentiality, however, shows that "ideological" appeals either to zealous advocacy of the client's cause, on the one hand, or to the truth, on the other, are only likely to simplify the moral complexity of the issue.

49. Criminal cases, civil cases and negotiations will obviously need relatively different treatment in these respects.

50. See p. 770 & note 30 *supra*.

51. See generally Flynn, *Professional Ethics and the Lawyer's Duty to Self*, 19 WASH. U.L.Q. 429 (1976).

52. Wasserstrom, *supra* note 35.