THE DEGREE OF HARM:
TOWARD A COGENT FRAUD EXCEPTION TO CLIENT CONFIDENTIALITY

Pam R. Jenoff[1]

Attorneys face myriad conflicting obligations in fulfilling their ethical obligations under the Rules of Professional Conduct. These rules create duties to clients and others, and which are often in conflict with one another. Most present among these is the tension between duties to the client, such as confidentiality, and duties to the tribunal and third parties, which include candor and fair dealing respectively. Fulfilling these duties to an individual or entity under one rule may necessarily require the attorney to violate ethical obligations under another.

The conflict between duties to client and other entities is acutely seen with the issue of client misconduct. Clients may engage in misconduct during the course of a representation and may, in some cases, use the attorney as an instrumentality to further the misconduct. The attorney is bound by ethical obligations to not engage in their own misconduct or aid in a client's misconduct. However, the attorney is also bound by client confidentiality in ways that sometimes make it impossible to remedy, or avoid serving as an instrumentality of, such misconduct.

The rules of professional conduct, as currently constructed, fail to comprehensively address this tension. When an attorney faces a conflict between keeping a client's confidence and not permitting misconduct that creates an ethical violation to stand, the rules provide little instruction as to which rule to follow, which rule should predominate, or how the attorney can resolve the ethical dilemma. Commentary and other informal guidance offer suggestions, but no solution that allows an attorney to fulfill their ethical obligations to clients and other entities where a client is unwilling to remedy their misconduct. Over time, there have evolved a number of attempts to aid with this dilemma, most notably a few narrowly-carved exceptions to the confidentiality rule. However, none of these are sufficient because they only address limited circumstances and fail to go far enough to truly instruct attorneys on the proper ethical steps to take when faced with conflicting duties.

This article seeks to address the problematic tensions between an attorney's ethical duties to client and others, most notably in the context of client misconduct. Part One considers the attorney's competing duties to the client, third parties and the tribunal, including confidentiality, candor and fair dealing. Part Two addresses the existing exceptions to confidentiality and other limited provisions for disclosure and the ways in which these are inadequate to remedy the ethical dilemmas presented by competing duties. Part Three seeks to develop a new framework,

[1] Associate Professor, Rutgers School of Law. Special thanks to my colleagues at the Rutgers Law Junior Faculty Workshop for their thoughtful feedback on an earlier draft of this article.

based on the avoidance of harm. This article argues that a comprehensive exception to confidentiality, which requires the attorney to balance contextual and fact-specific harms in order to determine whether disclosure of misconduct is permissible, is the best way to address the dilemma in a cogent manner.

INTRODUCTION

Regardless of the type of law practice, geographic location or area of specialization, attorneys are required to adhere to a code of ethical conduct which contains substantially similar rules.[2] These rules create duties to clients and others, including tribunals and third parties, and these duties are often in tension with one another. That is, fulfilling the attorney's duties under one rule may necessarily require them to violate or fail to fulfill ethical obligations under another rule. Most present among these tensions are the conflicts between duties to the client, such as confidentiality[3], and duties to the tribunal and third parties, which include candor and fair dealing respectively.[4] Thus, attorneys face myriad conflicting obligations in fulfilling their ethical obligations under the Rules of Professional Conduct.

One of the areas in which the conflict between duties to client and other entities is acutely seen is that of client misconduct. Clients may engage in misconduct before or during the course of a representation and may, in some cases, use the attorney as an instrumentality to further the misconduct. Additionally, clients often disclose past or on-going misconduct to their attorney in the course of a representation. The attorney is bound by ethical obligations not to engage in their own misconduct or aid in a client's misconduct, particularly where it may

[2] Most states have adopted the Model Rules of Professional Conduct ("M.R.P.C.") with only slight modifications. Arthur Garwin, ed., *Am. Bar Ass'n, Ctr. For Pro. Resp., A Legislative History: The Development Of ABA Model Rules Of Professional Conduct*, *1982-2013* 139 (4th ed. 2013). Although individual states modify the Model Rules of Professional Conduct when adopting them, the Model Rules as promulgated by the American Bar Association will form the basis for discussion in this article.
[3] M.R.P.C. 1.6.
[4] M.R.P.C. 3.3 and 3.4.

mislead a third party or factfinder.[5] However, the attorney is also bound by client confidentiality in ways that sometimes make it impossible to prevent, remedy, or avoid serving as an instrumentality, of such misconduct.[6]

The Model Rules of Professional Conduct, as currently constructed, do not address this tension in a comprehensive manner. For example, when an attorney faces a conflict between keeping a client's confidence and not permitting misconduct which creates an ethical violation to stand, the rules provide little instruction as to which rule to follow, which rule should predominate or how the attorney can resolve the ethical dilemma. Commentary and other informal guidance offer suggestions, but no definitive solution that allows an attorney to fulfill their ethical obligations to clients and other entities where a client is unwilling to remedy their misconduct. Even withdrawal from the case does not always remedy the issue, as the attorney is still not permitted to reveal the misconduct without violating confidentiality.

Over time there have evolved a number of attempts to aid with this dilemma. Most notably, there are a few narrowly carved exceptions to the confidentiality rule.[7] There are also some mandatory disclosure requirements in the corporate context, arising from both the Rules of Professional Conduct[8] and external statutes, such as Sarbanes-Oxley.[9] However, none of these are sufficient because they only address limited circumstances and fail to go far enough

[5] The myriad rules prohibiting attorneys from aiding in misconduct are discussed in more detail in Section II.A. *infra*. These include M.R.P.C. 1.2(d) (client-lawyer relationship), 3.3 (duties to the tribunal); M.R.P.C. 3.4 (transactions with persons other than clients), M.R.P.C. 4.1 (truthfulness instatements to others), and M.R.P.C. 8.4 (misconduct).
[6] The primary rule governing confidentiality, M.R.P.C. 1.6, is discussed more fully in Section II.B, *infra*.
[7] These include M.R.P.C. 1.6(b)(1) (exception for risk of death or bodily harm) and M.R.P.C. 1.6(b)(2) and (3) (financial exceptions).
[8] M.R.P.C. 1.13.
[9] Sarbanes Oxley mandates disclosure in the setting of certain publicly-traded companies. 15 U.S.C. § 98.

to truly instruct attorneys on the proper ethical steps to take when faced with client misconduct.

This article seeks to address the problematic tensions between an attorney's ethical duties to client and others, most notably in the context of client misconduct. Part One considers the attorney's competing duties to the client, third parties and the tribunal, including confidentiality, candor and fair dealing respectively. Part Two addresses the existing exceptions to confidentiality and other limited provisions for disclosure and the ways in which these are inadequate to remedy the ethical dilemmas presented by competing duties. Finally, Part Three seeks to develop a new framework to permit attorney's to address the misconduct/confidentiality conundrum. This article argues that a comprehensive exception to Rule 1.6, which requires the attorney to balance contextual and fact-specific harms in order to determine whether disclosure of misconduct is permissible, is the best way to address the dilemma in a cogent and comprehensive manner.

I. THE ATTORNEY'S CONFLICTING DUTIES

A. DUTIES TO THE CLIENT

The most fundamental concept in lawyering is that of the attorney-client relationship. When a client seeks representation and an attorney agrees to take a client, it is done with the understanding that the attorney will represent that client zealously and diligently, will be loyal to the client's interests and not undertake any action that would be contrary to that interest, or place another interest above it.[10]

[10] *See generally* the Model Rules of Professional Conduct, and in particular M.R.P.C. 1..3, 1.7, 1.8, 1.9.

The Modern Rules of Professional Conduct underscore this theme of duty to client. This can be seen in the myriad rules which set forth these duties, including the duties of confidentiality[11], diligence[12], competence[13], etc. Indeed, duties to client encompass approximately 50 percent of the rules, with the remainder divided between duties to the tribunal, third-parties and other entities.[14] Thus, there is an unspoken mandate that duties to client are paramount.[15]

Central to the attorney's duty to the client is the notion of loyalty. As one commentator noted, "Attorney loyalty to clients is considered a cornerstone of the attorney-client relationship."[16] Interestingly, there is not one rule which expressly sets forth the attorney's duty of loyalty to the client. Rather, loyalty is a theme that runs through all the rules, most notably the rules governing conflicts of interest, and inherent in it is the expectation that an attorney will act in the client's best interest and advocate zealously for the client.[17] These rules require an attorney to reject any interest, relationship or representation, which will put the primacy of client loyalty in tension or jeopardy.[18]

[11] M.R.P.C. 1.6.
[12] M.R.P.C. 1.3.
[13] M.R.P.C. 1.1.
[14] Approximately half of the Model Rules of Professional Conduct focus primarily on an attorney's duty to the client. *See* M.R.P. C. 1.1-8.5.
[15] Benjamin C. Zipursky, *Loyalty and Disclosure in Legal Ethics*, 65 AM. J. JURIS. 83 (2020)
[16] Eli Wald, *Loyalty in Limbo: The Peculiar Case of Attorney's Loyalty to Clients*, 40 ST. MARY'S L. J. 909 (2009)
[17] Jane M. Graffeo, *Ethics, Law and Loyalty: The Attorney's Duty to Turn Over Incriminating Physical Evidence*, 32 STAN. L. REV. 977 (1980).
[18] Wald, *supra* note __ at 920.

The concept of loyalty manifests itself in one of the highest duties[19] an attorney has to a client: confidentiality.[20] The attorney is expected not to disclose any confidential information[21] obtained during the course of the representation, unless permission is granted by an exception to the rule. Rule 1.6 provides: "(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)."[22]

Simply put, an attorney is generally prohibited from disclosing any confidential information related to a client representation.[23] This rule on confidentiality is expansive and includes any information obtained before, during or after the representation.[24]

There are several key rationales for the duty of confidentiality and its place of primacy among the attorney's ethical duties. First, confidentiality fosters the policy goal of allowing a client to speak candidly to an attorney without fear of disclosure.[25] As the Supreme Court

---

[19] Of course, confidentiality is not the only duty an attorney has to a client. Attorneys also have a duty of diligence and are required to look into all matters necessary to competently represent the client and fulfil their role. M.R.P.C. 1.3.

[20] Valerie Breslin & Jeff Dooley. *Whistle Blowing v. Confidentiality: Can Circumstances Mandate Attorneys Exposing Their Clients?* 15 GEO J. L. ETHICS 719 (2002); *see also* Harry I. Subin, *The Lawyer as Superego: Disclosure of Client Confidences to Prevent Harm*, 70 IOWA L. REV. 1091, 1096 (1985); Patrick Santos, *Why The ABA Should Permit Lawyers To Use Their Get-Out-Of-Jail Free Card: A Theoretical and Empirical Analysis*, 31 U. LA VERNE REV. 151 (2009); Daniel R. Fichel, *Lawyers and Confidentiality*, 65 U. CHI. L. REV. 1 (1998).

[21] Information which is generally available to the public from other sources is not considered confidential information. M.R.P.C. 1.6.

[22] M.R.P.C. 1.6(a).

[23] Christine Harrington, *Reevaluating the Duty of Confidentiality*, 47 N.Y.L. SCH. L. REV. 423 (2003.)

[24] *Id.*

[25] M.R.P.C. 1.6; *see also* Susan R. Martyn*, In Defense of Client-Lawyer Confidentiality…And Its Exceptions*, 81 NEB. L. REV. 1320, 1322 (2003) (noting that the utilitarian rationale for confidentiality usually concludes that, "confidentiality promotes the greatest good for the greatest number, because it encourages clients to give lawyers facts, which are essential to making the legal system work.")

noted in *Upjohn*, the purpose of the confidentiality is "to encourage the full and frank communication between attorneys and their clients and promote broader public interests in the observance of law and the administration of justice."[26]

Further, in an adversarial system, it is essential that a client is able to speak freely to their attorney and provide their attorney with information, without fear that the information will be disclosed.[27] Candid conversations, proponents argue, are essential to facilitating effective representation.[28] This is particularly important in the criminal context to protect the defendant's constitutional rights, most notably not to incriminate themselves.[29]

Confidentiality is the default rule and the exceptions to confidentiality are narrow.[30] Several of the few exceptions to confidentiality were added sometime after the original rule

[26] Breslin, *supra* note __, citing *Upjohn v. United States*, 449 U.S 383. (1981). Some commentators have, however, questioned whether this rationale is justified, arguing that many clients do not understand the duty of confidentiality sufficiently for it to have an impact on their disclosures to counsel. Santos, *supra* note __ at 154.

[27] *Id.* There is of course the related problem of attorney-client privilege. The privilege, which derives from common law, provides that an attorney may not divulge, nor a client be forced to testify regarding communicates between the two seeking or providing legal advice. Subin, *supra* note __ at 1008. Attorney-client privilege is narrower than confidentiality because it only protects the subset of confidential information that is transmitted between attorney and client for purposes of seeking legal advice. The privilege is owned by the client and so, regardless of any confidentiality exception, the attorney would not be permitted to disclose privileged conversations. *See Upjohn Co. v. United States*, 449 U.S. 383, 389-92 (1981); *Fisher v. United States*, 425 U.S. 391, 403 (1976). However, for purposes of this article and consideration of an exception to attorney confidentiality rules for cases of client misconduct, this article assumes that the information in question is not attorney-client communication and is not subject to attorney-client privilege.

[28] Santos, *supra* note __ at 161.

[29] *Id.*

[30] M.R.P.C. 1.6(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;

was promulgated as a response to lawyer silence in the face of Enron and other corporate fraud.[31] These exceptions generally involve very specific circumstances, such as permission to disclose confidential information where failure to do so would pose a substantially likely threat of imminent bodily harm.[32] In some instances, such as financial misconduct, the exceptions require that the attorney's services have been used to propagate the fraud in order to permit disclosure.[33] Thus, the exceptions do not cover many situations involving client misconduct or fraud.[34]

The principle of confidentiality, while a long established bedrock of the attorney-client relationship, is not without its detractors.[35] Critics note that confidentiality helps to rationalize amoral representation.[36] Confidentiality can reinforce perceptions of lawyers as hired guns.[37] Some posit that the benefits of confidentiality are overstated and that the assumptions on which confidentiality are premised, for example, that a client will be more candid with an

---

(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.; *see also* Subin, *supra* note __.

[31] Harrington, *supra* note __(discussing the evolution of the confidentiality exceptions).
[32] *Id.*
[33] M.R.P.C. 1.6(b)(2) and (3).
[34] *Id.*
[35] Fred C. Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 351 (1989); Samuel D. Thurman, *Limits to the Adversary System: Interests That Outweigh Confidentiality*, 5 J. LEG. PROF. 5 (1980).
[36] Thurman, *supra* note __.
[37] *Id.*

attorney because of confidentiality, are premised on concepts of knowledge and decision-making that may not be accurate.[38]

Criticism notwithstanding, confidentiality remains the default rule and the exceptions which permit disclosure are extremely limited.

B. DUTIES TO THIRD PARTIES

When faced with the overwhelming number of duties to client, it is easy to forget that attorneys have duties to those other than the client. However, attorney and client are not one entity and even as the attorney seeks to place the client's interests first, the attorney has other external obligations to third parties and the court system which differ -- and may be in conflict with -- duties to clients.

First, attorneys have duties to the court or other tribunal.[39] Indeed, attorneys are often referred to as "officers of the court," suggesting that they have duties to the tribunal as well as to their own clients.[40] There are duties to the tribunal, such as candor.[41] This includes both the duty to disclose adverse facts and law, as well as the duty not to mislead the tribunal nor to permit others to do the same. For example, Rule 3.3(a)(2) provides, "An attorney shall not

[38] *Id.*
[39] M.R.P.C. 3.3.
[40] Eugene R. Gaetke, *Lawyers as Officers of the Court*, 42 VAND. L. REV. 39 (1989); Daniel Walfish, *Making Lawyers Responsible for the Truth*, 35 SETON HALL L. REV. 613 (2005).
[41] M.R.P.C. 3.3. M.R.P.C. 3.3(a)(3) provides, "An attorney shall not knowingly… offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. M.R.P.C. 3.4 provides, in relevant part, that "A lawyer shall not: (a) unlawfully obstruct another party' s access to evidence or unlawfully alter, destroy or conceal a document or other material having potential evidentiary value. A lawyer shall not counsel or assist another person to do any such act;…(d) in pretrial procedure, make a frivolous discovery request or fail to make reasonably diligent effort to comply with a legally proper discovery request by an opposing party…"

knowingly… fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel…"[42] M.R.P.C. 3.3(a)(3) provides, "An attorney shall not knowingly… offer evidence that the lawyer knows to be false."[43]

Attorneys also have duties to third parties.[44] For example, attorneys have the duty of fairness in dealing with others.[45] Rule 3.4 provides that, "In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a third person; or (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6."[46]

The attorney's duties are to others reflected in various places throughout the rules. For example, M.R.P.C. 4.1: Truthfulness in Statements to Others, provides:

> *Transactions With Persons Other Than Clients*
>
> In the course of representing a client a lawyer shall not knowingly:
>
> (a) make a false statement of material fact or law to a third person; or
> (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.[47]

[42] *Id.*
[43] *Id.*
[44] M.R.P.C. 3.4.
[45] M.R.P.C. 3.3; 4.1.
[46] M.R.P.C. 3.4.
[47] M.R.P.C. 4.1.

Similarly, M.R.P.C. 1.2(d) provides, "A lawyer shall not… assist a client, in conduct that the lawyer knows is criminal or fraudulent…"[48] M.R.P.C. 8.4(c) provides that it is professional misconduct for an attorney to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation."[49]

The aforementioned rules establish a general expectation that attorneys will deal fairly with, and not make false representations to, third parties. As with duties to the client such as confidentiality, there are important public policy rationales which underscore the attorney's duties to the tribunal and third parties. Most notably, attorneys are officers of the court, and there is a fundamental notion that the attorney's duties go beyond any single client to the legal profession and the legal system as a whole.

Thus, duties to client are not by measure the only responsibilities in the rules.

C. DUTIES IN CONFLICT – THE MISCONDUCT PARADIGM

The duties an attorney owes to their client and other parties often come into conflict.[50] Often times the attorney is faced with a dilemma where the duties to a client and the duties to an external entity are in direct conflict with one another. That is, upholding a duty to a client may mean violating a duty to a third party or vice versa. As one commentator noted, "Attorney serves two masters: his client and the law. As a servant of the law, he is an 'officer of the court'…required to deal with the court …candidly. But at the same time, the attorney

[48] M.R.P.C. 1.2(d).
[49] M.R.P.C. 8.4(c).
[50] Richard Silverman, *Is New Jersey's Heightened Duty of Candor a Good Thing?,* 19 GEO. J. LEG. ETHICS 951 (2006). ("When trying to comply with one of these duties, a lawyer may often violate the other.")

must serve as an advocate on behalf of the client. He must represent the interests of the client 'zealously' and with 'undivided loyalty' and preserve his confidence and secrets…"[51] Yet at the same time, the attorney comply with external duties that may require the very opposite of duties owed to clients.[52]

These duties come into play – and into tension with one another – at various points in an attorney's career. One of the most difficult things about navigating the Rules of Professional Conduct is understanding the interplay between the rules and which predominate when.

The tension between these duties can most clearly when considering confidentiality and misconduct. Misconduct, broadly defined, may include behavior which violates a law, rule or ethical standard or norm. Under the Model Rules of Professional Conduct, attorneys are

[51] *Privileged Communications; Disclosure of Clients Non-Material Representation*, Opinion 642 Advisory Cmte on Professional Ethics.
[52] *Id.*

prohibited from engaging in their own misconduct[53] are generally not permitted to assist in client misconduct.[54]

Often times, the misconduct may involve the actions of a client. Client misconduct may create a conflict with another duty the attorney has, such as not misleading others or permitting misrepresentation to the tribunal.[55] In many cases, the way for an attorney to prevent, remediate or mitigate the effects of client fraud would be to report or disclose the conduct. However, the tight constructs of the client confidentiality rules make it difficult or impossible for an attorney to comply with these rules when the misconduct is on the part of a client. The attorney is constrained by confidentiality, though, and therefore cannot fulfil their duties with respect to misconduct.[56]

---

[53] Rule 8.4: Misconduct
Maintaining The Integrity Of The Profession
It is professional misconduct for a lawyer to:
(a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another;
(b) commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects;
(c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation;(d) engage in conduct that is prejudicial to the administration of justice;
(e) state or imply an ability to influence improperly a government agency or official or to achieve results by means that violate the Rules of Professional Conduct or other law;(f) knowingly assist a judge or judicial officer in conduct that is a violation of applicable rules of judicial conduct or other law; or
(g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law. This paragraph does not limit the ability of a lawyer to accept, decline or withdraw from a representation in accordance with Rule 1.16. This paragraph does not preclude legitimate advice or advocacy consistent with these Rules.
[54] *Id.*
[55] M.R.P.C. 3.3, 3.4.
[56] M.R.P.C. 1.6.

Significantly, the places throughout the rules which prohibit attorneys from abetting misconduct or create duties to entities other than the client do not provide a framework for reconciling those requirements with confidentiality. For example, M.R.P.C. 4.1 prohibits attorneys from making false statements to third parties, or failing "to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client."[57] However, the rule concludes, "unless disclosure is prohibited by Rule 1.6."[58] Therefore, the rule provides a prohibition which is largely hollow and does not offer a meaningful and effective way for attorneys to avoid being an instrumentality of client misconduct.

One particularly vexing type of misconduct is the instance of a client lying during sworn testimony. The attorney has an ethical duty not to let the false testimony stand.[59] However, the attorney's ability to correct the false testimony is greatly constrained by other enumerated duties to the client, most notably that of confidentiality.[60] There is no confidentiality exception in the Model Rules of Professional Conduct that would permit the attorney to disclose the fact that the testimony is false to the court.[61]

As seen above, the attorney's duties to report and not abet misconduct and to keep client confidences are squarely in conflict with one another.[62] The rules provide no

[57] M.R.P.C. 4.1.
[58] *Id.*
[59] M.R.P.C. 1.6.
[60] M.R.P.C. 1.6
[61] As discussed more fully in Section II., infra, Comment 10 to Rule 3.3 does suggest that an attorney must disclose when confronted with the dilemma of a client lying under oath. However, this is not codified anywhere in the rules in a way that would provide an attorney with a safe harbor to disclose.
[62] Stephen Gillers, *What We Talked About When We Talked Ethics: A Critical View of the Model Rules*, 46 OHIO ST. L. J. 243 (1985).

comprehensive instruction on how to resolve these conflicts. They do not explain whether certain rules should have primacy. Nor do they excuse one duty in favor of the other or offer any safe harbor for complying with one duty in violation of another.

Guidance on this tension is divided. Court have similarly emphasized the attorney's duty to the tribunal in such circumstances.[63] However, professional organizations, such as the bar, have perhaps not surprisingly come down on the side of confidentiality and duty to client.[64]

II. CURRENT LANDSCAPE

In order to understand the confidentiality/misconduct dilemma and possible solutions, it is first necessary to look at the current exceptions. This can demonstrate both the inadequacies of the present rules and also help look for a path forward in creating a new solution.

Under the rules as presently written, confidentiality is the default rule and any exceptions are limited and piecemeal exceptions. There is no comprehensive guide for an attorney when faced with the intractable conflict between duties to clients and others. Nor is there a single rule or comprehensive exception of general application. Rather, there are a handful of fragmented, exceptions for limited factual circumstances, found in various rules[65], comments to the rules[66] and external statutes.[67]

[63] *See Dike v. Dike*, 75 Was. 2d 1, 5-6 (1968) (noting that an attorneys high vocation is to inform the courts).
[64] Gaffeo *supra* note__; *see also* ABA Code of Conduct Canon 7 (noting that a lawyer should represent a client zealously within the bounds of the law.)
[65] M.R.P.C. 1.6(b).
[66] M.R.P.C. 3.3 Comment 10.
[67] Sarbanes-Oxley. 15 U.S.C. § 98.

A. LIMITED 1.6 EXCEPTIONS

1. Imminent Physical Harm

Rule 1.6 has a handful of exceptions to confidentiality which are relevant to the conflict between duty to client and duty to others. The first of these is Rule 1.6(b)(1), which provides in relevant part: "(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…"[68] In the limited circumstances where an attorney knows that a client is about to engage in misconduct that is reasonably certain to seriously injure or kill someone, the attorney may break confidentiality.[69]

Thus, an attorney may break confidentiality and disclose where there is a significant risk of death or bodily harm to a third party[70] – a scenario which is present in a very small number of cases. This exception is therefore not helpful in resolving the confidentiality/misconduct dilemma.

2. Financial Harm

There is also an exception to confidentiality for financial harm where the client uses the attorney's services to perpetuate the fraud.[71] These exceptions were promulgated by

[68] M.R.P.C. 1.6(b)(1).
[69] *Id.*; *see also* Santos, *supra* note __ at 164.
[70] *Id.*
[71] *Id.*; *see also* Kenneth F. Krach, *The Client-Fraud Dilemma: A Need for Consensus*, 46 MARYLAND L. REV. 436 (1987).

amendment to the Model Rules in 2003.[72] Specifically, Rule 1.6(b)(2) and (3) provide that a lawyer may reveal information relating to the representation of a client: "(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…"[73]

As presently constructed, this is a very narrow exception. The fraud must be financial in nature, which excludes a wide range of scenarios involving client misconduct.[74] Perhaps more significantly, the exception only applies where the client use the lawyer's services in furtherance of the fraud.[75] Therefore, in any circumstance where the attorney merely discovered, knew, or became aware of the fraud, the exception would not help to address the misconduct/confidentiality dilemma.

B. Corporate Exceptions

1. Rule 1.13

There are also exceptions to confidentiality codified in Rule 1.13, representing a corporation. Specifically, Rule 1.13 provides that:

---

[72] Lawrence A. Hamermesh, *The ABA Task Force on Corporate Responsibility and the 2003 Changes to the Model Rules of Professional Conduct*, 17 GEO. J. LEGAL ETHICS 35, 35 (2003) (quoting the Task Force's mission statement).
[73] M.R.P.C. 1.6(2) and (3).
[74] *Id.*
[75] *Id.*

> (b) If a lawyer for an organization knows that an officer, employee or other person associated with the organization is engaged in action, intends to act or refuses to act in a matter related to the representation that is a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization, and that is likely to result in substantial injury to the organization, then the lawyer shall proceed as is reasonably necessary in the best interest of the organization. Unless the lawyer reasonably believes that it is not necessary in the best interest of the organization to do so, the lawyer shall refer the matter to higher authority in the organization, including, if warranted by the circumstances to the highest authority that can act on behalf of the organization as determined by applicable law.
>
> (c) Except as provided in paragraph (d), if
>
> > (1) despite the lawyer's efforts in accordance with paragraph (b) the highest authority that can act on behalf of the organization insists upon or fails to address in a timely and appropriate manner an action, or a refusal to act, that is clearly a violation of law, and
> >
> > (2) the lawyer reasonably believes that the violation is reasonably certain to result in substantial injury to the organization, then the lawyer may reveal information relating to the representation whether or not Rule 1.6 permits such disclosure, but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.[76]

Thus, Rule 1.13 creates an exception to confidentiality where an employee violates the law in a way that is injurious to the corporation.[77] The attorney is required to report the misconduct to a higher authority within the organization and, if that higher authority fails to act, is required to report the misconduct externally in order to prevent substantial injury to the

[76] M.R.P.C. 1.13.
[77] M.R.P.C. 1.13.

corporation.[78] Significantly, Rule 1.13 is not permissive, but mandatory; that is, the attorney does not just have the option of disclosing when the rule's criteria are met. Rather, the attorney is required to do so.[79]

While Rule 1.13 provides important precedent, it is worth noting the differences that render it less than applicable. Rule 1.13 provides mandatory disclosure when an attorney becomes aware of an agents wrongdoing that is not in the best interest of the corporation. Because the corporation cannot act, but rather acts through agents, there is a recognition that the agents might not always act in the best interest of the corporate client. Here the attorney is safeguarding the well-being of the client by disclosing. Thus, it does not present the same sort of tension between client and external duties as is the case when the client is committing the wrongdoing themselves.[80]

The Rule 1.13 exception is therefore not squarely on all fours with a client misconduct issue, but is nevertheless worth considering when looking at possible solutions.

2. Sarbanes Oxley

External to the Model Rules of Professional Conduct, there are also certain circumstances in which attorneys are permitted or required to disclose confidential client information. Most notable among these is the Sarbanes Oxley Act.[81]

[78] *Id.*
[79] *Id.*
[80] William H. Simon, *Duties to Organizational Clients*, 29 GEO. J. LEG. ETHICS 489 (2016).
[81] Sarbanes-Oxley. 15 U.S.C. 7245 (2002).

In 2003, pursuant to Section 307 of Sarbanes-Oxley, the Securities and Exchange Commission promulgated rules governing wen attorneys practicing before the Commission are required to disclose. The relevant provisions of the statute:

> (1) require an attorney to report evidence of a material violation "up-the-ladder" within the client to the chief legal counsel or the chief executive officer of the company or the equivalent;
> (2) require an attorney, if the chief legal counsel or the chief executive officer of the company does not respond appropriately to the evidence, to report the evidence to the audit committee, another committee of independent directors, or the full board of directors; and
> (3) allow an attorney, without the consent of the client, to reveal confidential information related to his or her representation to the extent the attorney reasonably believes necessary:
>
> (a) to prevent the issuer from committing a material violation likely to cause substantial financial injury to the financial interests or property of the issuer or investors;
> (b) to prevent the issuer from committing an illegal act; or
> (c) to rectify the consequences of a material violation or illegal act in which the attorney's services have been used.[82]

Much like Rule 1.13, Sarbanes-Oxley has significant differences and limitations that render it not entirely applicable to client misconduct writ large. First, it applies only to attorneys practicing before the Securities and Exchange Commission representing publicly-traded companies.[83] Second, it is not codified in the Rules of Professional Conduct but is rather a rule promulgated pursuant to a different statute.[84] Third, the up-or-out reporting structure, also present in Rule 1.13 is not applicable to scenarios involving individual client misconduct.

[82] *Id.* Stephanie R.E. Patterson, *Section 307 of the Sarbanes-Oxley Act: Eroding the Legal Profession's System of Self-Governance*, 7 N.C. BANKING INST. 155 (2003).
[83] Sarbanes-Oxley. 15 U.S.C. 7245 (2002).
[84] *Id.*

Significantly, the Sarbanes-Oxley exception requires mandatory disclosure, not the permissive disclosure contemplated by Rule 1.6.[8586]

Despite these differences, the mandatory disclosure requirements of Sarbanes-Oxley are a worthy comparison point when considering a codified exception to client confidentiality for some cases of misconduct.

C. OTHER CONTEMPLATED EXCEPTIONS

In recent years, there have been attempts to create additional exceptions to confidentiality. For example, some advocate for an exception to confidentiality where keeping the confidence will result in the wrongful incarceration of another.[87] Interestingly, some scholars have taken the position that this would require a new exception[88], while others have argued that it fits within the definition of existing exception, in that wrongful incarceration creates the substantial risk of bodily harm contemplated by M.R.P.C. 1.6(b)(1).[89]

D. LIMITATIONS TO THE CURRENT EXCEPTIONS – THE MISREPRESENTATION DILEMMA

When an attorney is faced with misconduct that does not fall within any of the above limited exceptions, possible recourse is limited and unclear. Take the case of an attorney whose client lies on the stand and the attorney is aware of the misrepresentation. As one commentator has noted: "Client perjury provides a particularly useful workshop for

[85] *Id*. *See also* M.R.P.C. 1.6(b).
[86] Also significantly, because the disclosures mandated by Sarbanes Oxley are contained in another law, they fall squarely within the permissive confidentiality exception of M.R.P.C. 1.6(b)(6).
[87] *See* Santos, *supra* note __ at __.
[88] Id.
[89] Vania M. Smith, *Wrongful Incarceration Cases Substantial Bodily Harm: Why Lawyers Should Be Allowed To Breach Confidentiality To Help Exonerate The Innocent*, 69 CATH. UNIV. L. REV. 769 (2020).

considering client fraud. It is immediate and the fraud is egregious and it is to the tribunal and the lawyer is immediately aware of it."[90]

An attorney has a duty not to offer false testimony and to correct any misrepresentation made to the court.[91] However, the attorney cannot do so without violating confidentiality and none of the enumerated confidentiality exceptions apply to this circumstance.[92] The lie does not involve use of the attorney's services, does not create the risk of imminent bodily harm and is not in the context of representing a corporate. Therefore, none of the enumerated exceptions apply. Thus the attorney is faced with an intractable dilemma between the duties of confidentiality and candor to the tribunal.[93]

The rules as currently constructed do not provide an adequate solution for attorneys faced with this dilemma. When an attorney is confronted with the problem of client fraud, no current rule instructs the attorney on how to behave ethically and resolve the inherent conflict. Instead, when a client lies on the stand, the attorney is counseled to utilize the four Rs: Recess, Remonstrate, Resign and Reveal.[94] First, the attorney is to recess, to take a break from the proceedings to confer with the client.[95] Second, the attorney is to remonstrate the client, that is, to explain the severe consequences for misrepresentations to the tribunal in an attempt to persuade the client to correct the testimony.[96]

---

[90] Michael J. Callan and Harris David, *Professional Responsibility and the Duty of Confidentiality: Disclosure of Client Misconduct in an Adversary System*, 29 RUTG. L. REV. 332 (1976).
[91] M.R.P.C. 3.4
[92] M.R.P.C. 1.6.
[93] Carl A. Pierce, *Client Misconduct in the 21st Century*, 35 U. MINN. L. REV. 731 (2005); *see also* Subin, *supra* note __ at 1095.
[94] Fred Zacharias, *Coercing Clients: Cab Lawyer Gatekeeper Rules Work?* 47 B.C. L. REV. 455 (2022).
[95] Ethics Opinion RO-2009-01; Breslin, *supra* note __ at 721
[96] *Id.*

However, if the client is unrepentant and refuses to rectify the testimony than the attorney is left with no other step than to resign and withdraw from the representation.[97] As the comment to Rule 1.16 notes, "Withdrawal is also justified if the client persists in a course of action that the lawyer reasonably believes is criminal or fraudulent, for a lawyer is not required to be associated with such conduct even if the lawyer does not further it."[98]

Withdrawal is generally considered a drastic measure and the Rules of Professional Conduct only allow it in a limited number of circumstances.[99] However, where the client refuses to correct the misrepresentation, the attorney cannot continue representing the client and allow the fraud to stand unchecked.[100] As one Ethics Opinion notes, "A lawyer who knows or with reason believes that her services or work product are being used or are intended to be used by a client to perpetrate a fraud must withdraw from further representation of the client…."[101]

However, the duty of confidentiality does not end when the representation ends. Indeed, Rule 1.9(c) provides that: "A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter…reveal information relating to the representation except as these Rules would permit or require with respect to a client."[102] Even after an attorney withdraws, they remain bound by confidentiality and cannot reveal the reason for withdrawal.[103]

---

[97] *Id.*
[98] M.R.P.C. 1.16 Comment.
[99] M.R.P.C. 1.16.
[100] *Id.*
[101] ABA Formal Ethics Opinion 92-366
[102] M.R.P.C. 1.9(c).
[103] M.R.P.C. 1.6.

Withdrawal from a case because of client fraud is sometimes called "noisy withdrawal."[104] This is the notion that if an attorney cannot disclose because of confidentiality, withdrawing from the case may somehow signal client conduct so egregious that the attorney cannot ethically remain a part of the case.[105] However, noisy withdrawal is not a panacea, but rather a highly imperfect solution to the client fraud dilemma. First, it is significant to note that noisy withdrawal is part of commentary, not the rule.[106] The withdrawal itself may not signal a red flag, nor does it give the court any indication of what the misconduct might be.[107] Noisy withdrawal is also unhelpful to remedy fraud which the attorney discovers after the representation has ended.[108] Therefore, withdrawal does not, in and of itself, cure the fraud or misconduct.[109]

The final "R" if the attorney is unable to resolve through other means is to reveal the misrepresentation. This is a very drastic measure because the attorney must violate confidentiality to do so. The black letter rules do not provide an explicit exception or safe harbor for disclosing under such circumstances. The drafters of the Model Rules of Professional Conduct do, in a single instance, purport to provide guidance for the confidentiality/misconduct dilemma where it involves misrepresentation to the tribunal. Comment 10 of Rule 3.3 states:

> [10] …If withdrawal from the representation is not permitted or will not undo the effect of the false evidence, the advocate must make such

[104] Marc I. Steinberg, *Lawyer Liability After Sarbanes-Oxley: Has The Landscape Changed?* 3 WYO. L. REV. 371 (2003)
[105] *Id. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 92-366 (1992) (describing "noisy withdrawal" and circumstances under which such a withdrawal is permitted).*
[106] Maria Helen Bainor and Nancy Batterman, *Report on Debate Over Whether There Should be an Exception to Confidentiality for Rectifying a Crime or Fraud*, 20 FORD. URB. L. J. 857, 858 (1993).
[107] Bainor, *supra* note __ at 860.
[108] *Id.*
[109] *Id.*

> disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6. …[110]

This one comment is significant. For the first time, it puts the attorney's duty to the tribunal above the duty of confidentiality to the client, and explicitly instructs that when all else has failed, the attorney should choose duty to tribunal and disclose the misrepresentation.[111]

This one comment is at the same time inadequate in several respects. First, it only covers misrepresentation to the tribunal and not the myriad other types of misconduct in which a client may engage. Second, by limiting the permission to disclose to situations where the attorney is withdrawing from a representation, it does not contemplate any misconduct of which the attorney becomes aware after the conclusion of the representation. Further, the guidance is only provided in a comment and not as part of the rule. Thus, there is no actual safe harbor under Rule 1.6(b) if the attorney discloses.[112]

Some states have taken a cue from the comment and adopted a more stringent approach, codifying the exception. For example, New Jersey requires disclosure of a material fact that is reasonably certain to mislead the tribunal.[113] Specifically, N.J.R.P.C. 3.3 provides, "(a) A lawyer shall not knowingly:…(2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting an illegal, criminal or fraudulent act by the client…"[114]

On its own, this provision would not be enough, because it would still leave the disclosing misconduct provision of Rule 3.3 squarely in tension with the confidentiality

---

[110] M.R.P.C. 3.3 Comment 10.
[111] *Id.*
[112] *See e.g.,* the codified confidentiality exceptions enumerated in M.R.P.C. 1.6(b).
[113] N.J.R.P.C. 3.3; *see also* Silverman, *supra* note __.
[114] N.J.R.P.C. 3.3(a)(2)

provision of Rule 1.6.[115] However, N.J.R.P.C. 3.3 goes on to state, " (b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by RPC 1.6."[116] Therefore, the New Jersey Rules of Professional Conduct provide guidance on how to proceed in the fact of client misconduct and a safe harbor provision where attorneys need to disclose confidential information in order to fulfil their duties with respect to candor to the tribunal. Such clarity would be welcome in the Model Rules of Professional Conduct.

III. PROPOSED REFORMS

A. Amending M.R.P.C. 1.6(b)

As illustrated above, there is a constant tension in the Rules of Professional Conduct between duty to client and duties to others. This tension is most acutely seen in the conflict between confidentiality and duties to the tribunal or third parties where the client has engaged in misconduct, such as fraud or misrepresentation. The current system, which includes a few narrow, dissonant and highly fact-specific exceptions, is unworkable. It does not provide attorneys with any consistent or meaningful guidance regarding how to navigate these conflicts and balance competing aims in a way that is beneficial to the client, the legal system or society. Nor do the rules instruct the attorney regarding how to avoid violating the rules or ethical norms. They also are not codified in any way that provide the attorney with a safe harbor if they invoke one of the exceptions. Clearly, something more and different is needed.

[115] N.J.R.P.C. 3.3; 1.6.
[116] N..JR.P.C. 3.3(b).

One possibility would be to exclude certain types of information which involve fraud and misconduct from the definition of confidential information. The crime fraud exception to attorney-client privilege provides an interesting possible analog.[117] The crime fraud exception holds that where a client has used an attorney's service in furtherance of a crime, those communications are not entitled to the privilege.[118] Rather than creating an exception which allows the disclosure of privileged information, the principle simply excludes such communications from the definition of what is privileged, eliminating the disclosure problem and the violation that would be creating by disclosure.[119]

However, a stronger approach, which would be more consistent with the existing rules, would be to modify the Model Rules of Professional Conduct to include an exception to confidentiality for client misconduct under Rule 1.6(b). Before discussing what the actual carveout might look like, it is necessary to establish certain parameters. First, in order to be effective, the exception would need to be incorporated within M.R.P.C. 1.6 itself because Rule 1.6 only has a carveout "…to comply with other law or a court order."[120] So if the exception is included elsewhere in the rules, it would not necessarily be covered by the safe harbor for disclosure. Putting the exception in another rule does not provide clarity but only amplifies the current tensions that are at the heart of the confidentiality-misconduct conundrum. Placing the

[117] Douglas R. Richmond, *Lawyers' Duty of Confidentiality and Clients' Crimes and Frauds*, 38 GA. ST. UNIV. L. REV. 493 (2022).
[118] *Id.*
[119] *Id.*
[120] M.R.P.C. 1.6(b)(6).

exception within Rule 1.6(b) would put it on equal footing with other exceptions such as bodily harm and financial fraud involving attorneys services.[121]

B. Necessary Limitations

The solution, however, is not as simple as adding an exception to Rule 1.6 which would permit an attorney to disclose a client's misconduct. Indeed, misconduct is often the very reason client's come to an attorney. An exception which encompassed any sort of misconduct in its permissive disclosure would effectively eviscerate attorney-client confidentiality and would have a chilling effect on attorney-client communications, which are necessary for effective representation. This is the reason why the confidentiality exceptions have consciously been drafted to be narrow in scope.[122] Any exception weakens the trust between attorney and client and therefore has a chilling effect on necessarily candid communications.[123]

For this reason, there is a school of thought which argues that there should be few or no confidentiality exceptions at all.[124] Proponents of this theory would likely oppose a broader exception for client fraud, arguing that such a blanket exception goes too far and would prioritize the attorney's other duties over confidentiality, which has always been among the paramount duties.[125] There is also the risk that expanding the attorney's ability to reveal confidential information will have a chilling effect on attorney-client communications and an attorney's ability to gather the information they need to represent their client effectively.[126]

---

[121] M.R.P.C. 1.6(b)(1)-(3).
[122] Bainor, *supra* note __.
[123] *Id.*
[124] Zacharias, *supra* note __.
[125] *Id.*
[126] Zipursky, *supra* note__.

Such cautions should, while not negating the need for exceptions entirely, be at the forefront in carefully designing an exception that is contoured to meet the needs of disclosure while balancing those with the important public policy and instrumentalist rationales underscoring confidentiality.[127]

However, there should at a minimum be an exception where the attorney knows that he client is engaging in ongoing misconduct or conduct with ongoing harm that has utilized the attorney's services and has exhausted all other avenues to remedy the disclosure should be an exception to confidentiality. The exception must be narrowly crafted enough not to create a chilling effect on attorney-client communications, yet robust enough to provide the attorney with a real mechanism for reporting fraud.

C. Balancing The Harms

As demonstrated above, any contemplated exception cannot be absolute. Rather, an exception would need to balance confidentiality and the need to disclose misconduct in a given situation. Looking at the exceptions to confidentiality which are presently in place, there are certain themes which emerge. First, the exceptions look at the seriousness of the harm that may result from the misconduct and also the likelihood of that conduct occurring. For example, Rule 1.6(b)(1) requires a "substantial" likelihood of death or "serious" bodily harm.[128] Thus, there is a weighing of the harms of disclosure versus the likelihood and degree of physical harm which may result from failing to disclose.

[127] Richard W. Painter, *Toward a Market for Lawyer Disclosure Services: In Search of Optimal Whistleblowing Rules*, 63 GEO. WASH. L. REV. 221 (1995).
[128] M.R.P.C. 1.6(b)(1).

There is also throughout the limited confidentiality exceptions a willingness to permit disclosure where the attorney's services have played a role in the misconduct. This can most clearly be seen in the financial fraud exceptions where the attorney's services have been used in furtherance of the misconduct is a necessary precursor to breaking confidentiality.[129] Implicit in this requirement is also the notion of harm: that is, the role and reputation of the attorney and attorneys as a whole will be harmed if their services are used as an instrumentality to propagate or further fraud. Here too, as in the previous paragraph, there is a weighing of harms: the harm to the attorney and the profession versus the harm of disclosing confidential information.

The willingness to waive confidentiality also depends on the nature of the victim harmed. The rules place a high value on not misrepresenting to the tribunal, and a willingness to let attorneys break confidentiality to remedy this, if only in the comment.[130] Thus, there exists in the rules not only a primacy of confidentiality, but also a reluctant acknowledgement that it may be necessary to forego that value when certain other factors are present. Throughout all of these factors, a common thread emerges about balancing the degree of harm. The seriousness of harm to another (bodily injury or death), the harm to the profession of having an attorney's services used to further misconduct, harm to the legal system in misrepresentations to the tribunal.

In some sense, the conflict between misconduct and confidentiality is, like so many ethical duties, about the degree of harm, the harm caused by the misconduct with the potential

[129] M.R.P.C. 1.6(b)(2).
[130] M.R.P.C. 3.3 Comment 10.

harm of disclosure by the attorney. The duties themselves are constant. However, the degree of harm that results from prioritizing one conflicting duty over another (*e.g.*, disclosing a client's confidence to disclose misconduct or maintaining a client's confidence and letting the misconduct go undetected), will vary depending on the factual context. Therefore, any well-crafted exception will necessarily take into consideration a balancing of the potential harms from one course of action over the other. Because this is a fact-specific analysis and the answer dependent upon the context and circumstances, the rule would require the attorney to balance the harms and make the determination regarding disclosure on their own.

There are admittedly limitations to any attempt to carve out an exception for client misrepresentation. One challenge is to create such a rule in a way which recognizes these dissonant values but is not piecemeal or overly fact specific. In many cases, the harms are prospective and require the attorney to speculate with the most certainty possible the degree of harm.[131] For these reasons, It would be impossible to develop a bright line rule when every dilemma is contextual and fact specific. Rather, the exception should be a balancing test. Where the harm significantly outweighs, the attorney may reveal to the extent necessary to prevent or remediate the harm.

There is precedent for such balancing tests. The rules already require such balancing with respect to confidentiality. For example, in the existing confidentiality exceptions, attorneys must use judgment as to whether the exception applies. Rule 1.6(b)(1) only allows an attorney to break confidentiality where doing is "reasonably certain" to result in death or

[131] Other rules also require attorneys to speculate about the likelihood of future conflict. *See* M.R.P.C. 1.7. (requiring attorneys to speculate whether a representation will be limited by interests).

"substantial" bodily harm.[132] Thus, in the example of the bodily harm exception, there must not be only the possibility of harm but a strong likelihood it will occur and that it will be substantial. This the attorney has to weigh the likelihood of physical harm against the harm of disclosure.

Balancing is also seen throughout the rules which govern conflicts of interest. For example, M.R.P.C. 1.7(a) provides that a concurrent conflict of interest exists if:

> (1) the representation of one client will be directly adverse to another client; or
>
> (2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.[133]

However, M.R.P.C. 1.7(b) goes on to state:

> (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
>
> > (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;…[134]

Therefore, the attorney is required to engage in careful balancing to determine whether a conflict exists and whether, notwithstanding the conflict, they may undertake the representation.[135] Similarly, the Rules of Professional Conduct require attorneys to engage in

[132] M.R.P.C. 1.6(b)(1).
[133] M.R.P.C. 1.7(a).
[134] M.R.P.C. 1.7(b). This provision further requires that: "(2) the representation is not prohibited by law; (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
(4) each affected client gives informed consent, confirmed in writing."
[135] M.R.P.C. 1.7(a)-(b).

similar balancing when considering when considering the interests of a prospective client,[136] or a former client[137] and when contemplating whether there is a conflict between a representation and the attorney's own interests.[138] The conflict of interest rules, provide an example of how attorneys may ably balance competing harms.[139]

The challenge, then, is to craft an exception to confidentiality which enables an attorney to balance the relative harms of breaking confidentiality and allowing the client misconduct to go unchecked. For example, a proposed rule might read, "When an attorney is in possession of information regarding client misconduct and there is a significant risk that the conduct will result in misleading the tribunal and/or harming third parties; and b) the harm will substantially outweigh the detriment of disclosure, the attorney may disclose the information only to the extent necessary to prevent, remedy or mitigate the harm." That is, the rule would require the attorney to balance the relative harms of the misconduct versus disclosure to determine if the information fits within the confidentiality exception.

---

[136] M.R.P.C. 1.18(c) ("A lawyer subject to paragraph (b) shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter…")

[137] M.R.P.C. 1.9 (requiring an attorney to consider whether a new representation may be materially adverse to the interests of a former client).

[138] Conflicts created by an attorney's personal interests are covered by a range of specific prohibitions under M.R.P.C. 1.8, as well as by the catch all language of M.R.P.C. 1.7, providing that a conflict exists where: "(2) there is a significant risk that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer."

[139] One possibility would be to conceive of the confidentiality/fraud dilemma as a conflict between the representation and the attorney's interests (*e.g.*, complying with their ethical duties.). M.R.P.C. 1.7. However, the conflicts rules, while requiring an attorney to withdraw from the representation where the conflict is not consentable, do not in themselves authorize disclosure and would not, therefore, provide a solution to the misconduct/confidentiality dilemma.

The balancing test is, admittedly, not as definitive as a bright line rule. However, the fact-specific nature of the inquiry makes a bright-line rule impossible. A balancing test is not the option of last resort, however, but has several advantages as seen with conflicts analysis. One plus, as with conflicts, is that the attorney knows the case and is in the best position to balance the harms of the misconduct and disclosure and make the call as to which harm is greater.

Detractors may point out that such a rule, which allows the attorney to decide to disclose ex ante may have a chilling effect on a representation. How can a client speak freely knowing that at some point the attorney may decide to disclose?

This is not unlike the situation with conflicts where an attorney takes on a representation and, at some point thereafter, realizes that a conflict will preclude the attorney from continuing to represent the client. For example, when an attorney undertakes a joint representation, sometimes a conflict arises that precludes the attorney to continue representing both parties. This issue is addressed ahead of time when the attorney takes on the representation and issues a warning that if a conflict arises the attorney will need to stop representing one or both of the parties. In the case of the proposed 1.6(b) confidentiality exception for client misconduct, the attorney could issue a similar "Miranda" style warning prospectively about the need to disclose if such misconduct arises or is discovered.

CONCLUSION

There is an intractable conflict between the attorney's ethical duties to clients and to others, most acutely seen in the problem of client misconduct and the attorney's inability to

disclosure information in order to remedy same. The Model Rules of Professional Conduct fail to address this dilemma in any meaningful or comprehensive way.

The Model Rules should be amended to include an exception under 1.6(b) for disclosure of confidential information where the client is engaging in misconduct. Such a rule must be closely tailored because overly broad disclosure would have a chilling effect on attorney client communications and hinder the attorney's ability to effectively represent the client. A bright line rule would not work with such fact specific inquiries.

The optimal rule would employ a balancing test, whereby the attorney would weigh the harm caused by the misconduct with the harm caused by disclosure in order to determine whether disclosure is warranted. This would be akin to the balancing attorney's do when weight whether a conflict of interest exists in a representation.

Permitting the attorney to make the determination enables them to balance their duties to client and others most effectively and find the proper balance between the duty of confidentiality to the client and duties owed to others.