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Rutgers Law Review

47 Rutgers L. Rev. 81 (Fall, 1994)

Testing the Radical Experiment: a Study of Lawyer Response to Clients Who Intend to Harm Others

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[*81] There are many, or at least several occasions when a client gives indications that he/she might commit a violent/criminal act against another person. These situations are the toughest, most perplexing dilemmas that I face. In other words, I am not reasonably convinced that the client will definitely commit[] the act; I am reasonably convinced that he might commit the act. . . .How can anyone ever be sure? My worst fears have never been realized, but I live in dread that they may be. n1

The question of what, if anything, a lawyer should do when confronted with a client who intends to commit a criminal or fraudulent act that will seriously harm another is theoretically [*82] challenging and as a practical matter, agonizingly difficult. Problems begin almost immediately, with questions about what to tell the client about the confidentiality of communications when the client's conversations turn to future criminal plans or fraudulent pursuits. The problems multiply as the lawyer tries to assess the likelihood that the wrongful act n2 will in fact occur and the seriousness of any harm that it might cause.

Once these questions are answered, the lawyer must then face the more difficult question of what to do. Efforts to convince the client to abandon the plans may alienate the client and--even worse--fail. A decision to alert the intended victim may subject the client to prosecution, prejudice the client in other proceedings and destroy the attorney-client relationship. While weighing the moral-philosophical implications of disclosure and non-disclosure, the attorney must also wrestle with competing self-interested considerations. These considerations include potential civil liability to third parties or clients, n3 loss of business and reputation, and even personal danger, n4 depending upon the lawyer's response to the client's plans.

Lawyers have not been left alone to struggle with their clients and their consciences. Codes of professional responsibility and to a lesser extent, other laws, have addressed this problem, [*83] but they reflect competing views of how lawyers should respond to client plans to commit wrongful acts. The "solutions" run the gamut from giving lawyers wide discretion to decide whether to disclose their clients' plans to giving them no apparent discretion whatsoever, other than quiet disobedience of the rules. n5

The justifications for the varying approaches to the problem are based in large part upon assumptions about how lawyers and clients will behave when communications between lawyer and client are treated as confidential. While much has been written about the theoretical justifications underlying confidentiality and disclosure in this context, n6 little has been done to test the underlying assumptions about how practitioners in fact behave when confronted with clients who intend to commit wrongful acts that will seriously harm others. n7 Less is known about whether lawyers follow the rules that address this problem or whether they make their own rules. n8

[*84] To explore these questions, New Jersey lawyers were surveyed to determine how they respond to clients who plan to commit wrongful acts that are likely to substantially harm others. New Jersey's Rules of Professional Conduct have been called an "openly radical experiment," n9 in part because New Jersey was the first state to adopt a rule of professional conduct requiring lawyers to disclose client information to prevent a client from committing a criminal, fraudulent or illegal act that would seriously harm another. n10 New Jersey Rule of Professional Conduct (RPC) 1.6(b) was a radical departure from previous bar rules, which had only permitted lawyers to reveal client information to prevent future crimes. n11

Other states have followed New Jersey's lead and now require that lawyers disclose information to prevent clients from committing certain wrongful acts that will seriously harm others. n12 On the tenth anniversary of New Jersey's rule, it is time to revisit the experiment to consider the workability of mandatory disclosure rules in practice and to reflect upon what the experiment teaches about the assumptions underlying the rules governing lawyers when their clients plan to harm others.

This Article considers not only mandatory disclosure rules, but the other rules that govern attorney conduct when lawyers are confronted with clients who intend to commit serious wrongdoing. It begins with the rules governing lawyer [*85] confidentiality and disclosure in this context and their theoretical justifications. It then considers the empirical support for those rules, including the results of the New Jersey study. The New Jersey study is only a preliminary effort to explore this area, n13 but the results of the study cast doubt on some of the justifications underlying mandatory disclosure rules. The results also suggest that more consideration must be given to what lawyers tell clients about mandatory disclosure rules and to whether broad disclosure rules are worth their price.

I. The Rules Governing Attorneys When Their Clients Intend To Harm Others

The laws and rules governing attorneys when they learn that their clients are planning to commit wrongful acts consist of a patchwork of evidentiary privilege, common law duties, miscellaneous statutes and professional responsibility rules. To understand lawyer response to such client plans, it is useful to briefly identify those laws and rules, beginning with the attorney-client privilege which informs so much bar tradition.

A. The Attorney-Client Privilege

The attorney-client privilege is too well known to warrant extended discussion. It protects against the use of legal process to compel disclosure of communications made in confidence by a client to a lawyer relating to the subject of the representation. n14 To enjoy the status of a privileged communication, the communication must be made for the purpose of obtaining legal advice. n15

The justifications for the attorney-client privilege can be roughly classi-

fied as rights-based and utilitarian. n16 The [*86] rights-based justifications relate directly to the client's privacy and personal autonomy. n17 The utilitarian justifications are based largely on assumptions about the benefits to the client and to society of full and free communication between lawyer and client. Those benefits include improved legal representation because the trust relationship between the attorney and client encourages the client to feel free to convey all relevant facts to an attorney. n18 In addition, clients will seek legal advice about questionable conduct and lawyers will encourage their clients to act within the law and discourage them from acting in violation of the law. n19

The attorney-client privilege does not protect the communications of a client who consults an attorney for advice that will serve the client in the commission of a crime or fraud. n20 The crime-fraud exception to the privilege applies both to communications with an attorney concerning future crimes or fraud, and communications concerning wrongful acts that are already [*87] in progress. n21 The client's intent usually determines whether the exception applies, that is, whether the client knowingly sought the attorney's aid in committing or concealing a crime or fraud. n22 The crime-fraud exception applies even if the attorney has no knowledge of the wrongful activity. n23

The exception is justified on the ground that protecting communications about planned crime or fraud does not achieve the objectives of the attorney-client privilege. n24 Since there is little societal interest in fostering client communications with a lawyer which were made with the intent to further a crime or fraud, the balance tips toward disclosure.

The crime-fraud exception addresses only the issue of testimonial compulsion--usually after wrongdoing has occurred--and not the question of what an attorney should do when faced with knowledge that a client is about to commit a wrongful act. That question is answered to a limited extent by case law, statutes and state professional responsibility codes.

B. Laws Requiring Disclosure to Prevent Harm to Others

Traditionally, lawyers, like the general public, have no legal obligation to take steps to prevent a future crime or fraud. n25 [*88] Courts have generally declined to impose obligations on lawyers to prevent wrongful client acts in which the lawyers are not involved. n26 Where the lawyers know-

ingly lend assistance to client wrongdoing, they will be subject to common law liability on an agency theory for failure to disclose client information to prevent a client from committing wrongful acts. n27

Although Congress has considered imposing statutory duties on lawyers to disclose information that may include client confidences in order to prevent future harm to others, it has been reluctant to do so. n28 State legislatures have been only slightly more willing to impose a duty to disclose. For example, while lawyers in some states have an obligation to disclose past or ongoing child abuse, few states obligate lawyers to [*89] reveal a belief about future abuse. n29 Regulatory agencies such as the Securities and Exchange Commission and the Office of Thrift Supervision have pursued lawyers for failure to disclose client information to prevent serious financial injury, but they have not done so where the lawyers were not allegedly assisting the wrongful activity. n30 Lawyers confronted with clients who are contemplating future wrongdoing must often look to their consciences and to the applicable state codes of professional responsibility to decide what to do.

C. Professional Responsibility Codes

1. The ABA Codes

Prior to 1983, the ABA bar codes required lawyers to maintain client confidences, but permitted them to disclose the intention of a client to commit a crime. n31 Lawyers were not permitted to reveal a client's intention to commit a non-criminal fraud, although they were required to reveal a fraud or [*90] perjury that had already occurred in the course of the representation. n32

In the late 1970's, the ABA's Kutak Commission, which was charged with drafting new proposed Model Rules of Professional Conduct, prepared a Discussion Draft requiring disclosure of client information to prevent substantial bodily harm to another. This proposal provoked such controversy n33 that the Kutak Commission ultimately recommended in its Proposed Final Draft that attorneys be permitted to disclose client confidences when necessary to prevent a client from committing a criminal or fraudulent act that was likely to result in substantial bodily harm or injury to the financial interest or property of another. n34

[*91] The ABA House of Delegates declined to adopt the Kutak Commission's proposal. n35 Instead, in early 1983, the ABA adopted an amendment to Rule 1.6 which narrowed the discretion previously left to lawyers by permitting an attorney to reveal client information only to the extent necessary to prevent a client from committing criminal acts likely to result in imminent death or substantial bodily harm. n36 Lawyers were not permitted to reveal the intention of a client to commit criminal or fraudulent acts likely to result in substantial financial injury or property damage. n37

The ABA Model Rules of Professional Conduct have been adopted in some form in the majority of the states. n38 Although it made some significant modifications, New Jersey was the first state to consider and adopt some form of the Model Rules. [*92]

2. New Jersey's Rules of Professional Conduct: The Radical Experiment

In July 1982, in the midst of the controversy surrounding the Kutak Commission's proposals, the New Jersey Supreme Court appointed a committee to recommend whether the ABA's proposed Model Rules should be adopted in New Jersey. n39 The following year, the Debevoise Committee n40 proposed that Model Rule 1.6 be revised to require an attorney to disclose client information if necessary to prevent the client from committing a criminal or fraudulent act likely to result in death or substantial bodily injury. n41 It also recommended that a lawyer be permitted to reveal information to prevent criminal or fraudulent acts likely to result in substantial injury to the financial interest or property of another. n42

This proposed rule went even farther than the highly controversial Kutak Commission's Proposed Final Draft, which had been rejected a few months earlier by the ABA House of Delegates. Perhaps because of this controversy, the Committee felt compelled to note in its report that the Kutak proposal was "by no means a radical departure from New Jersey's present Disciplinary Rules." n43

In fact, the Debevoise Committee's own proposal concerning disclosure of future client wrongdoing was something of a "radical departure" from the existing rules. Although New Jersey's then-existing professional responsibility rules permitted lawyers to reveal the intention of a client to commit a crime, n44 [*93] never before had there been any requirement that an

attorney disclose a client's intention to commit a crime, no matter how heinous. Moreover, New Jersey's existing rules did not permit lawyers to reveal a client's future plans to commit non-criminal fraud. n45

The Committee sought to bolster its recommendation by relying upon New Jersey Supreme Court pronouncements that when balancing the conflicting principles of full disclosure versus confidentiality, "public policy demands that full disclosure is the more fundamental principle." n46 The Committee also reasoned that "any step less than acceptance by the bar of proposed Rule 1.6 will diminish the public's esteem for the legal profession." n47 Due possibly in part to concern about the public's particularly low opinion of lawyers at that time, the New Jersey State Bar Association endorsed the Committee's mandatory disclosure proposal. n48 [*94]

When the New Jersey Supreme Court adopted its new Rules of Professional Conduct in 1984, it took the Debevoise Committee's recommendations two steps farther. RPC 1.6(b) required that an attorney disclose information necessary to prevent a client from committing a criminal, fraudulent or illegal act that is likely to result in death or substantial bodily harm to another or in substantial injury to the financial interest or property of another. n49 The Court provided no specific explanation of its reasons for adopting mandatory disclosure requirements or for its decision to expand the disclosure requirements to the prevention of non-bodily harm. n50

In a statement accompanying the release of the new rules, Chief Justice Robert N. Wilentz explained, "we believe that [*95] these new Rules of Professional Conduct represent sound principles that protect the public and the integrity of the legal profession and maintain New Jersey's position as a leader in setting and upholding high professional standards." n51 The New Jersey bar voiced no opposition to RPC 1.6(b), even though it contained the most far-reaching disclosure requirements of any attorney code of conduct in the country. n52 The new rules were hailed by some as a welcome reordering of priorities n53 and criticized by others as "an extremely unfortunate development." n54 Thus, a radical experiment commenced. n55 [*96]

II. The Justifications For Confidentiality And Disclosure Rules When Clients Plan To Cause Harm

Before considering the responses of New Jersey lawyers to clients who plan to harm others, it is useful to identify briefly some of the theoretical

justifications for confidentiality and disclosure under both mandatory and permissive schemes. n56 Those justifications are infused with intuitive assumptions about the ways in which attorneys and clients behave when lawyers are confronted with clients who are likely to seriously harm others.

A. The Rationale For "Strict" Confidentiality

Proponents of strict confidentiality n57 view the lawyer as the client's defender against the world and rely heavily on the same justifications supporting the attorney-client privilege. n58 [*97] They contend that confidentiality exceptions will interfere with the development of client trust and will discourage clients from using or freely communicating with their counsel. n59 In essence, if clients know that a communication about future wrongdoing may be disclosed, then other important communications may not occur.

In addition to this broad based concern, the "more focused" argument for strict confidentiality is that a confidentiality requirement will in fact help prevent serious harm to the public. n60 The reasoning is as follows: (1) client confidentiality encourages clients to tell their lawyers that they are contemplating wrongful acts; (2) lawyers who learn of these plans will try to dissuade their clients; and (3) lawyers who try to dissuade their clients from wrongdoing will succeed. n61 Confidentiality proponents argue that if the client is deterred from communicating with counsel about those future plans by fear of attorney disclosure, then the attorney will not have the opportunity to prevent the wrongful act.

Another justification for strict confidentiality is that it promotes client autonomy. It is widely agreed that clients are entitled to know about exceptions to client confidentiality rules in order to make informed decisions about whether to disclose information to their counsel. n62 Confidentiality proponents argue that as a practical matter, lawyers do not tell clients about the exceptions to confidentiality rules. n63 Strict confidentiality [*98] thus promotes client autonomy because it causes lawyer's actions to conform to client expectations that lawyers will maintain confidentiality. n64

B. The Rationale For Mandatory Disclosure

Proponents of disclosure devote much of their effort to demonstrating why the justifications for strict confidentiality do not bear up under scrutiny. n65 Perhaps their strongest argument is that there is no evidence that clients

are discouraged from talking with their lawyers as a result of exceptions to confidentiality rules, and that pure self interest would cause clients to talk. n66 They also question whether and to what extent lawyers dissuade their clients from committing wrongful acts. n67 [*99]

While these points deserve serious consideration, they do not explain why there should be mandatory disclosure rules, particularly when most states do not require the public to act to prevent harm to others. n68 Considering that ten states currently require disclosure of client information to prevent some types of prospective client harm to a third party, n69 it is appropriate to ask what are the justifications for requiring lawyers to disclose client confidences in order to prevent a client from seriously harming another?

One major reason for disclosure of client information in this context is to prevent harm to third parties. n70 It seems one of the justifications for a disclosure requirement is that the privilege conferred on lawyers to practice law, and the lawyer's role as an officer of the court, give rise to an obligation to protect the public from a client who intends to cause serious harm. n71 Society's interests are judged to outweigh the client's interests when the client is contemplating future wrongdoing. n72 The broader philosophical justification for mandatory disclosure is that a moral society requires this result. n73

Disclosure proponents also offer other, related arguments to support their position. They contend that lawyers should be required to disclose simply because they can more conveniently do so than others. n74 In addition, if lawyers are required to [*100] disclose client confidences to prevent harm to others, then they will be better able to dissuade clients from planned wrongdoing by threatening to disclose if the clients' plans are not abandoned. n75 Even if lawyers cannot dissuade their clients, they are more likely to disclose to prevent harm than lawyers would be under a permissive disclosure scheme. n76

Finally, those favoring disclosure argue that unless there is mandatory disclosure of client plans to cause future harm, clients will believe that lawyers will do anything for them. As a result of this belief, clients will be encouraged to bring more wrongful schemes to their lawyers, and society's view of lawyers and legal institutions will suffer. n77 Societal disapproval of the rules governing lawyers may also adversely affect the ability of lawyers to continue to regulate themselves. n78 [*101]

C. The Rationale for a Permissive Disclosure Scheme

Permissive disclosure rules afford lawyers latitude to deal with very difficult and often highly fact specific problems. n79 Proponents of this approach hope that clients will confide in their lawyers and that lawyers who learn of a client's intention to commit a crime or fraud will listen without concern about a disclosure requirement and dissuade a client from committing the act. n80 Supporters of permissive rules also believe that when lawyers are faced with clients who will not abandon plans to cause harm, lawyers will "do the right thing." n81

Permissive disclosure rules are also justified on the ground that they promote lawyer morality. It has been argued that lawyers' attitudes about their role suffer when confidentiality is required because it can distort the view of their own obligations "as moral and autonomous individuals." n82 In essence, a strict confidentiality requirement permits lawyers to fall back on the code requirement and their role as "lawyers" and to ignore the morality of their conduct. In contrast, a permissive scheme forces them to confront these difficult issues. [*102]

Many of the utilitarian justifications for the rules governing lawyers with clients who are contemplating wrongdoing can be explored empirically. Before looking at the New Jersey study, it is useful to review what is known to date about how attorneys view and use the attorney-client confidentiality rules, and what attorneys actually do when confronted with clients who intend to commit wrongful acts.

III. Prior Empirical Research

Lawyers and their relationships with their clients have been the subject of several studies. n83 Unfortunately, relatively little empirical research has focused on the assumptions underlying the attorney-client confidentiality rules. n84 Even less effort has been made to study empirically lawyer response to clients who intend to commit wrongful acts that will substantially harm another. n85 The absence of such research has been much [*103] noted, n86 but little has been done to remedy the problem. n87 Some of the existing empirical research is summarized below.

A. What Clients Don't Know About the Confidentiality Rules

Laypersons seem to know that their communications with lawyers are confidential, but they do not understand the exceptions to the general rule. According to a study conducted by the Yale Law Journal in 1962 (“Yale study”), over 50% of the laypersons surveyed n88 correctly believed that lawyers did not have a legal obligation to disclose confidential information if asked to do so by a lawyer in court. n89 At the same time, over 30% of the laypersons believed that lawyer-client communications were more protected than they in fact were. n90

In a study conducted more than twenty-five years later in Tompkins County, New York (“Tompkins County study”), these basic findings were confirmed. n91 The Tompkins County study revealed that most clients claimed to know of attorney-client [*104] confidentiality. n92 Over 42% of all the clients surveyed believed that the confidentiality requirements are absolute. n93

The Tompkins County study also revealed that “lawyers overwhelmingly do not tell clients of confidentiality rules.” n94 Even when the Tompkins County lawyers told their clients about confidentiality, most told their clients “only generally that all communications are confidential,” and only one quarter told their clients that any exceptions to the rule of attorney-client confidentiality exist. n95

Although these studies involved relatively small samples and were comprised of a better-educated population than the norm, they strongly suggest that many lay people do not understand the limits of attorney-client confidentiality. Perhaps one reason why lay people do not understand is because lawyers intentionally exaggerate the scope of confidentiality, believing that most of their clients misunderstand its scope. n96

B. What Clients and the Public Think About Confidentiality

Some empirical evidence indicates clients would be less willing to disclose information to their lawyers if they believed [*105] their lawyers might disclose information. In the Yale Study, more than 50% of the lay people believed they would be less likely to make free and complete disclosure to a lawyer if there were a legal obligation to disclose client information to another lawyer in court. n97 Over 15% of the Tompkins County lay people

indicated that they would withhold information from an attorney if the attorney promised confidentiality except for specific types of information which the lawyer described in advance. n98 The Tompkins County respondents also indicated that a permissive disclosure rule or other disclosure by lawyers would cause them to trust and use lawyers less. n99 These questions, however, were hypothetical and do not necessarily reflect what clients would do if confronted with the actual need for lawyers’ services. n100

Not surprisingly, lay people view the confidentiality rules differently when the rules may be protecting someone else’s secrets. In the Yale study, only 45% of the lay people clearly supported the attorney-client privilege. n101 In the Tompkins [*106] County study, most laypersons believed that lawyers should be permitted to disclose client information in a variety of contexts not currently permitted by state codes in order to prevent injury to others. n102 At the same time, most of the Tompkins County laypersons did not believe that public perception of lawyers would be improved by a broad permissive disclosure rule that would allow disclosures in the public interest. n103

C. Lawyer Willingness and Ability to Prevent Harm

Relatively little research has focused specifically on the theory that strict confidentiality enables lawyers to dissuade clients from wrongdoing, or on the alternative theory that mandatory disclosure better equips lawyers to prevent harm. A study of white-collar criminal defense attorneys suggests that some lawyers attempt to neutralize the impact of information about prospective wrongdoing rather than to dissuade their clients from committing wrongful acts. n104 Other evidence suggests that at some points in their careers, most lawyers dissuade clients from taking improper action, but it is not known what techniques they use to dissuade, how consistently they [*107] try to dissuade or how often they succeed. n105 How much of a role confidentiality plays in those efforts is also not known. n106

Finally, no study has examined what lawyers do when they fail to dissuade their clients and must decide what step, if any, to take next. In fact, little is known about how lawyers view the disclosure rules or whether they obey the rules in practice. The purpose of the New Jersey study was to begin to explore some of these questions.

IV. The New Jersey Study

A thirty-nine question mail survey was used to explore how New Jersey attorneys respond when they believe a client may be about to commit a wrongful act that is likely to result in substantial harm to others. The survey also attempted to determine whether New Jersey attorneys comply with their obligation to disclose under the Rules of Professional Conduct and if not, why not.

A. The Survey

The surveys were mailed in September 1993 to approximately 1950 lawyers throughout New Jersey who were identified as practicing members of the state bar. A cover letter that accompanied the survey explained the purpose of the survey and requested anonymous responses. n107

The experiences of lawyers who practiced criminal law and family law were of particular interest because of the nature of [*108] the problems their clients confront. Consequently, approximately one-third of the surveys were mailed to lawyers who were believed to devote a portion of their practice to criminal defense work n108 and about one-fifth were mailed to lawyers who identified themselves as devoting part of their practice to family law. n109 Most of the remaining surveys were mailed to lawyers engaged in other practice areas n110 who did not work for any governmental entity. n111 Surveys were also provided to New Jersey public defenders who requested a copy. n112 [*109]

To obtain a complete picture of attorney conduct when lawyers encounter clients who are about to commit future wrongdoing, clients should also be surveyed. Clients of the attorney-respondents could not be surveyed, however, because the attorneys answered the surveys anonymously. n113 No attempt was made to identify and survey randomly selected clients who had discussed future wrongdoing with their lawyers. Efforts to survey certain client groups should be considered in the future. n114

1. The Survey Design

A passive-observation design was used for the eleven page survey. n115 The first section requested some limited demographic information. n116 The second section asked very generally about attorney-client confidentiality. The third and fourth sections inquired in detail about actual attorney experience with clients who were going to commit wrongful acts that were

likely to result in substantial bodily harm, financial injury or property damage to another. n117 The last section of the survey [*110] asked about attorney views and practices, including views about mandatory disclosure rules. To obtain unbiased and unapologetic responses from the attorneys, the survey never mentioned RPC 1.6 and did not explain the attorney's duty to disclose under that rule. The majority of the survey questions were multiple choice, although the survey also asked a number of open-ended questions to allow attorneys to elaborate on their experiences. Space was left at the end of the survey for additional comments.

2. The Survey Respondents

The survey yielded a response rate of almost 40%, n118 which is considered a good rate for a survey of professionals. In certain respects, the survey respondents resembled the general population of active New Jersey lawyers. n119 Almost three-quarters of the respondents were admitted to the bar within the last twenty years, which is similar to the 73.3% admitted in the general population since 1976. n120 Approximately one-half of the survey respondents were also admitted to practice in another state, as compared to 59.6% of the lawyers in the general New Jersey population. n121

In other respects, the respondents differed from the general population of New Jersey lawyers. The survey respondents were somewhat more experienced attorneys than the general population of New Jersey lawyers. n122 A far greater percentage [*111] of the respondents worked in private practice than did the general population. n123 Not surprisingly, almost one-third of the survey respondents devoted a substantial amount of their time to criminal defense work and almost one-quarter of the respondents devoted a substantial amount of their time to family law practice. n124 These percentages are probably higher than the percentage of such practitioners in the general population of New Jersey lawyers because they were over-sampled. n125

Thus, while the sample is representative in its geographic distribution throughout the state, it cannot be characterized as truly random n126 or as completely representative of the general population of New Jersey lawyers. Nevertheless, the results provide some indication of the ways in which some New Jersey attorneys respond to the problem of a client who intends to cause serious harm to another.

B. Survey Results

1. The Problem is Real

The survey revealed that the problem of a client who may cause serious harm to another is not just a hypothetical problem; n127 it is a real one. Sixty-seven lawyers reported that [*112] since January 1985, they had encountered at least one occasion on which they reasonably believed that a client was going to commit a specific wrongful act that was likely to result in death or substantial bodily harm to an identifiable third party. n128 Almost half of those lawyers had encountered the problem on more than one occasion. n129 About 20% of the lawyers who had encountered the problem identified the anticipated act as homicide. n130 Another 58% identified the act as assault or battery, including acts of domestic violence. n131 Other anticipated wrongful acts included arson, kidnapping, driving while intoxicated and terrorism. n132

Approximately 190 attorneys reported that since January 1985 they had encountered occasions on which they believed that a client was going to commit a wrongful act that was likely to result in substantial injury to the financial interests or property of another. n133 Most of the lawyers who had confronted this problem had encountered it on more than one occasion. n134 The most commonly reported anticipated act was [*113] financial fraud. n135 Some of the other anticipated wrongful acts were vandalism, theft, environmental pollution and perjury. n136

One important caveat must be noted. These responses do not necessarily reflect the frequency with which the general New Jersey lawyer population encounters clients who intend to commit serious wrongful acts because the survey respondents probably included more criminal defense attorneys and family law attorneys than would be found in the general lawyer population. n137 These practitioners reported encountering the problem of clients who were contemplating future wrongdoing significantly more often than other lawyers. n138 Moreover, prior experience with the problem may cause respondent self-selection. n139 At most, the survey responses reflect that this problem occurs with some frequency in certain types of practices, and occurs at least occasionally in a wide variety of practices. n140

[*114]The survey also revealed that lawyers who work in certain law office settings were more likely to learn of clients' plans to commit wrongful

acts than other lawyers. n141 For example, legal services attorneys were significantly more likely to encounter clients who they believed intended to physically harm others than attorneys in law firms or other practice settings. n142 Attorneys practicing in small firms encountered the problem of clients who were contemplating wrongful acts that would cause injury to financial interests or property more often than lawyers in other practice settings. n143

The lawyers who reported that they had encountered clients who they "reasonably believed" were going to commit wrongful acts seemed fairly convinced about their clients' plans. n144 Few of these lawyers thought that their clients did not commit the anticipated acts because they were mistaken about their clients' original intentions. n145 [*115]

The lawyers may have felt fairly confident about their beliefs because their clients directly told them about their plans. Almost 60% of the lawyers who believed that their clients were going to cause death or bodily injury formed those beliefs as a result of direct oral communications from clients. n146 Likewise, more than 80% of the lawyers who believed their clients were going to cause substantial financial injury or property damage reached that conclusion based on client statements or questions. n147 Thus, any suggestion that lawyers do not learn of client plans directly from their clients--and that client confidentiality is not compromised by disclosure requirements n148 --is probably incorrect.

Finally, a number of attorneys indicated that they had had clients who spoke about future wrongful acts that would cause substantial harm to others, but that the lawyers did not "reasonably believe" that the client would commit the acts. n149 For example, some lawyers noted that their clients were simply "letting off steam" or sending up "trial balloons." n150 Others noted that clients raised questions as to the advisability of taking certain action, rather than expressing a clear intent to do so. n151 Some of the lawyers felt that they needed to respond [*116] strongly to these client statements in order to prevent the client from developing serious plans to commit wrongful acts. n152

These responses suggest that the problem of clients who communicate to their lawyers that they are contemplating future wrongful acts may be more pervasive than indicated above. n153 In considering whether mandatory disclosure rules "work," it is important to remember that those rules may

indeed have some effect on clients who are communicating their thoughts about future wrongdoing to their lawyers, even though clients are not communicating these ideas with such conviction that they are causing lawyers to conclude that their clients are reasonably likely to commit wrongful acts.

2. Lawyers Try to Dissuade Their Clients From Wrongdoing--and Think They Do

An important premise underlying attorney confidentiality is that lawyers who learn of client plans to commit wrongful acts will attempt to dissuade their clients from committing those acts and that they usually succeed in those efforts. n154 The survey responses revealed that New Jersey lawyers who reasonably believed that their clients intended to commit wrongful acts did try to dissuade their clients from committing the acts. Most of the lawyers who reported having clients who were going to commit wrongful acts indicated that their clients did not commit the acts after talking with their lawyers. The lawyers believe they were largely responsible for preventing the harm. n155 [*117]

a. Attorneys Try to Dissuade Their Clients From Harming Others

The vast majority of lawyers who believed that their clients were going to commit wrongful acts that were likely to cause substantial bodily harm reported that they discussed this belief with their clients. n156 In those discussions, the lawyers appealed mainly to their clients' self-interest. Virtually all of those lawyers discussed the legal consequences of the act. n157 Approximately three-quarters of the lawyers discussed the likelihood of apprehension. n158 Less than half of the lawyers discussed the morality of the act. n159 Almost 20% of the lawyers explicitly threatened to disclose the anticipated act to someone else n160 and about 5% threatened to withdraw from the representation. n161

Similarly, almost all of the attorneys who believed that their clients were going to commit wrongful acts likely to result in substantial injury to the financial interest or property of another discussed their belief with their clients. n162 More than [*118] 97% of these lawyers discussed the legal consequences of the act. n163 Over 57% of the lawyers discussed the likelihood that the client would be apprehended. n164 Approximately 41% discussed the morality of the act. n165 Almost one-quarter of the lawyers threatened to withdraw from the representation. n166 About 12% explicitly

threatened to disclose the information in order to prevent the act. n167

Lawyers chose to talk about practical reasons for not committing the wrongful acts rather than engage in philosophical discussions. Less than half of the lawyers talked about the morality of the act, even when bodily harm was at issue. n168 As one lawyer noted--

Discussing the morality of the act is, in my view[,] an extremely poor strategy. First, morality is rarely a high priority for persons engaged in criminal acts or who are desperate to avoid or terminate prosecution. Second, discussions of morality can sound pompous and/or condescending to a client[,] thereby breaking down the channel of communication between us. In these situations, it is my view that maintaining communication and client confidence is the only effective means of preventing the client from taking the wrongful action. . . . n169

Although it has been suggested that exceptions to confidentiality may be desirable because they will encourage more frequent moral dialogue between attorney and client, n170 these responses indicate that many lawyers will avoid such dialogues even when disclosure is required. [*119]

b. Clients Abandoned Their Plans After Talking With Their Lawyers

The New Jersey lawyers reported that most of their clients did not commit the anticipated wrongful acts. n171 More than 60% of the lawyers who reported that their clients did not cause the anticipated bodily harm believed that they were responsible for dissuading their clients. n172 Most of those lawyers believed that they dissuaded their clients by using reasoning other than the threat to disclose their clients' plans. n173 More than three-fourths of the attorneys whose clients did not commit anticipated wrongful acts that were likely to result in financial injury or property damage believed that they dissuaded their clients by using reasoning other than the threat to disclose. n174

The lawyers' comments confirm that they believe that they are able to dissuade their clients from committing wrongful acts. As one lawyer noted,

I can't conceive of a situation where I would be obliged to report a

client. Twenty years ago when working Legal Aid Landlord-Tenant a Portuguese speaking . . . man came to the New York office carrying a gun. His mother had been served with a dispossess notice. He was going to kill the landlord. If [*120] I could talk him out of his gun and his intentions without knowing one word of Portuguese[,] I can dissuade anyone. n175

Several other lawyers expressed the same basic sentiment, although somewhat less colorfully. n176

On the surface, these lawyer responses appear to support some of the basic assumptions underlying the justifications for maintaining client confidentiality in the context of future client wrongdoing. Nevertheless, this information provides only a partial picture. n177 Even if most lawyers regularly try to dissuade clients from committing wrongful acts and even if they succeed, it does not necessarily follow that they are able to do so because of confidentiality rules or because of mandatory disclosure. To understand the interplay between the rules and efforts to dissuade, it is necessary to step back and consider how the confidentiality and disclosure rules are discussed and used in practice.

3. Attorney Discussions About Confidentiality and Disclosure Rules

a. Lawyers Talk More About Confidentiality Than About Its Exceptions

The New Jersey study revealed that lawyers talked with their clients about confidentiality more than previously reported, but they do not talk much about the exceptions. More than 95% of the lawyers said that in the last twelve months they [*121] personally informed at least some of their clients of the confidentiality of their communications. n178 Criminal defense attorneys were significantly more likely to tell most of their clients about the confidentiality of their communications than other lawyers. n179 Even lawyers who did not practice a substantial amount of criminal law discussed confidentiality with their clients with some frequency: over 41% of those lawyers discussed confidentiality with more than half of their clients within the preceding twelve month period. n180

While the vast majority of lawyers told at least some of their clients about

confidentiality, most of them did not tell their clients about the disclosure rules. Over 65% of the New Jersey lawyers informed none of their clients in the last twelve months about an attorney's obligation to disclose client confidences to prevent a client from committing a wrongful act. n181 Another 23% of the respondents stated they had informed less than 10% of their clients of this disclosure obligation. n182 [*122]

The lawyers' failure to inform clients about the disclosure rule cannot be attributed to a belief that clients already know about the rules. Like the Tompkins County lawyers, most New Jersey lawyers did not believe that their clients understood that attorneys may be required to disclose client confidences. n183

Many New Jersey lawyers seem to discuss confidentiality in order to develop client trust and to encourage the free flow of client information. n184 At the same time, most lawyers do not discuss the subject of mandatory disclosure unless they must do so, apparently because they feel that discussions about confidentiality exceptions interfere with client trust. n185 These lawyers seem to believe they will obtain less than full disclosure [*123] from their clients if they promise anything less than complete confidentiality. n186

It appears that some lawyers do not mention the disclosure rules to their clients unless they are obviously relevant to a particular client or to clients seeking a particular type of representation. n187 For example, lawyers who practiced family law and those who practiced criminal law were significantly more likely than other lawyers to discuss this confidentiality exception with at least some of their clients within the past year. n188 One reason for this finding may be that they encounter clients who are contemplating future wrongdoing more often than other practitioners. n189

A similar explanation may account for the finding that lawyers who have had at least one client who they reasonably believed was going to commit a wrongful act likely to result in financial injury or property damage were more likely to tell at least some of their clients about the mandatory disclosure rule than lawyers who had never encountered the problem. n190 Exposure to the problem of future client wrongdoing on one occasion may cause a lawyer to be more sensitive to the problem, [*124] to learn of the disclosure obligation, n191 and to alert future clients to the disclosure rules.

b. Discussions of Mandatory Disclosure Rules May Inhibit Client Communications

As previously noted, lawyers who tell clients about the disclosure rule seem to do so because they anticipate that they may become relevant in the course of the representation. The survey responses indicate that attorneys who inform clients about mandatory disclosure rules may be doing so at times that may inhibit client communications about future wrongdoing or may be doing so in ways that insure such communications never occur.

Approximately one-quarter of the attorneys who told any of their clients about New Jersey's mandatory disclosure rules did so at the first substantive meeting with the client. n192 Another 42% of the lawyers did so when they believed that the client "might be about to discuss" a future criminal or fraudulent act. n193 Thus, over two-thirds of the lawyers who advise any of their clients of the mandatory disclosure rules are telling them about the rules at the beginning of the representation or when they believed that a client might be about to discuss a future crime or fraud. n194 [*125]

On the one hand, this approach unquestionably promotes client autonomy. If a client's communications are not protected, clients are entitled to know it before they speak. n195 On the other hand, by discussing the mandatory disclosure requirements at the first substantive meeting with the client or when the lawyer thinks that the client might be about to discuss future wrongdoing, the lawyer reduces the likelihood that clients will say any more about the subject. For example, one lawyer noted that "the client is advised of my obligation prior to my obtaining any knowledge." n196 The lawyer had not encountered clients who were going to commit a wrongful act, "perhaps because of [the lawyer's] position" with respect to informing clients of the disclosure rules. n197

A small number of lawyers take their discussions about disclosure one step farther and explicitly warn clients to say no more about future wrongful acts. n198 Some of these attorneys employ methods of information control to avoid learning of facts that may interfere with their ability to represent their clients. n199 For example, when one criminal defense lawyer be [*126] gins to suspect that the client might be about to discuss future wrongdoing, the lawyer "stops the client. I don't want to know." n200 The lawyer added, "I discourage my clients from discussing any matter which may lead to my knowledge of any planned or contemplated future activity. I like to

concern myself strictly with the defense of the matter for which I am retained." n201

Other attorneys appear to cut off client communications because of concerns about maintaining confidentiality. When one lawyer begins to suspect that a client might be about to discuss future wrongful conduct, the lawyer "warns the client that the attorney-client privilege might not protect the communication and that he should not be told." n202 Similarly, another lawyer would "inform him not to tell me anything like that because of my duty to inform the authorities." n203

These efforts at information control enable attorneys to avoid professionally difficult situations, but they may also cut off any opportunity for lawyers to dissuade clients from committing future wrongful acts. As the attorneys' comments indicate, some lawyers cut off the communication in this way because there is a duty to disclose.

4. The Use and Abuse of the Disclosure Requirement

a. Lawyers Are Not Threatening to Disclose to Prevent Harm to Others

Most New Jersey lawyers report that they are not using threats to disclose to dissuade their clients from committing [*127] wrongful acts. Less than 20% of the lawyers who discussed with their clients their belief that their clients were going to cause substantial bodily harm to another explicitly threatened to disclose the information in order to prevent the act. n204 Only 12% of the lawyers who discussed with their clients their belief that their clients intended to cause substantial injury to the financial interests or property of another explicitly threatened to disclose information to prevent the act. n205

The lawyers' reports of their threats to disclose may not tell the entire story because they do not reveal whether clients understood other statements by their lawyers as threats to disclose. For example, lawyer responses do not reveal whether lawyers' discussions with clients about the lawyers' disclosure obligations were perceived by clients as implicit threats to disclose. As one lawyer noted, "I would not indicate that I would disclose client information because client would perceive same as threat. Client would thereby be unwilling to confide in me if he believed I would disclose such information."

n206

In addition to the lawyers who explicitly threatened to disclose client information to prevent substantial harm to others, no more than another 15% of the lawyers may have discussed their duty to disclose with clients whom they believed were going to cause substantial harm. n207 It is not known whether [*128] clients perceived this information as a threat to disclose, a warning to say no more, or both.

Thus, explicit or implicit threats to disclose were used by no more than 30% of the New Jersey lawyers. n208 Relatively few of the lawyers thought that their threats to disclose caused their clients to abandon their plans. n209

b. Many Lawyers Are Not Disclosing Client Information to Prevent Harm to Others

Few New Jersey lawyers reported that they had ever disclosed client information in order to prevent a client from committing a wrongful act. This finding is not in itself surprising, since disclosure is a last resort and is not required until the lawyer “reasonably believes” disclosure is necessary to prevent the act. n210 Consequently, lawyers are not required to disclose when their clients abandon or cannot execute the wrongful plans. Nevertheless, nine years after the adoption of RPC 1.6(b), many lawyers were not disclosing client confidences to prevent wrongful acts, even when disclosure was necessary to prevent substantial harm to others.

Many of the sixty-seven lawyers who believed that their clients were going to commit wrongful acts likely to result in future death or bodily injury had reason to conclude that disclosure was not necessary to prevent the wrongful act. n211 [*129]

Twelve of the sixty-seven lawyers disclosed client information to an “authority” or opposing lawyer to prevent the wrongful act, n212 but at least twelve other lawyers who had a duty to disclose to prevent the harm failed to do so. n213 Thus, only about half of those lawyers who were required to disclose under RPC 1.6(b) to prevent death or substantial bodily harm had in fact made disclosure. n214

Attorneys disclosed their clients’ plans far less frequently to prevent

substantial harm to the financial interests or property of another. Only 100 of the approximately 190 lawyers who encountered clients whom they believed were going to cause financial injury or property damage indicated that the anticipated acts did not occur. n215 Only eight lawyers arguably disclosed client information to prevent the wrongful acts. n216 Additional attorney disclosures might have prevented substantial harm; twenty-two lawyers who did not disclose reported that the wrongful act was committed n217 and another sixty-two did not know if the act had occurred. n218 Thus, less than 9% of the [*130] lawyers who should have disclosed under RPC 1.6(b) to prevent financial injury or property damage arguably made disclosure substantial. n219

Although the level of non-disclosure is higher than might have been predicted, n220 it is not surprising that lawyers were more willing to reveal client confidences to prevent death or bodily injury than they were to prevent substantial harm to the financial interest or property of another. This may be explained by the strong cross-cultural ethic concerning the preservation of life n221 and the strong bar ethic concerning protection of client confidences. n222 Those views seem to affect attorney behavior far more than the existence of RPC 1.6(b).

i. RPC 1.6(b) Is Not the Primary Reason Why Lawyers Disclose Client Information

The mandatory disclosure rule seemed to have some effect on the New Jersey attorneys who disclosed client information to prevent harm to others, but the effect is difficult to measure. [*131]

Virtually all of the lawyers who disclosed client information to prevent substantial harm indicated that they would have disclosed even if disclosure were optional under the Rules of Professional Conduct. n223 At the same time, most of the lawyers ranked compliance with the Rules of Professional Conduct as one of the most important reasons why they disclosed. n224

The most important reason cited by the disclosing attorneys for revealing client information to prevent bodily harm was concern about the intended victim. n225 As one attorney explained, “there didn’t have to be any rule. I just know there wouldn’t be any question about what I would do.” n226 Concern about compliance with the Rules of Professional Conduct was ranked second by most of those lawyers. n227

The lawyers who disclosed to prevent substantial injury to the financial interests or property of another ranked concern about compliance with the Rules of Professional Conduct as slightly more important than concern about the victim. n228 [*132]

Concern for the client seemed to be another important reason for disclosing, particularly when bodily harm was at stake. n229 Other reasons cited by the disclosing lawyers for revealing client information to prevent harm included concern about criminal prosecution, concern about the lawyer's civil liability and concern about reputation. n230

While moral concerns about the victim seemed to underlie most attorney disclosures to prevent bodily harm, the eight lawyers who disclosed to prevent injury to financial interests or property seemed to disclose in order to protect themselves. Five of those lawyers indicated that concern about their reputations was one of the reasons why they disclosed and two lawyers ranked it as the second most important reason. n231 Three lawyers ranked concern about civil liability as the third most important reason why they disclosed. n232

Although not easily measurable, the mandatory disclosure rule seems to have some impact on attorney decisions to disclose client confidences to prevent serious harm. n233 With the use of RPC 1.6(b) to create civil standards of liability, the importance of the rule to lawyer decision-making will undoubtedly grow. n234 For the moment, though, RPC 1.6(b) appears not to be the primary reason why lawyers disclose when lawyers are confronted with clients who contemplate future wrongdoing.

ii. Lawyer Opinions and Failure to Comply With the Disclosure Rule

Lawyers offered a variety of reasons for not disclosing client information to prevent harm to others, but most of these reasons relate to a basic disagreement with the disclosure rule. n235 For example, lawyers who did not disclose client information to prevent harm often indicated that they did not do so because of the perceived importance of maintaining client trust. One public defender who did not reveal the intention of a client to commit a crime noted concerns about the client "losing confidence in my representation of him" and the "reputation of working for prosecutor." n236 The public defender concluded, "Once you lose your reputation for fighting for your

client regardless of the information that you receive from him, it leaves you in a vulnerable position." n237 Another lawyer who did not disclose the intention of a client to commit a murder also cited a similar concern about maintaining a reputation for being someone who could be trusted with a client's most sensitive matters. n238

The relatively low number of lawyer disclosures to prevent harm to others may reflect fundamental disagreement with the disclosure rules. n239 Some lawyers noted that they would "never" advise a client that they would disclose a confidential discussion. n240 As one lawyer wrote, "if I felt someone was about to disclose a plan to commit a future crime I would tell them not to inform me because I believe that an attorney should not be placed in the position of becoming an informant under any [*134] circumstances." n241 Even nine years after the adoption of RPC 1.6, these feelings about maintaining the sanctity of client confidentiality remained firmly rooted in the bar. n242

Lawyer ambivalence about mandatory disclosure to prevent substantial harm was confirmed by opinion questions. When attorneys were asked whether they believed that the New Jersey Rules of Professional Conduct should require lawyers to disclose client confidences if necessary to prevent a client from committing a criminal act that was likely to result in substantial harm to others, they responded as follows:

[Table omitted from on-line edition.]

As the numbers reflect, there is strong support for requiring disclosure when a lawyer believes that death or bodily injury is likely to result. n243 In contrast, only a bare majority of the lawyers supported a mandatory disclosure requirement to prevent criminal acts likely to result in substantial injury to the financial interest or property of another. n244 Significantly fewer criminal defense attorneys favored mandatory disclosure rules to prevent wrongful acts than other attorneys. n245 [*135]

The numbers changed considerably when lawyers were asked whether there should be mandatory disclosure where a client's fraudulent or illegal, but non-criminal acts were likely to result in substantial injury to others. n246

[Table omitted from on-line edition.]

By large margins, New Jersey attorneys did not support mandatory disclosure of fraudulent or illegal (but non-criminal) acts to prevent substantial harm to the financial interests or property of another. n247

Lawyers' views about mandatory disclosure seem to directly affect compliance. Far fewer attorneys disclosed to prevent financial injury or property damage than to prevent bodily harm. n248 Lawyer disagreement with rules requiring disclosure to prevent substantial financial injury and property damage undoubtedly affect their willingness to disclose client confidences to prevent such acts. n249 This disagreement with the rule, when coupled with the small chance that the lawyer who [*136] does not disclose will ever be detected, n250 may explain why disclosure in this context is infrequent.

iii. Lawyers Withdraw in Some Cases Rather Than Disclose

For many years, withdrawal from representation was the prescribed course for lawyers who faced a variety of problems with their clients. n251 Although New Jersey lawyers did not withdraw often when their clients were contemplating bodily harm, many attorneys withdrew from the representation rather than disclose client confidences when substantial injury to the financial interests or property of another was at stake.

Only 5% of the sixty-seven attorneys who discussed with their clients their belief that the clients were going to commit acts likely to result in substantial bodily harm threatened to withdraw from the representation. n252 None of the sixty-seven lawyers who believed their clients were going to commit the wrongful acts actually withdrew from the representation without also disclosing client information to prevent the wrongful act. n253

In contrast, lawyers confronted with clients who were going to commit wrongful acts likely to result in financial harm or property damage were much more likely to threaten withdrawal and to actually withdraw from the representation. Almost 25% of the attorneys confronted with such clients threatened to withdraw, as compared to 12% who threatened to disclose. n254 Twenty-six of the total lawyers who encountered such clients ultimately withdrew from the representation rather than [*137] disclose; only eight lawyers disclosed client confidences when disclosure was required. n255

The low number of withdrawals when clients were contemplating bodily

harm may reflect a moral judgment that the lawyers should not simply remove themselves from the situation and allow an innocent party to be physically harmed. In cases not involving physical harm, the traditional importance that lawyers attach to maintaining client confidences seemed to take priority over moral concerns. As one attorney noted:

The attorney-client relationship is very important. Clients should be able to divulge all confidences to their attorney without fear of disclosure. . . . If, as a result of the information received, the attorney no longer can or will represent the client, all parties can terminate the relationship and move on with no potential retribution to either side as a result of the information learned. n256

These lawyers' responses indicate that lawyers generally prefer to remove themselves from the representation rather than to reveal client confidences to prevent future client wrongdoing, at least where injury to the financial interests or property of another are at stake. n257 [*138]

5. Lawyer Handling of Future Harm Problem Often Has Little Adverse Impact on Relationships with Clients

One objection to any attorney disclosure rule is the impact that an exception will have on the attorney-client relationship. The lawyers' responses suggest that they believe the ways in which they handle the problem of future client wrongdoing have relatively little adverse impact on the attorney-client relationship.

More than 75% of the attorneys who believed their clients were going to cause substantial bodily injury to another reported that their handling of the situation had no apparent impact on their relationships with their clients. n258 Less than 20% of the lawyers reported that their clients were less cooperative or that the relationship prematurely terminated. n259 A small number of the lawyers responded that their relationships with their clients actually improved. n260

Client relations became more strained when injury to the financial interests or property of another was at stake. This increased strain may have occurred because clients were seeking to have their lawyers facilitate the wrongful conduct or because clients could not conduct the wrongful acts

without their attorneys' assistance. About 55% of the attorneys who had clients who they believed were going to commit wrongful acts likely to result in such injury said that their handling of the situation had no apparent impact on their relationships with their clients. n261 Almost 10% of the lawyers reported that their client was less forthcoming or less cooperative. n262 [*139] Approximately 24% reported that the client prematurely terminated the relationship or the attorney withdrew from the representation. n263 Five percent of the lawyers said that their relationships with their clients were enhanced. n264

Surprisingly, the lawyers who threatened to disclose their clients' plans but did not actually disclose reported that they did not necessarily experience a deterioration of their relationships with their clients. Of the seven attorneys who threatened to disclose to prevent bodily harm but did not ultimately disclose, five reported no apparent impact on their relationships with their clients. n265 The same was less true of the nineteen lawyers who threatened to disclose in order to prevent financial injury or property damage, but who did not ultimately disclose. Only ten of those lawyers reported no adverse impact on their relationships with their clients. n266

When bodily injury was at stake, the lawyers who actually disclosed client information damaged their relationships with their clients less than might be imagined. Of the twelve attorneys who disclosed to prevent bodily harm, five reported no apparent impact on their relationships with their clients and one reported that the relationship was enhanced. n267 Three of those six lawyers had warned their clients that they would disclose before disclosing, lending support to psychological research suggesting that this approach may better preserve the relationship. n268 On the other hand, of the eight lawyers who disclosed to prevent financial injury or property damage, five reported that their relationships with their clients were [*140] terminated. n269 Obviously, to thoroughly investigate what types of attorney behavior negatively affects attorney-client relations, interviews with clients must be performed.

V. Reexamining the Experiment

The New Jersey study reveals how some lawyers respond to the problem of clients who plan to cause serious harm to others. The study's results do not indicate the full impact of RPC 1.6(b) on attorney conduct, n270 but they can be used to begin to evaluate how a mandatory disclosure rule

affects attorneys and their clients. Although further empirical research in this area is needed, some tentative suggestions are made that may better accommodate the interests at stake.

A. Do Mandatory Disclosure Rules "Work?"

This question cannot be answered on the basis of the New Jersey study alone. The findings suggest, however, that mandatory disclosure rules may not achieve their major objective: the prevention of harm. n271 In addition, mandatory disclosure rules may not substantially affect lawyers' views of their obligations to disclose.

1. The Disclosure Rule Does Not Clearly Prevent Harm

The New Jersey study does not clearly demonstrate that a mandatory disclosure rule prevents harm to others. Although the vast majority of lawyers tried to dissuade their clients from committing wrongful acts, whether any of them did so because of the existence of the mandatory disclosure rule is uncertain. Moreover, the theory that lawyers will be better able to [*141] dissuade their clients from wrongdoing if they can tell their clients that they are required to disclose is not borne out in practice. Most lawyers did not attempt to use the disclosure rule to dissuade client wrongdoing. n272 Threats to disclose were not a major reason why clients abandoned plans to commit wrongful acts. n273

Instead, it appears that some lawyers believe that the myth of strict confidentiality enables them to dissuade clients from wrongdoing. As one lawyer noted:

My experience is that clients are more forthcoming if they know their communications cannot be disclosed. This presents the attorney with the opportunity to discuss the situation with the client and prevent the act from occurring. My experience has proven this to be successful. These discussions would never take place if the client knew they could be disclosed and an opportunity might be lost. n274

Clients need to be interviewed to determine to what extent this view of confidentiality is accurate.

It also appears that when lawyers reach the end of the line with their

clients and cannot persuade them to abandon their wrongful plans, most lawyers surveyed did not disclose their clients' plans. The few lawyers who disclosed client information to prevent harm believed they would have done so regardless of whether they were required to do so by the Rules of Professional Conduct. n275 Even when attorney disclosure did occur, it did not always prevent the occurrence of the wrongful act. n276 [*142]

These observations do not fully answer the question of whether mandatory disclosure rules prevent harm to others. New Jersey lawyers may try harder than lawyers in other states to dissuade their clients from committing wrongful acts because of the obligation to disclose client information if they fail. In addition, threats to disclose possibly are more effective in New Jersey than they would be in a state with different disclosure rules. To test these hypotheses, however, it would be necessary to compare the responses of New Jersey lawyers to those of attorneys in a state with permissive disclosure rules. It would also be useful to compare client responses from the two states to explore the reasons and the extent to which clients believed their attorneys prevented them from committing wrongful acts.

2. The Disclosure Rule and the Lawyer's Role

The New Jersey study does not clearly reveal whether RPC 1.6 has had an effect on lawyers' views of their obligation to disclose to prevent harm to others. It does show that bar support for mandatory disclosure rules appears not much stronger among those attorneys who were admitted to the New Jersey bar after the adoption of RPC 1.6 than those who were admitted before 1984. n277 The similarity of the opinions suggests that the prevailing bar culture or subcultures concerning confidentiality may be more powerful than the impact of legal education on lawyers. n278 [*143]

Lawyers' written comments suggest that their views about their obligations as lawyers and the role of individual morality are quite varied. Some lawyers persist in the view that their role as protector of the client usurps any consideration of moral issues, even to the point of remaining silent knowing a client plans to commit a wrongful act. n279 Other lawyers firmly believe that the client's interests do not supersede the attorney's own morality. n280 One lawyer made it quite clear that his or her morality could not be legislated: "I would not 'give up' a client unless I believed that a particular individual would certainly be killed. Then I would act out of a sense of my own morality, not because of a court rule." n281 These comments are

purely anecdotal; to determine whether RPC 1.6 has in fact affected lawyers' views of their role and their disclosure obligations, lawyers in a state without a mandatory disclosure rule should also be surveyed.

B. Tinkering with the Experiment

The New Jersey study provides a fascinating glimpse at the ways in which attorneys deal with clients whom they believe are about to harm others, but its findings cannot be over-generalized. In view of the number and importance of the open questions, it would be premature to suggest that mandatory disclosure rules should be scuttled or embraced. Nevertheless, some consideration should be given to tinkering with the rules. [*144]

1. Being Honest with Clients About the Disclosure Rules

The New Jersey study confirmed that lawyers do not tell most of their clients about the disclosure rules, even though they do not believe their clients understand the rules. n282 While scholars agree that clients have a right to know about attorney disclosure rules, n283 lawyers do not usually talk about the rules, apparently because they fear that such discussions will interfere with client trust and the client's willingness to talk freely with counsel. n284

A lawyer's deliberate failure to inform a client of the disclosure rule is deceptive and the deception carries costs for both lawyer and client. n285 The costs of deception include client distrust of lawyers, loss of client autonomy, and damage to lawyers' internal standards of integrity. n286 [*145]

Rules governing lawyers that require systematic deception of clients to achieve the rule's goals impose too many costs on lawyers, on clients and, ultimately, on society to be desirable. n287 When mandatory disclosure rules are adopted, it should be with the understanding that clients are entitled to know about these rules before they speak about future wrongdoing. Moreover, lawyers should be required to tell their clients about the rules prior to any such communication by the client.

State rules of professional conduct should specify when, how, and to whom this information about the disclosure obligation is to be provided, n288 because lawyers do not know what to do. n289 If the rules of professional conduct required lawyers to discuss the disclosure rule with their clients, then the lawyer's professional obligations would be clearer to both lawyer and client.

It is easy to say that clients should be told about this confidentiality exception, but much more difficult to decide who should learn of the rule and to devise a palatable and meaningful way to tell clients. In theory, all clients should be told explicitly about the disclosure rule because all are entitled to know the rules that govern their communications with their lawyers. n290 As a practical matter, such a requirement could [*146] confuse many clients and seriously interfere with the development of client trust, thereby affecting lawyers' ability to represent their clients. n291

The subject of how best to advise clients about the contours of the attorney confidentiality rules is beyond the scope of this Article, but it would seem that the "who" to tell should include, at a minimum, those clients who are told about confidentiality by their lawyers and those clients whom lawyers believe might contemplate future wrongdoing during the representation. n292 The "what" to tell clients should include specific mention of the lawyer's desire to discuss the client's questions about the legality of the client's contemplated conduct so as not to discourage client communications. By inviting clients to discuss the legality of contemplated conduct, lawyers may retain the opportunity to dissuade clients from committing wrongful acts.

2. Being Clear with Lawyers About the Withdrawal Rules

It is not surprising that many lawyers withdraw from the representation rather than disclose information to prevent their clients from committing wrongful acts. Disclosure is risky and unpleasant for a variety of reasons. n293 Withdrawal reduces those risks, while permitting the lawyer to feel like she has signalled disapproval (at least to the client) of the wrongful conduct. n294

Lawyers should not be permitted to circumvent their obligation to disclose by quietly withdrawing from the representation. Withdrawal without disclosure does not prevent harm; at best it may delay it and at worst it leaves better educated clients who can then enlist a new lawyer's unwitting assistance with the wrongful acts. An affirmative statement should be added to codes of professional conduct clarifying that lawyers cannot satisfy their obligations to disclose by withdrawing from the representation. n295 This statement should reduce the incidence of lawyers who withdraw from the representation without making disclosure to prevent client wrongdoing. In addition, a separate bar examination ethics component or Continuing Legal Education requirement in states with mandatory disclosure rules may also

help insure that lawyers better familiarize themselves with the particular state's disclosure requirements. n296 [*148]

3. Reconsidering Mandatory Disclosure to Prevent Financial Injury or Property Damage

Although further empirical research is needed, the New Jersey study suggests that a mandatory disclosure requirement may be defensible--if not desirable--to prevent a client from causing death or serious bodily harm. n297 At the same time, the study also suggests that mandatory rules to prevent other types of harm should be carefully scrutinized because their costs may significantly outweigh their benefits. n298

The bar does not strongly support a rule requiring disclosure to prevent a client from committing a wrongful act that will cause substantial injury to the financial interest or property of another. n299 Disapproval of the rule seems to modestly contribute to the failure to attempt to dissuade clients from wrongdoing n300 and to the failure to comply with the disclosure requirement. n301

Undoubtedly, the failure to comply with RPC 1.6(b) is fueled by the difficulty of detection and the lack of enforcement of the rule. n302 No formal disciplinary action has been taken against a lawyer for failure to comply with Rule 1.6(b). n303 The lack of [*149] enforcement signals to lawyers that the rule need not be obeyed. While fear of civil liability may improve compliance, such lawsuits are relatively rare. n304

Although lawyer disapproval of the rule, failure to comply, and lack of enforcement are not necessarily reasons to change it, they do raise serious issues. n305 Lawyer disapproval of RPC 1.6(b) may engender wider disrespect of the Rules of Professional Conduct and foster the view among lawyers that it is acceptable to pick and choose which of those rules they will obey. n306 If lawyers do not obey the rules that govern them, there is a danger of a loss of legitimacy of their efforts to regulate themselves n307 and a further loss of public trust in lawyers.

Rather than require disclosure to prevent non-bodily harm and have that rule disregarded, a permissive disclosure rule with a withdrawal requirement (where withdrawal is possible) may better protect the interests at stake. The withdrawal requirement should be coupled with code language suggesting

that if disclosure is not made to an authority or to the intended [*150] victim, then it should be made to a successor lawyer so that a new lawyer does not unwittingly facilitate a wrongful scheme.

For substantially the same reasons that clients should be told about mandatory disclosure rules, n308 clients are entitled to know about permissive disclosure rules before they speak about future wrongdoing. While a permissive disclosure rule and the attendant need to advise the client of the rule would create some of the same potential problems raised by a mandatory disclosure scheme, a permissive rule may interfere less with lawyers' opportunities to dissuade clients from wrongdoing. Undoubtedly, knowledge of the possibility that a lawyer will disclose will deter some clients from speaking. It seems likely, however, that fewer clients would be deterred from speaking by a permissive disclosure rule and that fewer lawyers would discourage their clients from speaking if the disclosure rule were not a mandatory one.

A permissive disclosure rule would not necessarily reduce the number of lawyer disclosures to prevent financial injury or property damage. n309 At the same time, a permissive rule may not substantially reduce lawyers' efforts to dissuade their clients from wrongdoing, because in many instances, their failure to dissuade will result in economic loss occasioned by withdrawal. n310 Moreover, the impact of a withdrawal threat on a client should not be underestimated; withdrawal would give [*151] some clients pause, if only because of the cost and delay involved in changing lawyers. n311

A permissive disclosure, when coupled with and the threat of withdrawal also signal to the client the seriousness with which the attorney views the conduct, and signal to the public that lawyers will not tacitly abide conduct that will harm the financial interests or property of another. Finally, a permissive disclosure rule might increase respect for the Rules of Professional Conduct and cause lawyers to take disclosure rules concerning the prevention of bodily harm more seriously.

Conclusion

What was once tagged as part of a radical experiment has not clearly resulted in radical changes in the thinking or conduct of the lawyers surveyed. On the contrary, many attorneys continue to believe that the sanctity of client confidentiality outweighs other important values. As a result, some

lawyers have remained silent while clients committed crimes or frauds that seriously harmed others. Others have tried to avoid learning about their clients' plans.

At the same time, the New Jersey study reveals that most lawyers try hard and in good faith to cope with this very difficult problem. While they are not always forthcoming about their disclosure obligations, and often resist disclosure, their comments reflect a real commitment to attempting to dissuade their clients from committing wrongful acts.

The results of the New Jersey study raise a number of issues for further theoretical consideration and empirical research. For example, given the evidence that lawyers attempt to dissuade their clients from wrongdoing and that clients may be dissuaded by their lawyers' efforts, it becomes all the more important to determine how clients' communications with their lawyers are affected by knowledge that lawyers are subject to mandatory disclosure requirements. Further research is needed to determine whether opportunities to dissuade are in fact [*152] lost after clients learn of the disclosure rule, or alternatively, whether clients talk with their counsel because their need for advice outweighs their concern about disclosure.

Empirical research in this area is difficult and admittedly imperfect; it is tempting to rely instead upon theories based on intuitive assumptions about lawyer conduct. Unfortunately, the problem of client wrongdoing is not theoretical, and the New Jersey study suggests that lawyer response to client plans to commit wrongful acts cannot be predicted based solely upon intuition. If empirical evidence is collected carefully and interpreted cautiously, it cannot help but advance the debate about the rules that should govern lawyers confronted with clients who intend to harm others. [*153]

[Appendix omitted from on-line edition.]

FOOTNOTES:

n1 I.D. No. 193, Question A.C. (Additional Comments section). This quote is from a comment made by a New Jersey lawyer responding to a thirty-nine question mail survey. This survey is part of a study of how New Jersey lawyers respond to the problem of clients who plan to cause serious harm to others (“New Jersey study”). The survey is described in detail *infra* parts IV. A. & B. Tables containing specific frequencies and tabulations derived from the survey responses are cited in this article as “Table .” Individual lawyers responding to the survey were assigned coded identification numbers, and their quotes are cited in this article as “I.D. No. , Question .” Only those tables and survey responses quoted in this article are on file with the Rutgers Law Review. All tables and survey responses are on file with the author.

n2 The terms “wrongful act” and “wrongdoing” are used in this article to mean a criminal, illegal or fraudulent act. It is, of course, possible that a lawyer will learn that a client intends to take some entirely lawful action that will cause substantial harm to a third party. No rule or professional responsibility code suggests that attorneys must prevent such an action and this article focuses on wrongful acts only.

n3 Clients may have a claim for wrongful disclosure of client confidences. See, e.g., Alan B. Vickery, Note, Breach of Confidence: An Emerging Tort, 82 *Colum. L. Rev.* 1426, 1461, 1464-65 (1982). In addition, attorneys may have to contend with disciplinary proceedings. One attorney stated that she has been forced to respond to disciplinary charges that her client brought against her because she disclosed client information to prevent harm to another. Telephone Interview with Attorney A (June 24, 1993).

n4 Attorney A, described in *supra* note 3, revealed a client’s plans to physically harm a witness, and is concerned about her personal safety. She noted that even though her former client is now incarcerated, “he’ll get out” and because she lives alone she said, “I’m nervous about it.” Telephone Interview with Attorney A, *supra* note 3.

n5 Compare Model Code of Professional Responsibility DR 4-101 (C) (1980) (lawyer may reveal intention of a client to commit a crime) with N.J. Rules of Professional Conduct Rule 1.6(b) (1985) (lawyer must disclose when necessary to prevent criminal or fraudulent acts likely to result in

substantial harm to others) and Cal. Bus. & Prof. Code section 6068(e) (Deering 1993) (lawyer must maintain inviolate the confidences and secrets of the client).

n6 See, e.g., David J. Fried, Too High a Price for Truth: The Exception to the Attorney-Client Privilege for Contemplated Crimes and Frauds, 64 *N.C. L. Rev.* 443, 490-98 (1986); Harry I. Subin, The Lawyer as Superego: Disclosure of Client Confidences to Prevent Harm, 70 *Iowa L. Rev.* 1091, 1159-75 (1985); Fred C. Zacharias, Rethinking Confidentiality, 74 *Iowa L. Rev.* 351, 358-76 (1989); Note, Developments in the Law Privileged Communications, 98 *Harv. L. Rev.* 1450, 1501-24 (1985) [hereinafter Developments].

n7 Only two studies provide some information about lawyer conduct in this context. Kenneth Mann, Defending White-Collar Crime 111-23 (1985); Zacharias, *supra* note 6, at 389. Neither focused primarily on this subject.

n8 Professor Susan Koniak has demonstrated how the bar’s conception of the hierarchy of rules that bind it is different than the state’s vision and that bar rules may at times be followed even when they conflict with rules created by courts or other non-bar entities. This is particularly true when client confidentiality is at stake. Susan P. Koniak, The Law Between the Bar and the State, 70 *N.C. L. Rev.* 1389, 1411-47 (1992).

n9 2 Geoffrey C. Hazard, Jr. & W. William Hodes, The Law of Lawyer-ing: A Handbook on the Model Rules of Professional Conduct, section AP4:104 at 1263-65 (2d ed. Supp. 1993) [hereinafter The Law of Lawyer-ing]. The “radical experiment” included not only the requirement that lawyers disclose client information to prevent future crimes and fraud, but a requirement that lawyers disclose material facts where the tribunal may be misled by not knowing them, even if the lawyer and client did not mislead the court. See *infra* notes 49, 52 and accompanying text.

n10 N.J. Rules of Professional Conduct Rule 1.6(b) (1985) [hereinafter RPC 1.6(b)].

n11 See *infra* notes 31-37, 44-45 and accompanying text.

n12 Nine other states have adopted mandatory disclosure requirements to prevent clients from committing certain future wrongful acts. Most of them

do not go as far as RPC 1.6(b) and are limited to disclosure to prevent death or substantial bodily harm. See *infra* note 55.

n13 The New Jersey study is the largest of its kind, but it is not based on a completely random sample, see *infra* notes 108-12, 126 and accompanying text, and should be viewed as a preliminary effort to explore this area.

n14 8 John H. Wigmore, *Evidence in Trials at Common Law* section 2290 (McNaughton rev. 1961). See also *Developments*, *supra* note 6, at 1456 & n.10.

n15 8 Wigmore, *supra* note 14, section 2292 at 554. See also Subin, *supra* note 6, at 1113.

n16 The justifications have also been described as “utilitarian” and “non-utilitarian,” *Developments*, *supra* note 6, at 1501-09; as “instrumental” and “rights-based,” Subin, *supra* note 6, at 1159-72; and as “deontological” and “utilitarian,” Lee A. Pizzimenti, *The Lawyer’s Duty to Warn Clients about Limits on Confidentiality*, 39 *Cath. U. L. Rev.* 441, 444 (1990).

n17 The rights-based justifications focus on the client’s rights and on the notion that the client is entitled to know the law and to obtain assistance from a lawyer in dealing with a complicated legal system. See, e.g., Subin, *supra* note 6, at 1160. Confidentiality also insures that the lawyer will not make disclosures that may harm the client, effectively disclosing a client’s self-incriminating statements. For a discussion of the relationship between the attorney-client privilege and the constitutionally-protected right to avoid self-incrimination, see *id.* at 1120-34.

n18 Attorneys are thought to need these communications to provide their clients with effective representation and to produce a more just result in the representation, which is a positive societal goal. Zacharias, *supra* note 6, at 358.

n19 For critiques of the rights-based and utilitarian defenses of confidentiality, see Subin, *supra* note 6, at 1160-72; Zacharias, *supra* note 6, at 359-76.

n20 See *Developments*, *supra* note 6, at 1457 & n.18. Wigmore states that “it has been agreed from the beginning” that the privilege does not protect the client in concerting with the lawyer a crime or other evil enter-

prise. 8 Wigmore, *supra* note 14, section 2298 at 572. See Fried, *supra* note 6, at 446-89, for general background regarding the crime-fraud exception to the attorney-client privilege.

n21 *Developments*, *supra* note 6, at 1509-10. In contrast, communications about wrongful acts that have been completed are protected by the attorney-client privilege. *Id.* at 1510 n.50. See also 8 Wigmore, *supra* note 14, section 2298, at 573; *The Law of Lawyering*, *supra* note 9, section 1.6:104 at 138.

n22 Subin, *supra* note 6, at 1115. In fact, the exception seems to apply regardless of the client’s purpose when consulting the attorney, if the client subsequently commits a crime or fraud aided by the attorney’s advice. See Fried, *supra* note 6, at 459 & n.70. See also *Developments*, *supra* note 6, at 1512-13.

n23 Subin, *supra* note 6, at 1114.

n24 *Developments*, *supra* note 6, at 1510. In addition, the client has no “right” to engage in wrongful activity and no right to use a lawyer’s services to facilitate that activity. Subin, *supra* note 6, at 1162.

n25 The law generally does not require lay persons to make disclosures in order to prevent a future crime that will result in physical harm to others. Indeed, in most states they need not take steps to prevent a crime as it happens, even if it would require relatively little for them to do so. Daniel B. Yeager, *A Radical Community of Aid: A Rejoinder to Opponents of Affirmative Duties to Help Strangers*, 71 *Wash. U. L.Q.* 1, 5-8 (1993).

n26 There are some individuals who have special duties to prevent imminent physical harm because they have special relationships with the persons who may cause harm to others. The most well-known example is mental health professionals, who in some states have a duty to act to prevent their patients from causing serious physical harm to others. E.g., *Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 334 (Cal. 1976). Parents of minor children, masters of their servants and persons “in charge” of another with dangerous propensities also have special relationships giving rise to a duty to control the conduct of another to prevent harm to third parties. See E.L. Kellett, *Annotation, Private Person’s Duty and Liability for Failure to Protect Another Against Criminal Attack by Third Person*, 10 *A.L.R.3d* 619, 623 (1966 & Supp. 1993). These duties to take steps to prevent serious bodily

harm to a third party have not been extended to lawyers. E.g., *Seibel v. City & County of Honolulu*, 602 P.2d 532 (Haw. 1979); *Hawkins v. King County Dep't of Rehabilitative Servs.*, 602 P.2d 361 (Wash. 1979).

It is possible that in the future, courts may hold lawyers liable for failure to prevent future harm based upon bar code obligations to disclose. One court has found a duty to disclose fraud based on disclosure requirements contained in a state bar code. See *Philadelphia Reserve Supply Co. v. Nowalk & Assoc., Inc.*, 1992 U.S. Dist. LEXIS 12745 (E.D. Pa. Aug. 25, 1992). But see *Schatz v. Rosenberg*, 943 F.2d 485, 492 (4th Cir. 1991) (holding alleged violation of ethical rule did not create duty to disclose), cert. denied, 112 S. Ct. 1475 (1992).

n27 See Geoffrey C. Hazard, Jr., *Lawyers and Client Fraud: They Still Don't Get It*, 6 *Geo. J. Legal Ethics* 701, 706-07 (1993). As Professor Hazard notes, client fraud may also entail accessorial civil liability for a lawyer who is merely negligent. *Id.* at 707.

n28 Senator Arlen Specter proposed the Lawyer's Duty of Disclosure Act of 1983, S. 485, 98th Cong., 1st Sess. (1983). The Act never made it out of the Senate Judiciary Committee.

n29 See generally Robert P. Mosteller, *Child Abuse Reporting Laws and Attorney-Client Confidences: The Reality and the Specter of Lawyer as Informant*, 42 *Duke L.J.* 203, 217-21, 244-55 (1992).

n30 See generally Geoffrey C. Hazard, Jr., *Lawyer Liability in Third Party Situations: The Meaning of the Kaye Scholer Case*, 26 *Akron L. Rev.* 395, 400-06 (1993); Richard M. Phillips, *Client Fraud and the Securities Lawyer's Duty of Confidentiality*, 49 *Wash. & Lee L. Rev.* 823, 827 (1992).

n31 Canon 37 announced the "duty of a lawyer to preserve his client's confidences," but explicitly permitted an attorney to disclose the announced intention of a client to commit a crime. See *Canons of Professional Ethics Canon 37* (1928).

The ABA Model Code of Professional Responsibility, which was adopted in some form by virtually every state, permitted lawyers to reveal "the intention of a client to commit a crime and the information necessary to

prevent the crime," regardless of the seriousness of the crime. Model Code of Professional Responsibility DR 4-101(C) (1970) [hereinafter CPR]. Although the official footnotes to the Code of Professional Responsibility suggested that a lawyer was required to make disclosure to prevent crimes under certain circumstances, Professor Hazard has suggested, probably correctly, that in practice it was generally understood that only "serious" crimes qualified for disclosure and that there was no mandatory disclosure requirement even in serious cases. See *The Law of Lawyering*, supra note 9, section 1.6:302 at 165.

n32 See *Canons of Professional Ethics Canons 29, 41* (1937). Subsequent ABA ethics opinions significantly eroded the force of the disclosure requirements set out in Canons 29 and Canon 41 based on the perceived importance of maintaining client confidences. See Koniak, supra note 8, at 1431-34.

When the ABA adopted the Model Code of Professional Responsibility it included in DR 7-102(B)(1) the requirement that lawyers disclose information to avoid a fraud or perjury on a person or tribunal that occurred in the course of the representation. In 1974, the ABA amended Rule 7-102(B) to add that disclosure must be made unless the information was protected as a "privileged communication." This exception virtually eliminated the disclosure obligation. Many states, including New Jersey, did not adopt this amendment. E.g., N.J. Code of Professional Responsibility DR 7-102(B)(1) (1983).

n33 The controversy began in earnest in August 1979 when Professor Monroe Freedman, an outspoken proponent of strict confidentiality, disclosed to the press the Kutak Commission's Discussion Draft, which required lawyers to disclose client confidences in order to prevent death or serious bodily harm and permitted disclosure to prevent or rectify a "deliberately wrongful act." See Ted Schneyer, *Professionalism as Bar Politics: The Making of the Model Rules of Professional Conduct*, 14 *Law & Soc. Inquiry* 677, 702 (1989). In response, the American Trial Lawyers' Association began to draft an alternative code. The Kutak Commission ultimately dropped the proposal concerning mandatory disclosure. *Id.* at 710-12.

n34 The Proposed Final Draft Rule 1.6(b) stated in part that a lawyer may reveal information to the extent the lawyer reasonably believes necessary:

(2) to prevent the client from committing a criminal or fraudulent act that the lawyer believes is likely to result in death or substantial injury to the financial interest or property of another;

(3) to rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services had been used.

Model Rules of Professional Conduct Rule 1.6 (Proposed Final Draft 1981).

n35 During the February 1983 mid-year meeting, following a heated debate, the American College of Trial Lawyers offered an amendment to Model Rule 1.6 which by a 207-109 vote eliminated those provisions of Rule 1.6(b) which permitted lawyers to disclose the intention of a client to commit "fraudulent" acts or to disclose client information in order to prevent substantial injury to the financial interest or property of another. See Elaine Reich, ABA Center for Professional Responsibility, *The Legislative History of the Model Rules of Professional Conduct: Their Development In The House of Delegates* 48 (1987).

n36 Model Rule 1.6(b) provides that a lawyer may reveal information to the extent the lawyer reasonably believes necessary

(1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm.

Model Rules of Professional Conduct Rule 1.6(b)(1) (1983).

n37 The only disclosure that could be made concerning client fraud appeared in Model Rule 3.3, entitled "Candor Toward the Tribunal," which provided that a lawyer shall not knowingly fail to "disclose a material fact to a tribunal when disclosure is necessary to avoid assisting" a client's criminal or fraudulent act. See Model Rules of Professional Conduct Rule 3.3(a)(2) (1983).

n38 At least 35 states have adopted some form of the Model Rules. The Law of Lawyering, supra note 9, section AP4:101 at 1255. Model Rule 1.6 is the section most often revised by the states. Id. section AP4:102 at 1257-59.

n39 See Report of the New Jersey Supreme Court Committee on the Model Rules of Professional Conduct, *112 N.J. L.J. 93 (Supp. 1983)*.

n40 The 20-person committee, chaired by United States District Court Judge Dickinson R. Debevoise, was comprised largely of the mainstream New Jersey legal establishment. The Committee included four judges, three law professors, one law school dean, a vice president of the New Jersey State Bar Association, the president of Legal Services Corporation, and two prominent non-lawyers. Report, supra note 39, Supp. at 1 (1983).

n41 See Report, supra note 39, Supp. at 10 (1983).

n42 The Committee's recommendation mirrored the balance of the Kutak Commission's Proposed Final Draft Rule 1.6, including that disclosure be permitted to rectify the consequences of a client's wrongful acts in the furtherance of which the lawyer's services had been used. Id.

n43 Id. at 9.

n44 N.J. Code of Professional Responsibility DR 4-101(C) (1983).

n45 At that time, New Jersey's Code of Professional Responsibility required disclosure of client fraud only when the lawyer learns the "client has, in the course of the representation, perpetrated a fraud upon a person or tribunal." N.J. Code of Professional Responsibility DR 7102(B)(2) (1983).

n46 Report, supra note 39, Supp. at 10 (1983). The Committee cited *In re Kozlov*, 398 A.2d 882 (N.J. 1979) and *In re Richardson*, 157 A.2d 695 (N.J. 1960). It is not surprising that the balance was struck in favor of disclosure in those cases, since they involved communications that fell within the well recognized crime-fraud exception to the attorney-client privilege. There were not, however, any prior opinions which required lawyers to disclose the intention of their clients to commit a crime.

n47 Report, supra note 39, Supp. at 10 (1983). The Committee had good reason to be concerned about the public's esteem given the bad press that lawyers were receiving at that time. In 1983, the OPM case was in the news, the ABA's Model Rules were receiving mixed reviews and a Gallup Poll revealed that the public rated funeral directors as having higher ethical standards than lawyers. E.g., Stephen P. Doyle et al., *Trustee's Criticism of*

Lawyers in O.P.M. Imbroglio, *Legal Times*, May 2, 1983, at 20; Stephen Gillers, *Lawyers' Silence: Wrong . . .*, *N.Y. Times*, Feb. 14, 1983, at A17; Honesty and Ethical Standards--Overview, Gallup Opinion Index 4 (1983).

n48 See New Jersey State Bar Association Special Committee on Model Rules of Professional Conduct, Report on the Proposed Model Rules of Professional Conduct 2, 4 (Dec. 9, 1983) (copy on file with the Rutgers Law Review).

Another explanation for the bar's acquiescence to this change in the rules is that the legal culture of the organized bar in New Jersey was different than the legal cultures represented in the ABA House of Delegates. This difference is suggested in an editorial a few months earlier in which the *New Jersey Law Journal* expressed clear disapproval of the ABA's rejection of the Kutak proposal. The newspaper noted: "The wringing of legal hands at the House of Delegates seems shocking. We in New Jersey are doing our duty to our clients and courts and at the same time serving a standard of conduct higher than that rejected by the A.B.A." *Attorney's Duty to Report Client Fraud*, *111 N.J. L.J.* 329, 332 (1983). See also Bruce Rosen, *Lawyer-Client Rules Toughened*, *The Bergen Record*, July 20, 1984, at A1, A16 (noting that while trial lawyers fought for the adoption of the ABA Model Rules in other states, "there was no such move in New Jersey").

n49 The rule provides:

(b) A lawyer shall reveal such information to the proper authorities, as soon as, and to the extent the lawyer reasonably believes necessary, to prevent the client--

(1) from committing a criminal, illegal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm or substantial injury to the financial interest or property of another.

RPC 1.6(b)(1). Another unexpected and controversial addition to the New Jersey Rules of Professional Conduct was RPC 3.3(a)(5), which stated that a lawyer shall not knowingly "fail to disclose to the tribunal a material fact with knowledge that the tribunal may tend to be misled by such failure."

n50 See Administrative Office of the Courts: State of New Jersey, Press

Release on the Rules of Professional Conduct (July 19, 1984) (copy on file with the Rutgers Law Review); Comment to RPC 1.6, *114 N.J. L.J.* 53 (Supp. at 3) (1984).

n51 Press Release, supra note 50.

n52 See Robert G. Seidenstein, *Lawyers Required to Report Illicit Plots of Clients*, *Star Ledger*, July 20, 1984, at 17; Judy Rotholz, *Court: Lawyers Must Snitch on Clients*, *The Trentonian*, July 20, 1984, at 1. The bar may have been silent about Rule 1.6 because it was so concerned about RPC 3.3(a)(5). See supra note 49. The latter rule was the subject of a letter from the Trustees of the State Bar Association to the New Jersey Supreme Court, stating that that rule had generated "near universal concern" and asking that the Court withhold its implementation. Letter from Raymond R. Trombadore, First Vice President, New Jersey State Bar Association, to the Supreme Court of New Jersey 2 (Aug. 9, 1984) (copy on file with the Rutgers Law Review).

n53 One member of the Debevoise Committee described the reordering of priorities:

The New Jersey Rules place the public interest before the interests of both clients and lawyers, and the interests of clients ahead of those of lawyers. . . . Although traditional adversary ethics (reflected in former rules) provide a legal and, perhaps, a moral justification to ignore the public interest when pursuing the interests of a client, the New Jersey Rules clearly do not. [footnotes omitted]

Michael P. Ambrosio, *The "New" New Jersey Rules of Professional Conduct: Reordered Priorities for Public Accountability*, *11 Seton Hall Legis. J.* 121, 130 (1987).

n54 See Bruce S. Rosen, *New Jersey Adopts Code Tougher than ABA's*, *Nat'l L.J.*, Aug. 6, 1984, at 3 (remarks of John C. Elam, past president of American College of Trial Attorneys).

n55 Subsequently, Arizona, Connecticut, Florida, Illinois, Nevada, North Dakota, Texas, Virginia and Wisconsin adopted mandatory disclosure requirements to prevent serious bodily harm. Florida and Virginia require disclosure when lawyers learn that a client plans to commit any crime. Fla.

Rules of Professional Conduct Rule 4-1.6 (1992); Va. Code of Professional Responsibility DR #4-101(D) (1994). Wisconsin's rule is similar to New Jersey's RPC 1.6. See Wis. Rules of Professional Conduct for Attorneys SCR 20:1.6 (1988).

n56 There is no dearth of law review articles analyzing the theoretical justifications for attorney confidentiality when clients plan to commit future wrongdoing. See supra note 6. See also Kenneth J. Drexler, Note, Honest Attorneys, Crooked Clients and Innocent Third Parties: A Case for More Disclosure, 6 *Geo. J. Legal Ethics* 393, 405-13 (1992); Timothy J. Miller, Note, The Attorney's Duty to Reveal a Client's Intended Future Criminal Conduct, 1984 *Duke L.J.* 582, 592-600 (1984). The purpose of this section is to move the discussion beyond critiques of strict confidentiality and to take a look at the rationales for disclosure.

n57 When commentators analyze the justifications for confidentiality, they often assume a "strict confidentiality" model. E.g., Subin, supra note 6, at 1159-72; Zacharias, supra note 6, at 359-70. In fact, only one state seems to require lawyers to maintain strict confidentiality even when a client intends to cause serious bodily harm to another. Cal. Bus. & Prof. Code section 6068(e) (Deering 1993). See also San Diego County Bar Association Legal Ethics and Unlawful Practices Committee Opinion 19901, 6 *Laws. Man. on Prof. Conduct (ABA/BNA)* 394 (1990) (lawyers are prohibited from disclosing a client's intention to kill an informant). Forty-two states permit or require lawyers to disclose client information to prevent future financial and property crimes. Drexler, supra note 56, at 405 n.61. At this point, the debate within the bar is not about "strict" confidentiality, but is largely a debate over the proper scope of the exceptions. See *The Law of Lawyering*, supra note 9, section 1.6:102 at 130.

n58 See supra notes 16-19 and accompanying text. See also Monroe H. Freedman, *Lawyers' Ethics In An Adversary System* 5 (1975). See generally Marvin E. Frankel, *The Search for Truth Continued: More Disclosure, Less Privilege*, 54 *U. Colo. L. Rev.* 51, 62 (1982).

n59 See *id.* See generally David Luban, *Lawyers and Justice: An Ethical Study* 189-90 (1988). For example, even clients who have no plans to commit wrongful acts may be deterred from communicating fully with their lawyers because they cannot make the fine distinctions that lawyers must make between future, past and ongoing wrongdoing.

n60 See *The Law of Lawyering*, supra note 9, section AP4:104 at 1263.

n61 See, Subin, supra note 6, at 1166; Zacharias, supra note 6, at 36970; *Model Rules Rule 1.6 cmt.*

n62 See, e.g., Drexler, supra note 56, at 408; W. William Hodes, *The Code of Professional Responsibility, The Kutak Rules and the Trial Lawyer's Code: Surprisingly, Three Peas in a Pod*, 35 *U. Miami L. Rev.* 739, 786 (1981); Pizzimenti, supra note 16, at 481-83; Roy M. Sobelson, *Lawyers, Clients and Assurances of Confidentiality: Lawyers Talking Without Speaking, Clients Hearing Without Listening*, 1 *Geo. J. Legal Ethics* 703, 711 (1988); Subin, supra note 6, at 1166.

n63 This argument is supported by existing empirical research. See *infra* text accompanying note 95.

n64 Zacharias, supra note 6, at 367-68.

n65 E.g., Subin, supra note 6, at 1159-72; See generally, Zacharias, supra note 6, at 361-76.

n66 As Professor Simon has noted:

People would have ample incentives to disclose adverse information to counsel even without confidentiality safeguards because they are honest and law abiding, because they cannot make reliable judgments about when it is in their interests to withhold, or because in many business contexts they risk liability by failing to seek good legal advice.

William H. Simon, *Ethical Discretion in Lawyering*, 101 *Harv. L. Rev.* 1083, 1142 (1988). See also Bruce M. Landesman, *Confidentiality and the Lawyer-Client Relationship in The Good Lawyer* 208 (David Luban ed. 1983); *Developments*, supra note 6, at 1474, 1476; Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 *Stan. L. Rev.* 589, 614 (1985); Subin, supra note 6, at 1163-65.

n67 See Subin, supra note 6, at 1166-68 ("even assuming that lawyers regularly advise their clients to adhere to the law, it does not necessarily follow that lawyers are effective as law enforcers"). See also authorities

cited in Zacharias, *supra* note 6, at 369 n.83. But see Fried, *supra* note 6, at 492 n.275.

A third argument against strict confidentiality is that lawyers do not need complete client candor and that it should not be encouraged at the cost of silencing lawyers so that they cannot prevent harm to third parties. In fact, there is some evidence that lawyers believe that they do not need to know everything that their clients might tell them in order to provide adequate representation. See Zacharias, *supra* note 6, at 367. While lawyers probably do not need to know everything their clients might tell them, the real question is whether lawyers need to know the information that is being withheld, which is a very difficult question to answer without also asking clients.

n68 See *supra* note 25 and accompanying text.

n69 See *supra* note 55.

n70 Landesman, *supra* note 66, at 207-08.

n71 Subin, *supra* note 6, at 1175. See generally Frankel, *supra* note 58, at 52.

n72 A pervasive theme of the New Jersey Rules of Professional Conduct is that accountability to the public interest at times outweighs the duty of loyalty to the client. Ambrosio, *supra* note 53, at 130. See also Jennifer Hall, States Modifying ABA's Ethic's Rules, *Legal Times*, Aug. 12, 1985 at 1 (indicating revision of Virginia code also addressed this balance).

n73 Subin, *supra* note 6, at 1105-06, 1169, 1172. See also Luban, *supra* note 59, at 205.

n74 Professor Subin has argued that a lawyer's duty to disclose felonies is the "precise equivalent" of the doctor's duty to report gunshot wounds, communicable diseases or dangerous patients. Subin, *supra* note 6, at 1173 & n.378. These analogies are not precise. Injuries or illnesses present no ambiguity about whether they have occurred. The duty to report dangerous patients is also an imperfect analogy, because it is based on a "control" theory. See Marc L. Sands, Note, The Attorney's Affirmative Duty to Warn Foreseeable Victims of A Client's Intended Violent Assault, 21 *Tort & Ins. L.J.* 355, 356, 363 (1986). Lawyers cannot commit their clients to institutions,

nor do they have the same level of control that parents have over children or masters have over their servants.

n75 Subin, *supra* note 6, at 1166, 1173-74.

n76 Subin, *id.* at 1174. One response to these arguments is that if lawyers fear that they must disclose client confidences, lawyers will be more reluctant to obtain complete information from their clients. In order to reconcile a lawyer's duty of loyalty and desire to maintain confidences with an obligation to disclose, attorneys might be less aggressive in eliciting information. Cf. Developments, *supra* note 6, at 1476-77. As Professor David Luban has noted, "there is a personal dimension to confidentiality: clients trust their lawyers, and lawyers want to deserve that trust." Luban, *supra* note 59, at 186. If lawyers seek to avoid learning certain information, they will have few opportunities to dissuade.

n77 Report, *supra* note 39, Supp. at 10. See generally Zacharias, *supra* note 6, at 375.

Concern about public opinion seems to have affected the decisions in some states to support mandatory disclosure rules. See, e.g., *supra* note 47 and accompanying text. In fact, it is not clear that a disclosure requirement to prevent future harm would significantly affect the public's perception of lawyers. See *infra* note 103 and accompanying text.

n78 Lawyers have a substantial interest in maintaining their role in the regulation of the bar, which is increasingly under siege. To the extent that the public disapproves of the rules used to govern the bar, the rules may ultimately be revised by courts, legislatures and regulatory agencies. See Drexler, *supra* note 56, at 400-02; Koniak, *supra* note 8, at 1477-78. But see David B. Wilkins, Who Should Regulate Lawyers?, 105 *Harv. L. Rev.* 799, 810-11 (1992) (suggesting it is not unrealistic to assume that the Model Rules and the CPR will be used by enforcement officials to determine behavior for which lawyers can be sanctioned, even if they do not approve of rules).

n79 J. Michael Callan & Harris David, Professional Responsibility and the Duty of Confidentiality: Disclosure of Client Misconduct in an Adversary System, 29 *Rutgers L. Rev.* 332, 356 (1976); Zacharias, *supra* note 6, at 405. Some have criticized permissive disclosure schemes because they

substitute the lawyer's views for society's judgment. See Subin, *supra* note 6, at 1174. But see Simon, *supra* note 66, at 1145 (noting the benefits of affording lawyers more discretion when representing clients).

n80 Callan & David, *supra* note 79, at 356.

n81 Professor William Hodes has expressed the view that as a practical matter when serious bodily injury is at stake, the permissive disclosure rule will be read as "shall" and a strict confidentiality rule would be ignored. Hodes, *supra* note 62, at 755-58.

n82 Landesman, *supra* note 66, at 208-09; Subin, *supra* note 6, at 1091; Zacharias, *supra* note 6, at 372-73.

n83 E.g., Jerome E. Carlin, *Lawyers' Ethics: A Survey of the New York City Bar* (1966); Joel F. Handler, *The Lawyer and His Community: The Practicing Bar in a Middle-Sized City* (1967); John P. Heinz & Edward O. Laumann, *Chicago Lawyers: The Social Structure of the Bar* (1982); Douglas E. Rosenthal, *Lawyer and Client: Who's In Charge?* (1974); Edward Laumann et al., *Washington Lawyers and Others: The Structure of Washington Representation*, 37 *Stan. L. Rev.* 465 (1985).

n84 There are two notable exceptions. See Notes & Comments, *Functional Overlap Between the Lawyer and Other Professionals: Its Implications for the Privileged Communications Doctrine*, 71 *Yale L.J.* 1226 (1962) [hereinafter *Yale Note*]; Zacharias, *supra* note 6, at 379-96. See generally Note, *Corporate Legal Ethics--An Empirical Study: The Model Rules, The Code of Professional Responsibility, and Counsel's Continuing Struggle Between Theory and Practice*, 8 *J. Corp. L.* 601, 622 (1983).

n85 Indeed, not much is even known about whether this problem presents itself with any frequency in practice. One of the few studies suggesting that it might is Kenneth Mann's study of white collar criminal defense lawyers. He found that "requests for legal counsel in order to cover up future criminal acts are not frequent but neither are they a rare phenomenon." Mann, *supra* note 7, at 111. See generally Zacharias, *supra* note 6, at 389.

n86 Drexler, *supra* note 56, at 411; Fried, *supra* note 6, at 490; Lonnie Koontes, *Client Confidentiality and the Crooked Client: Why Silence is Not Golden*, 6 *Geo. J. Legal Ethics* 283 (1992); Subin, *supra* note 6, at 1165,

n.353, 1168. See generally *Developments*, *supra* note 6, at 1474; *The Law of Lawyering*, *supra* note 9, section 1.6:101 at 128.

n87 See *supra* note 7. On the one hand, the relative lack of empirical research is surprising because so many commentators have noted the dearth of empirical research and because many of the assumptions underlying confidentiality could be tested on an empirical basis. On the other hand, the absence of such research is not that surprising, because empirical research is expensive and time consuming; it is far easier to analyze someone else's study than to generate one's own.

n88 The Yale study analyzed, *inter alia*, the responses of 108 laypersons who lived in the Eastern United States. Those answering the questionnaire tended to be "non-lower class socially and economically." *Yale Note*, *supra* note 84, at 1227 n.6.

n89 *Id.* at 1262. Almost two-thirds of the laypersons surveyed believed that lawyers would not repeat client confidences.

n90 Laypersons were asked whether they thought that a lawyer "would refuse to talk even if ordered to do so by a judge." *Id.*

n91 Cornell University is located in Tompkins County, New York. The Tompkins County study analyzed 105 responses from lay people, including 73 persons who had consulted lawyers in the past ("clients"). It also analyzed 63 responses from lawyers. Zacharias, *supra* note 6, at 379.

n92 The vast majority of clients who were not told of confidentiality directly by their lawyers claimed to know of the rule. *Id.* at 383 (79.1%).

n93 *Id.* In fact, New York lawyers were permitted to disclose client confidences to prevent any crime. N.Y. *Lawyers Code of Professional Responsibility DR# 4-101(C)* (1992 & Supp. 1994).

n94 The study showed that 22.6% of the lawyers surveyed "almost never" informed clients of the confidentiality of their communications to the lawyer. Another 59.7% of the lawyers surveyed informed their clients of confidentiality in less than half of their cases. Zacharias, *supra* note 6, at 382. When clients were asked a similar question, 53.5% of them confirmed that none of their attorneys had mentioned confidentiality. *Id.* at 383 n.155.

A 1982 study of corporate law practice also suggests that lawyers do not tell clients of confidentiality rules. In that survey of 85 corporate lawyers, almost 70% of them reported that they raised the issue of confidentiality when interviewing corporate employees, but less than one-third of that group seemed to raise the issue under all circumstances. *Corporate Legal Ethics*, supra note 84, at 604 & n.5-6, 622-23.

n95 Zacharias, supra note 6, at 386 (27.8%).

n96 Almost two-thirds (64.8%) of the lawyers surveyed thought that more than three-quarters of their clients believed that confidentiality is absolute. *Id.* at 386-87.

n97 Yale Note, supra note 84, at 1262 (50.9%).

n98 Zacharias, supra note 6, at 386 (15.1%). Professor Zacharias notes that this percentage is not that different from the 11.3% of the clients who reported that they withheld information from their lawyers under current confidentiality rules, and states that this similarity suggests that “the general sense of trust in attorneys as professionals, rather than strict confidentiality rules, is what fosters client candor.” *Id.* This conclusion seems premature. It may be that the 11.3% who withheld information from their lawyers knew that New York permitted lawyers to reveal client confidences under certain circumstances and that those clients withheld information precisely for that reason.

n99 When lay people were asked about a proposed code amendment that would allow disclosure by a lawyer “who reasonably deems it necessary in the public interest,” approximately one third said they would consult lawyers less frequently and they would trust lawyers less. Zacharias, supra note 6, at 388 n.191, 395.

n100 There is no serious dispute that if clients know that there are exceptions to confidentiality, it will inhibit some client communications in some circumstances. Zacharias, supra note 6, at 358. As Professor Zacharias has noted, the question is not really “whether confidentiality as a whole comports with its general underlying theory,” but “on how well confidentiality serves its justifications and whether limited exceptions would undermine the rules’ effects.” Zacharias, supra note 6, at 381.

n101 Yale Note, supra note 84, at 1262. Lay people were asked whether they thought that lawyers should have a legal obligation to disclose confidential information if asked to do so by a lawyer in court. *Id.*

n102 Zacharias, supra note 6, at 394-95. At the same time, anywhere from 10-25% indicated that if lawyers could disclose client information in those cases, it would affect their willingness to use lawyers. *Id.*

n103 The respondents were asked about the effect of a hypothetical code amendment that would allow disclosure by a lawyer who “reasonably deems it necessary in the public interest.” Zacharias, supra note 6, at 388. More than 55% of the respondents believed that such a change would either have no effect on the public perception of lawyers or that it would cause the public perception of lawyers to decline. *Id.* at n.191. As Professor Zacharias noted, this question is problematic because it asked respondents to gauge the view of the public and not to report their own views, but the results probably are somewhat indicative of the respondents’ views. *Id.* at n.195. It does not necessarily reflect what the public would think of a more focused disclosure rule.

n104 Mann, supra note 7, at 106-17.

n105 In the Tompkins County study, more than three-quarters of the respondents indicated that confidentiality had at some point in their careers enabled them to dissuade a client from taking improper action. Zacharias, supra note 6, at 381; see also Fried, supra note 6, at 492 n.275.

n106 In the Tompkins County study, more than 40% of the lawyers indicated that the existence of confidentiality had “occasionally” enabled the lawyer to obtain information and then dissuade a client from taking improper action. Zacharias, supra note 6, at 381 & n.146. The answer to this compound question does not reveal how often the existence of confidentiality had enabled lawyers to obtain information.

n107 Anonymous responses were used to try to prevent self-selection of respondents who might not be proud of their approach to the problem and to try to insure that the answers were not self-censored.

n108 The names of 569 lawyers were obtained from the membership list of the 1992-93 Handbook of the Association of Criminal Defense Lawyers

New Jersey [hereinafter ACDL Handbook]. The names of an additional 120 lawyers who indicated that they devoted at least 25% of their practice to criminal defense work were obtained from the Westlaw New Jersey West's Legal Directory. Search of Westlaw, WLD database (July 14, 1993).

n109 Westlaw was used to obtain the names and addresses of 377 New Jersey lawyers who indicated that they devoted 20% or more of their time to practicing matrimonial, domestic or family law. Search of Westlaw, WLD database (approx. July 22, 1993).

n110 A search of Westlaw initially identified 20,994 lawyers who did not list themselves as practicing any specific percentage of criminal, matrimonial, family or domestic law. Search of Westlaw, WLD database (July 22, 1993). Lawyers from this list were selected by a random sampling in the pattern 1-5, 100-05, 200-05, etc. The names and addresses of 877 lawyers were selected by this method.

Thus, the sampling technique used in this survey combined a systematic random sample of New Jersey lawyers with a stratified sample of lawyers who devoted a substantial portion of their practice to criminal law or family law, in order to obtain an adequate number of such lawyers to discern trends and make statistical inferences. See Earl R. Babbie, *The Practice of Social Research* 184-90 (6th ed. 1989).

n111 Government lawyers were excluded from the sample because they have somewhat different ethical obligations than other lawyers and because it was believed that they would not have much experience with this problem.

n112 Approximately 80 surveys were mailed directly to New Jersey public defenders whose addresses were obtained either from the ACDL Handbook or the Westlaw, WLD database. In an effort to help the author reach the remaining 220 New Jersey public defenders, Dale Jones, Esq., Assistant Public Defender of the State of New Jersey, circulated a memorandum to all New Jersey public defenders advising them of the availability of the survey, encouraging participation in the survey and indicating how a copy of the survey could be obtained.

n113 Even if the identities of the attorneys were known, they have a duty to maintain the confidences of their clients and could not reveal the information. See generally *In re Advisory Opinion No. 544 of the N.J. Sup. Ct.*

Advisory Comm. on Professional Ethics, 511 A.2d 609 (N.J. 1986) (holding that legal services organizations may not disclose client identity to private or governmental entities without consent or legal justification).

n114 Clients were not surveyed because of the difficulty and expense of locating a sufficiently large sample using random sampling techniques. The New Jersey study reveals information about the practice areas of lawyers who encounter the problem and the types of wrongful acts that they encounter which may permit more focused sampling in the future. See *infra* text accompanying notes 131, 138, 142.

n115 The survey questions are found in the Appendix. For a discussion of passive observation, see Noreen L. Channels, *Social Science Methods in the Legal Process* 74-75 (1985).

n116 There was a real risk that many lawyers would refuse to answer a longer survey. Due to space constraints, certain information such as gender and race was not requested.

n117 The term "bodily harm" is used in this Article to encompass the idea of death as well as substantial bodily harm. "Financial injury or property damage" is used to convey the idea of "substantial injury to the financial interest or property of another" set forth in RPC 1.6.

n118 After removing names from the sample because they were not attorneys admitted to practice in New Jersey or for other valid reasons, the total sample size was 1926 lawyers. Valid responses to the mail survey totalled 762, producing a response rate to the mail survey of 39.6%. An additional 14 surveys were completed in response to the internal memorandum to public defenders inviting them to complete the survey. Thus, the total number of responses in the study was 776.

n119 Table 1.

n120 The total number of lawyers admitted to practice was 50,314 as of March 1993, but it appears that less than 47,000 were actively engaged in practice. Administrative Office of the Courts and Office of Attorney Ethics, *Characteristics of the Bar of the State of New Jersey 1992* at 3 (1993) [hereinafter *Characteristics of the Bar*].

n121 Table 2. Characteristics of the Bar, supra note 120, at 5. New York was the most frequent other state of admission for both groups. Table 3.

n122 Although three-quarters of the lawyers in both groups were admitted within the last 20 years, see supra text accompanying note 121, approximately one-third of the survey respondents had been admitted to the bar since September 1983. See Table 1 (37.7%). In contrast, 61% of all New Jersey lawyers were admitted to practice since 1980. Characteristics of the Bar, supra note 120, at 3.

n123 See Table 4 (89.9%). Only 52.8% of all New Jersey lawyers worked in private practice in 1992. Characteristics of the Bar, supra note 120, at 7.

n124 Table 5. For the purposes of this article, “substantial” means 20% or more of the attorney’s time was devoted to the particular practice area.

n125 Many of the respondents also devoted a substantial amount of time to personal injury and real estate practices. In contrast, relatively few respondents practiced tax or environmental law. Table 5.

n126 See supra note 110. For a discussion of “systematic” or “quasi-random” samples, see Channels, supra note 115, at 94-97. Only the 877 names derived from the Westlaw general practice list were selected through systematic random sample.

n127 More than one respondent suggested that the problem of a client who discusses with counsel future criminal or fraudulent acts was an academic exercise rather than a real problem. I.D. No. 619, Question 34. See I.D. Nos. 007, 300, at Question A.C..

n128 Table 6. RPC 1.6(b) does not limit the attorney’s disclosure obligations to situations in which an identifiable third party will be harmed, but pre-testing of the survey suggested that the survey questions should be so limited to avoid ambiguous responses. Some lawyers routinely represent clients who they reasonably believe intend to commit serious crimes, but whose victim is not identifiable. I.D. No. 174, Question 8; I.D. No. 332, Question 8. As one lawyer noted, “90% of my criminal practice deals with possession-sales [of controlled drug substances]. My answer “none” to questions [about clients whom the lawyer believes will substantially harm others] result from the

word “identifiable” [third party]. I have no idea of the identity of the next purchaser.” I.D. No. 599, Question A.C. Of course, in those cases RPC 1.6(b) still requires disclosure, but lawyers who represent repeat offenders indicated that they draw a distinction between the general belief that criminal activity will continue and situations when identifiable third parties were likely to be harmed.

n129 Table 6 (47.8%).

n130 Table 7 (19.4%).

n131 Id.

n132 Id.

n133 Table 8.

n134 Id. (78%).

n135 Table 9. The term “financial fraud” in this article includes all types of fraud resulting in the loss of money or other assets including, but not limited to, bankruptcy, insurance, real estate, tax or securities fraud and secreting marital assets.

n136 Table 9. Perjury is governed by a separate sub-section of RPC 1.6(b) which requires disclosure to prevent a client from committing a fraud upon a tribunal. See RPC 1.6(b)(2). Nevertheless, since perjury also involves a future crime that may result in substantial injury to the financial interests or property of another under RPC 1.6(b)(1), it is included here.

n137 See supra text accompanying notes 124-25.

n138 Lawyers who devoted at least 40% of their time to practicing criminal law or at least 20% of their time to practicing family law encountered clients whom they believed were going to cause substantial bodily harm, financial injury or property damage significantly more often than lawyers who practiced in other areas. Table 47.

n139 For example, lawyers who had previously encountered the problem may have been more likely to complete the survey because they were

interested in the subject, skewing upward the reported frequency of the problem. At the same time, it is possible that attorneys who were not comfortable with the manner in which they had previously handled the problem may have decided not to answer the survey.

n140 There were lawyers who reported encountering this problem who spent at least 90% of their time practicing in the following areas: Bankruptcy (I.D. Nos. 214, 318, at Question 2); Commercial litigation (I.D. Nos. 260, 696, at Question 2); Corporate (I.D. No. 104, Question 2); Environmental (I.D. No. 722, Question 2); and Trust & Estates (I.D. No. 163, Question 2).

n141 Lawyers were asked to indicate whether they worked as solo practitioners, in small law firms (2-20 lawyers), in medium or large firms (more than 20 lawyers), in a corporation, or in a legal services office. See Appendix infra Survey Question 1.

n142 Table 13. The significance of this finding should not be overstated. Criminal defense attorneys, as a group, were more likely to encounter the problem of future client wrongdoing than most other lawyers. See supra text accompanying note 138. Nevertheless, this finding is somewhat surprising given the view expressed by more than one public defender that their clients do not trust them. See, e.g., I.D. No. 730, Question A.C. As one public defender noted, “defendants often have distrust in a public defender.” I.D. No. 494, Question 7. That lawyer also wrote, “a defendant often believes that a public defender is an agent of the state who will not preserve confidences. In trial preparation, I spend much time building a trust relationship. Usually, a defendant believes that their public defender is the last person to speak to about a criminal plan.” I.D. No. 494, Question A.C. See also I.D. No. 730, Question A.C..

n143 Table 14.

n144 Although much concern has been voiced about whether a lawyer can “know” that a client is going to commit a wrongful act, see, e.g., Model Rules 1.6 cmt. (1983), it was mainly the attorneys who had never encountered the problem who indicated concern about how they would “know” that the client would commit the act. E.g., I.D. No. 193, Question A.C.; I.D. No. 150, Questions 8, 34, A.C.

n145 Lawyers who believed that their clients were going to commit

wrongful acts, but whose clients did not ultimately commit the acts, were asked why they thought the acts did not occur. Only 4 out of 52 lawyers indicated that the reason was because their clients were not serious or they were wrong about their clients’ intentions to commit acts likely to result in death or bodily injury. See Table 10. Only 3 out of 96 lawyers said they were wrong about their clients’ intentions to cause financial injury or property damage. See Tables 10A & 10B.

n146 Table 11 (59.7%).

n147 Table 12 (80.7%).

n148 See generally Zacharias, supra note 6, at 399 (questioning whether information used to dissuade client misconduct was type covered by confidentiality rules).

n149 I.D. Nos. 019, 146, 184, 193, 290, 313, 368, 661, 740, at Question A.C.; I.D. Nos. 254, 365, 535, at Question 34. As one lawyer observed: “In family law practice you have a great deal of emotion--You must take some ‘talk’ with a grain of salt. You sometime sic get ‘I would like to break his neck. . . .’ You have to discount this type of statement as venting of ones sic frustrations.” I.D. No. 580, Question A.C.

n150 I.D. Nos. 19, 290, at Question A-C.

n151 I.D. No. 229, Question 29. As one attorney wrote, “please note that though only a handful of clients have told me that they fully intended to do something illegal, scores have asked me ‘what if’ types of questions.” I.D. No. 506, Question A.C..

n152 E.g., I.D. No. 70, Question A.C.; I.D. No. 110, Questions 29, 34.

n153 Another indication that the problem arises more often than reflected in the text is that some attorneys reported that they tell prospective clients about their obligations to disclose at their first meeting, after an individual indicates an intention to cause harm to others, and then decline to represent that person. E.g., I.D. Nos. 391, 445, 543, at Question A.C. These lawyers did not indicate that they had had clients who they reasonably believed were going to commit wrongful acts likely to harm others, but they may have answered differently if they had not immediately terminated their contact

with the prospective client. I.D. Nos. 391, 445, 543, at Question B, A.C..

n154 See supra note 61 and accompanying text.

n155 Tables 10 & 10A. It is not possible to determine from the lawyers' responses whether clients in fact abandoned plans to commit wrongful acts as a direct result of talking with their lawyers. Ideally, clients should also be asked this question.

n156 Table 16 (92.4%). Lawyers were asked about the "most recent occasion on which you believed that a client was going to commit a criminal, illegal or fraudulent act that was likely to result in death or substantial bodily harm to another." See Appendix infra heading to Survey Question Nos. 10-20. The lawyers who did not talk with their clients did not do so because they did not believe the client, there was inadequate proof, or the defendant was already in custody. Table 16B.

n157 Table 16A (96.7%). The lawyers were able to identify more than one subject they discussed and so the percentages in the text total more than 100%.

n158 Id.

n159 Id. (49.1%).

n160 Tables 16A & 16E (19.7%). "Lawyers who threatened to disclose" are defined in this Article as those lawyers who explicitly told their clients that they would disclose information to prevent the act.

n161 Table 16C (4.9%).

n162 Tables 17 & 17A (97.8%). Of the four lawyers who did not discuss their belief with their clients, one reported that someone else discussed it with the client, one could not get in touch with the client, one said "that was their business" (gambling) and one attorney did not want to know more. (Citations on file with the author).

n163 Table 17B (97.3%).

n164 Id. (57.2%).

n165 Id. (41.2%).

n166 Id. (24.6%).

n167 Tables 17B, 17F & 17G.

n168 See supra notes 159, 165 and accompanying text.

n169 I.D. No. 542, Question 13f. As another lawyer explained, "Usually explanation of the chance of exposure hazard and increased sentence, without getting philosophical, helps him quickly see the light back to the truth and planned theory of the case, letting the chips fall where they may." I.D. No. 576, Question A.C. See also I.D. No. 338, 506, at Question 34.

n170 E.g., Zacharias, supra note 6, at 404.

n171 Tables 19 & 20. Of the lawyers who believed that their clients were going to commit wrongful acts likely to result in substantial bodily harm, 78.8% reported that their clients did not ultimately commit the acts. Table 19. Of the lawyers who believed that their clients were going to commit acts likely to result in substantial financial injury or property damage, 53.5% reported that their clients did not commit the anticipated acts. Table 20.

n172 Table 10 (61.5%).

n173 Id. Twenty-eight out of 52 lawyers (53.8%) believed that they dissuaded their clients by using reasoning other than the threat to disclose. Another 7.7% thought that their clients did not commit the acts at least in part because they had threatened to disclose. Other reasons why the clients did not commit the wrongful acts included that the lawyer was wrong about the client's intentions, the client had no opportunity, the client calmed down, the plan was too difficult and the time for the act had not yet arrived.

n174 Table 10A (77.1%). An additional 13.5% of the lawyers thought that the client did not commit the act at least in part because they had threatened to disclose. Id.

n175 I.D. No. 178, Question A.C.

n176 As another lawyer wrote, "I am of the old school of confidence

which clients have in their attorneys and believe I am persuasive enough to stop them from taking any action which would get them in trouble or harm someone else either financially or bodily harm.” I.D. No. 124, Question 39. See also I.D. Nos. 273, 275, at Question 39; I.D. No. 576, at Question A.C..

n177 Although the responses suggest that virtually all of the lawyers who “reasonably believed” that their clients intended to commit a wrongful act attempted to dissuade their clients, see supra notes 156, 162-69 and accompanying text, this finding should be interpreted cautiously. Other survey responses suggest that some attorneys took steps to insure that they never obtained enough information to form a “reasonable belief” that their clients were going to commit a wrongful act. See infra notes 198-203 and accompanying text.

n178 Table 24. Lawyers were asked, “what percentage of your clients do you personally inform of the confidentiality of their communications to you?” See Appendix infra Survey Question 6.

n179 Table 26. Over 52% of the lawyers who devoted a substantial portion of their practice to criminal defense work said that during the last 12 months they personally informed more than three-quarters of their clients about confidentiality. Id. In contrast, about one-third of the other lawyers informed more than three-quarters of their clients about confidentiality during the same time period. Id.

n180 Table 26 (41.8%). These numbers may actually understate the percentage of clients who are told of confidentiality by lawyers because they may exclude long-time clients who have previously been told about the rule. In addition, they do not reflect the clients who may have been told of confidentiality by another lawyer who works with the survey respondent.

In the Tompkins County study, only 17.7% of the lawyers informed their clients of attorney-client confidentiality in half or more of their cases. See Zacharias, supra note 6, at 382. The differences between the two studies may be due in part to the fact that the Tompkins County lawyers were engaged in a rural, more personal law practice than many of the New Jersey lawyers; the Tompkins County lawyers may have felt less need to encourage client trust than the New Jersey lawyers.

n181 Table 30 (65.4%).

n182 Id. Only 5% of the respondents said that they communicated this information to more than three-fourths of their clients. Id.

n183 See Zacharias, supra note 6, at 386-87. The New Jersey lawyers were asked what percentage of their clients they believed understood that “there are circumstances under which a lawyer may be obligated to disclose attorney client confidences to a third party without the client’s consent?” See Appendix infra Survey Question 7. Approximately 20% of the lawyers believed that none of their clients understood that there were circumstances under which a lawyer may be obligated to disclose client confidences without a client’s consent. Table 27A. Another 40% of the respondents believed that less than 10% of their clients understood that a lawyer could be obligated to disclose. Id. As the Tompkins County study revealed, lawyers’ views are not necessarily an accurate reflection of actual client understanding of the rule, see Zacharias, supra note 6, at 387, but they shed insight into lawyers’ conduct.

n184 Indeed, the fact that criminal defense attorneys tell a greater number of their clients about confidentiality than most lawyers suggests that they may experience more difficulty obtaining client trust and information than other lawyers. See Mann, supra note 7, at 40-55. On the other hand, this theory is difficult to reconcile with the responses indicating that public defenders were significantly less likely to inform their clients about confidentiality than were other criminal defense lawyers. Table 27. Public Defenders should be interviewed to help interpret these findings.

n185 As one corporate lawyer explained:

My experience is that clients are more forthcoming if they know that their communications cannot be disclosed. This presents the attorney with the opportunity to discuss the situation with the client and prevent the act from occurring. My experience has proven this to be successful. These discussions would never take place if the client knew they could be disclosed and an opportunity might be lost.

I.D. No. 478, Question A.C.

n186 E.g., I.D. No. 779, Question A.C. As one attorney explained, “if I started explaining the fine points of attorney-client privilege sic [clients] would begin to suspect they could not trust me.” I.D. No. 538, Question A.C.

n187 As one lawyer noted in response to the question about advising clients of the mandatory disclosure rules, “most clients do not have situations that would call for such advice.” I.D. No. 59, Question 35. See also I.D. No. 69, Question 35 (indicating that the attorney tells 75% or more “of criminal clients”). Another lawyer who noted that criminal tax fraud issues arise in matrimonial cases informed a large percentage “of matrimonial clients” about the mandatory disclosure rule. I.D. No. 400, at Question 35.

n188 Tables 18, 31, 31A & 31B.

n189 Table 47. Moreover, family law practitioners reportedly encounter a lot of talk about future wrongdoing, even if it never comes to pass. See *supra* note 149.

n190 Tables 18, 18A and 22.

n191 It was clear from the attorneys’ responses that some lawyers had no idea that they are currently required to disclose to prevent a client from committing wrongful acts. See, e.g., I.D. Nos. 366, 367, 385, at Question A.C.

n192 Table 32 (25.2%). The lawyers who reported that they told 75% or more of their clients about mandatory disclosure rules usually did so at the first substantive meeting with their clients. Table 33 (76.9% inform at first meeting).

n193 Table 32 (42.1%).

n194 Lawyers who practiced a substantial amount of family law were somewhat more likely to tell their clients of the rule at the first substantive meeting than lawyers in other practice areas. Table 34. It may be that family law practitioners anticipate that the subject of client wrongdoing will be raised with varying levels of seriousness during the relationship and wish to be sure clients understand the rules up front. Even though criminal defense lawyers also have reason to anticipate that the subject of wrongdoing may be raised, they may have more pressing concerns in the first meeting, including the immediate need to establish trust in order to obtain information. See Mann, *supra* note 7, at 39-40.

n195 See *supra* note 62 and accompanying text.

n196 I.D. No. 38, Question 34.

n197 *Id.* at Question A.C. Another lawyer similarly would “inform the client that I have a duty to report to the authorities any illegal act that I have been informed by the client that the client plans to commit. This usually forestalls admission.” I.D. No. 711, Question 34.

n198 Several attorneys responded in this way to a question which asked “in your current practice, if a client’s statements cause you to begin to suspect that a client might be planning to commit” a future crime or fraud, what do you do? See Appendix *infra* Survey Question 34. Of 697 respondents, 3.3% explicitly stated that they would stop their clients from talking. Table 23A. Although some lawyers read this question as a hypothetical question, it was clear that others were answering based upon actual practice. See, e.g., I.D. Nos. 144, 510, at Question 34.

n199 Kenneth Mann has described the technique of “information control” in some detail. As he noted:

Attorneys do not want to be viewed by a client as unethical, nor do they want to go home thinking that their work is an obstruction of justice. To accomplish this end, they have acquired techniques for controlling what clients will talk about with them. Each of these techniques limits the frame of inquiry and can serve the attorney’s interest of not receiving information.

Mann, *supra* note 7, at 106. Techniques that lawyers use to avoid acquiring unwanted information include limiting the time frame of the discussion and controlling the client’s dialogue by literally saying, “stop, I don’t want to hear about that.” *Id.* at 107-09.

n200 I.D. No. 510, Question 34.

n201 *Id.* at 510, Question A.C.; see also I.D. No. 699, Question 34. Interestingly, the responses did not reflect that criminal defense lawyers were any more likely than other lawyers to believe that they would stop clients from talking if they began to suspect that a client is about to discuss wrongful conduct.

n202 I.D. No. 277, Question 34; see also I.D. Nos. 587, 627, at Question

34.

n203 I.D. No. 147, Question 34; see also I.D. No. 194, Question 34.

n204 Tables 16A & 16E (19.6%). Public defenders explicitly threatened to disclose client confidences to prevent bodily harm more often than lawyers in other practice settings. Table 49. This could be due, in part, to the fact that public defenders do not rely upon client referrals for their business or upon high levels of client satisfaction for continued employment. The higher percentage of public defenders who threatened to disclose may also be due to respondent self-selection. See supra notes 112, 139 and accompanying text.

n205 Tables 16A & 17F (11.8%).

n206 I.D. No. 54, Question 39.

n207 Almost 11% of the lawyers with clients who were likely to cause bodily harm (10.9%) and almost 15% of the lawyers with clients who were likely to cause financial injury or property damage (14.4%) indicated that they discussed the subject of confidentiality in ways that the lawyers did not describe as threats. Tables 16A, 16G, 17B & 17C. It is difficult to determine exactly how many of those lawyers who spoke with their clients discussed their obligation to disclose because some did not provide sufficient information. The attorneys were asked whether they discussed “the confidentiality of your conversation with your client” and were then asked to “describe what you said.” See Appendix infra Survey Question 13d. Some of the attorneys who indicated that they discussed confidentiality with their clients did not provide an explanation of what they said and so it is not possible to determine whether they told their clients about their disclosure obligation or told them--as some lawyers clearly did--that the information would be kept confidential. Tables 16A & 17B.

n208 See supra notes 204-05 and accompanying text; see also supra note 207.

n209 See Table 10 (7.7% of clients dissuaded from causing bodily injury by threats to disclose); Table 10A (13.5% of clients dissuaded from causing financial injury or property damage by threats to disclose).

n210 See RPC 1.6(b)(1), supra note 49.

n211 Table 10. Thirty-two lawyers reported that they dissuaded their clients and four reported that the client had no opportunity to commit the act (usually because the client was incarcerated). Thus, thirty-six lawyers had valid reasons to conclude that disclosure was not required. Id. Six other lawyers reported that the wrongful acts did not occur because they were wrong about their client’s intentions or their clients calmed down, Table 10, but it was not clear from the survey responses whether they reached this conclusion before the wrongful act was supposed to occur--in which case there was no duty to disclose--or afterwards.

n212 Table 35.

n213 Of those 12 lawyers who did not disclose, eight of the lawyers did not know whether their clients committed the acts and four of the lawyers reported that their clients subsequently committed the wrongful acts. Table 19. Some of the six lawyers described supra note 211, may have also had a duty to disclose, but they are not counted here.

n214 One of the lawyers who failed to disclose reported that the client committed murder.

n215 Table 20.

n216 Table 20A. In fact, eight overstates the level of disclosure under Rule 1.6(b). Although Rule 1.6(b) requires disclosure to the “proper authorities,” at least four of the eight disclosures were not made to “authorities,” but were made to persons who were allied with the client such as relatives of the client and other professionals retained by the client.

n217 Table 20.

n218 Id. The large number of attorneys who did not know whether their clients committed the act may be due to a combination of factors. First, most of these acts involved fraud, which may be difficult for lawyers to detect, even after being warned that it may occur. Second, lawyers may deliberately choose not to look for evidence of client fraud to avoid possible liability. Third, many attorneys may have withdrawn from the representation before the client decided whether to commit the act. See infra notes 254-55 and

accompanying text.

n219 The wrongful act that was most often not disclosed by the lawyers was financial fraud in divorce cases. See I.D. Nos. 27, 146, 155, 280, 751, at Question 23. Again, it is important to note that there may be a disproportionate number of these cases because of the lawyer population surveyed.

n220 The degree of non-disclosure is greater than might have been predicted based upon the Tompkins County study, in which lawyers were asked whether a “good attorney” would disclose information in various hypothetical situations. See Zacharias, *supra* note 6, at 392-93. More than 65% of the Tompkins County lawyers indicated that a good attorney would disclose information under certain circumstances to prevent bodily harm and more than half of the lawyers indicated that a good attorney would disclose to prevent one instance of financial injury. *Id.* The responses of the New Jersey lawyers suggest that there is a substantial difference between what a hypothetical “good attorney” would do and what a real life lawyer will do when confronted with a real client and a very serious problem.

n221 John Q. Wilson, *The Moral Sense* 17 (1993).

n222 Koniak, *supra* note 8, at 1427-31.

n223 Ten of the twelve lawyers who disclosed to prevent bodily harm said they would have disclosed client information even if disclosure were optional under the Rules of Professional Conduct, one would not have disclosed and one was unsure. Table 36. Six of the eight lawyers who disclosed client information to prevent financial injury or property damage said they would have disclosed anyway, one was not sure and one did not answer that question. Table 37.

n224 Tables 35 & 35B.

n225 Table 35. Eleven of the twelve lawyers who disclosed client information to prevent bodily harm did so at least in part because of concern for the victim. *Id.* Eight of those lawyers ranked this concern as the number one reason why they made disclosure. *Id.*

n226 Telephone Interview with Attorney A, *supra* note 3.

n227 Table 35.

n228 Table 35B. Of the eight lawyers who disclosed their clients’ intention to cause financial injury, seven lawyers cited compliance concerns as one of the reasons for disclosure, and two lawyers ranked it as the number one reason. *Id.* Six lawyers also cited concern for the victim as a reason for disclosure and two of those lawyers said it was the number one reason why they disclosed. *Id.*

n229 Three of the lawyers who disclosed to prevent bodily harm ranked it as the second most important reason for disclosing. Tables 35 & 35B.

n230 *Id.*

n231 In contrast, concern about reputation was cited by only one of the attorneys who revealed client information to prevent bodily harm. Table 35.

n232 Table 35B. Most of these lawyers disclosed a crime or fraud already in progress, *id.*, and may have been concerned that they could be viewed as personally involved in the wrongful conduct.

n233 At least one of the lawyers would not have disclosed to prevent bodily harm if disclosure were optional under the Rules of Professional Conduct. Table 36.

n234 See *infra* note 305.

n235 The reasons for not disclosing client information to prevent substantial harm are not always philosophical. At least one lawyer did not disclose out of fear of retribution. I.D. No. 132, Question 39. Another lawyer explained “if I ever spoke of [organized crime] people and their business I would never get any work and probably a beating which would be deserved.” I.D. No. 23, Question 39. Although no survey question specifically focused on the impact of fear of retribution on attorney disclosure, there is no question that it is a problem for some lawyers. See *supra* note 4 and accompanying text.

n236 I.D. No. 13, Question A.C.

n237 *Id.*; see also I.D. No. 615, Question A.C.

n238 The concern about reputation can take two different forms. For some lawyers, it was a concern that their clients would trust them so that they could provide the best possible representation. I.D. No. 13, Question A.C. For others, it was the less high-minded, but no less real concern about the impact of disclosure on the ability to earn a living. I.D. No. 758, Question A.C.

n239 Professors Hazard and Hodes have suggested that the New Jersey Professional Responsibility Rules would provoke “significant civil disobedience” and lack of respect for the rules. See *The Law of Lawyering*, supra note 9, AP4:104 at 1265.

n240 I.D. No. 54, Question 39; see also I.D. No. 430, Question A.C.

n241 I.D. No. 587, Question A.C.

n242 E.g., I.D. No. 751, Question A.C. (referring to the attorney-client privilege as “sacred”).

n243 Table 45.

n244 Id.; see also I.D. No. 670, Question 37. There was somewhat more support for disclosure to prevent substantial environmental harm, which may be due to the perceived permanence of environmental damage or its relationship to bodily injury. See I.D. No. 586, Question A.C.; I.D. No. 640, Question 37.

n245 Table 21B. The significance level increased even further among lawyers who practiced 40% or more criminal law. Table 21A.

n246 The question was intended to incorporate the language of RPC 1.6(b), which refers to “criminal, illegal or fraudulent” acts. See Appendix infra Survey Question 38. As some attorneys noted, most serious fraud is also a crime. I.D. No. 697, Question 38. Other attorneys noted that they had difficulty with the concept of an illegal but non-criminal act. E.g., I.D. Nos. 66, 152, 621, at Question 38.

n247 Table 45.

n248 See supra notes 214, 219 and accompanying text.

n249 The Tompkins County lawyers also seemed less inclined to think that disclosure should occur when financial injury rather than bodily injury was at stake. Zacharias, supra note 6, at 401.

n250 See infra notes 303-05 and accompanying text.

n251 For example, under the Code of Professional Responsibility, withdrawal was required when continued employment would result in the violation of a disciplinary rule and was permitted when the client persisted in action involving the lawyer’s services that the lawyer believed was criminal or fraudulent. CPR, supra note 31, at DR 2-110.

n252 Tables 16A, 16A(1), and 16C (4.9%). In contrast, approximately 20% of the lawyers who talked with their clients threatened to disclose. Tables 16A & 16E.

n253 Table 16D.

n254 Compare Tables 17B & 17E (24.5%) with Table 17F (12.2%). Six of the lawyers who encountered the problem (3.2%) both threatened to disclose and threatened to withdraw. Id.

n255 Tables 20A & 51. The 26 lawyers who withdrew reported that their clients committed the wrongful acts or that they did not know whether their clients had done so.

n256 I.D. No. 30, Question A.C. Another lawyer noted, “A lawyer[-]client relationship is fragile and needs sensitivity in particulars. A black and white ethical rule is impossible to follow. Lawyers should never allow a client to believe that they would accept illegal conduct and the greatest sanction to a client is your threat to withdraw from representation.” I.D. No. 70, Question A.C.; see also I.D. Nos. 283, 385, at Question A.C.

n257 This general preference for withdrawal was supported by the responses of lawyers who were asked about what they do in their current practice if they begin to suspect that a client might be planning to commit a future criminal or fraudulent act that is likely to substantially harm another. See Appendix infra Survey Question 34. In response to this open-ended question, which many lawyers read as hypothetical, 3.6% of the lawyers indicated that they would threaten to disclose and 13.2% said that they would

disclose client information. Table 23A. In contrast, 7.5% of the lawyers said that they would threaten to withdraw and 18.5% said that they would in fact withdraw from the representation. Table 23A. The lawyers' answers to this question at times made it difficult to distinguish explicit threats to disclose from actual disclosure and threats to withdraw from actual withdrawal from the representation, but it is clear that more attorneys believed that they would consider withdrawal from the representation rather than disclosure of client confidences.

n258 Table 41.

n259 Id.

n260 Id. (3.1%). This was a write-in response to "other" and may have been noted more frequently if the option had been specifically provided. See Appendix infra Survey Question 33f. One lawyer explained that "when an attorney gives a forceful 'no,' the client usually backs down and holds attorney in higher regard." See I.D. No. 19, Question 33f.

n261 Table 42.

n262 Id.

n263 Id.

n264 Id.; Table 52.

n265 Table 16E.

n266 Tables 17F and 52.

n267 Table 44. It should be noted that at least one of the five lawyers who experienced no adverse impact noted that the client did not learn of the disclosure. I.D. No. 17, Question 20f.

n268 There is evidence that when psychotherapists warn potential victims that patients may cause harm, the warning does not damage the therapeutic relationship if the doctor and patient discuss the warning ahead of time and the warning is justified. James C. Beck, *When the Patient Threatens Violence: An Empirical Study of Clinical Practice After Tarasoff*, 10

Bull. of the AAPL 189, 199 (1982).

n269 Table 35B.

n270 A true legal impact study typically requires a comparison of events in the jurisdiction before and after the rule was enacted, a comparison of jurisdictions with the two different rules or a combination of the two approaches. See Richard Lempert, *Strategies of Research Design in the Legal Impact Study: The Control of Plausible Rival Hypotheses*, 1 *Law & Soc'y Rev.* 111, 112 (1966-67).

n271 Landesman, *supra* note 66, at 207-08; see *supra* text accompanying note 70.

n272 Less than 30% of the lawyers threatened to disclose or discussed confidentiality with their clients who were contemplating wrongdoing and it is not clear how many of those lawyers actually told their clients that they were obligated to disclose. See *supra* notes 204-05, 207-08 and accompanying text.

n273 See *supra* note 209 and accompanying text.

n274 I.D. No. 478, Question A.C.; see also I.D. Nos. 481, 530, at Question A.C.

n275 Only one lawyer who disclosed would not have disclosed if disclosure were optional under the *Rules of Professional Conduct*. See *supra* note 223 and accompanying text.

n276 For example, two lawyers who reported that they disclosed client information to prevent bodily harm indicated that the wrongful act occurred anyway. I.D. No. 17, Question 15 (removing children from the court's jurisdiction to frustrate the spouse's visitation); I.D. No. 341, Question 15 (driving while intoxicated).

n277 The only significant differences were that the newer lawyers more strongly supported the mandatory disclosure rule to prevent bodily harm and to prevent illegal acts that would result in environmental harm. Table 46.

n278 On the one hand, this finding is somewhat surprising, since law schools typically teach the range of alternative rules governing the problem of

client wrongdoing, and practitioners believe that they learned sensitivity to ethical issues essentially in law schools. See, e.g., Bryant G. Garth & Joanne Martin, *Law Schools and the Construction of Competence*, Tables 4-8 (American Bar Foundation Working Paper No. 9212 1992). On the other hand, it may be that the view of the lawyer as defender of the client against the world, e.g., Freedman, *supra* note 58, at 4, is so ingrained within the population surveyed that it overpowers other rules. See generally Fred C. Zacharias, *Specificity in Professional Responsibility Codes: Theory, Practice and the Paradigm of Prosecutorial Ethics*, 69 *Notre Dame L. Rev.* 223, 268 *n.130* (1993) (noting that if a highly specific rule seems indefensible to a subculture of lawyers based on their shared experiences, then the lawyers may feel free to ignore that rule).

n279 Another attorney who did not disclose to prevent harm explained, “I hold sacred the attorney-client privilege.”

n280 One lawyer wrote, “personally, I would rather surrender my license than look the other way while a client commits civil fraud or a criminal act.” I.D. No. 770, Question A.C.; see also I.D. Nos. 173, 180, 285, 366, at Question A.C.

n281 I.D. No. 538, Question A.C.

n282 See *supra* notes 182-83 and accompanying text. Professor Zacharias made a similar observation based upon the Tompkins County study. The primary difference between the New Jersey study and the Tompkins County study is that the New Jersey study suggests that many lawyers deliberately perpetuate the myth of strict confidentiality by telling their clients about confidentiality while the Tompkins County study indicated that few lawyers told their clients about confidentiality. See Zacharias, *supra* note 6, at 382-83.

n283 See *supra* note 62. Some scholars have also argued that conversations about the lawyer’s disclosure obligations will allow the lawyer to “display his trustworthiness in concrete terms.” Hodes, *supra* note 62, at 786; see also Pizzimenti, *supra* note 16, at 485 n.200. This argument is not completely convincing. A client may trust that a lawyer will be forthright about the rules governing their relationship, but not trust that the client’s thoughts can be freely and safely shared with the lawyer.

n284 See *supra* notes 185-86 and accompanying text.

n285 Pizzimenti, *supra* note 16, at 482-83 (referring to policy of not disclosing limits on confidentiality as an “ongoing practice of deception”). Deception has been defined by Sissela Bok as “messages meant to mislead others . . . through gesture, through disguise, by means of action or inaction, even through silence.” Sissela Bok, *Lying: Moral Choice in Public and Private* 14 (1979).

n286 Lisa G. Lerman, *Lying to Clients*, 138 *U. Pa. L. Rev.* 659, 679-83 (1990); Pizzimenti, *supra* note 16, at 478-80. The full consequences of the deception become apparent when considering that some New Jersey lawyers disclosed client information without having told their clients about the disclosure rule. E.g., I.D. No. 8, Questions 12, 17; I.D. No. 100, Questions 13, 17.

n287 See *supra* text accompanying note 286. Some additional costs are described in Lerman, *supra* note 286, at 679-83.

n288 The ABA at one time considered requiring that similar information be given to clients, but the idea was abandoned. The Discussion Draft of the Model Rules contained a feature requiring lawyers to advise clients about “the relevant legal and ethical limitation to which the lawyer is subject” when the lawyer becomes concerned that the client expects prohibited assistance. Model Rules of Professional Conduct Rule 1.4 (Discussion Draft January 30, 1980); see Hodes, *supra* note 62, at 786-87. All that remains is Model Rule 1.4, which requires lawyers to “explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.” Model Rules of Professional Conduct Rule 1.4(b) (1983).

n289 As one lawyer noted, “It would be unfair to a client to disclose information if the holes in the attorney-client privilege had not been discussed with the client in advance. Lawyers need better training in this.” I.D. No. 689, Question A.C. See also I.D. No. 588, Question A.C.

n290 Indeed, in view of the empirical evidence that many clients may not understand that there are exceptions to confidentiality, see *supra* notes 93, 96, 183 and accompanying text, rules should be developed to insure that clients are told about all confidentiality exceptions that may come into play for the particular client.

n291 The difficulty presented by an across-the-board requirement that lawyers advise all clients of the disclosure obligation is perhaps best illus-

trated by the challenges facing public defenders. Public defenders reportedly have a great deal of difficulty establishing client trust, but they also encounter significantly more clients whom they believe will commit bodily harm than other lawyers. In addition, public defenders were less likely to believe their clients understood confidentiality exceptions than other lawyers. Table 29; see supra note 142 and accompanying text. Although it has been suggested that all criminal defendants be advised of the disclosure exception, see Pizzimenti, supra note 16, at 48687, careful thought must be given to whether a more flexible rule about whom to tell about the disclosure rule might be preferable.

n292 It has been suggested that the lawyer should evaluate the likelihood that information within a confidentiality exception may be confided and if it is likely, the exception should be discussed with the client. *Id.* at 486-87.

n293 See supra notes 3-4 and accompanying text.

n294 Rates of withdrawal in New Jersey may also be due to confusion about the rule. RPC 1.16(a)(1) requires withdrawal if “the representation will result in violation of the Rules of Professional Conduct or other law.” N.J. Rules of Professional Conduct Rule 1.16 (1984). Lawyers may reason that if they do not disclose, their continued representation will violate RPC 1.6(b), but if they withdraw from the representation, they will have no duty to disclose the plans of their former client.

n295 This suggestion is based in part on my experiences with practicing lawyers who indicate that they are often unclear about their professional obligations, but that they vaguely recall the rule of thumb “when in doubt--withdraw.”

n296 Law schools tend to teach the ABA codes, and the Multi-state Professional Responsibility Bar Examination (“MPRE”) is also based on those rules. As a result, some lawyers may never learn about the mandatory disclosure requirements in the state in which they practice unless they have reason to research the rule.

n297 Even though it is not clear that mandatory disclosure rules prevent bodily harm, see supra notes 272-76 and accompanying text, they can be defended on the grounds that they are supported by the bar and are often obeyed, if only because lawyers believe that disclosure is the moral thing to

do. See supra notes 225-26 and accompanying text.

n298 Mandatory disclosure rules should not be retained because they “cannot hurt.” There are costs to employing rules that purport to affect conduct but are not enforced. Zacharias, supra note 278, at 257 n.102.

n299 See supra notes 244, 247 and accompanying text.

n300 See supra notes 239-41 and accompanying text. Disapproval of the rule caused some lawyers to tell their clients to stop talking about wrongful plans so that the lawyers were not placed in a position where they would be required to disclose. As a result, those lawyers did not learn of the plans and lost an opportunity to dissuade their clients from wrongdoing.

n301 See supra notes 236-38, 248-49 and accompanying text.

n302 Traditionally, the effectiveness of laws turns on the likelihood and degree of sanctions. Zacharias, supra note 278, at 239 n.47. As Professor Zacharias notes, although other factors bear on decisions to comply with code rules, the likelihood of enforcement is undoubtedly one of them. *Id.* at 252 & n.91.

n303 Letter from Stephen W. Townsend, Clerk of the Supreme Court of New Jersey, to Leslie C. Levin (July 14, 1993) (on file with the Rutgers Law Review). It is unclear whether the absence of disciplinary action is due entirely to the difficulty of detection or whether it is also because the bar has declined to enforce the rule. For example, a member of New Jersey’s Disciplinary Review Board stated that the Board had avoided sanctioning lawyers based on alleged violations of the controversial RPC 3.3(a)(5) (dealing with disclosure to the tribunal) because of fundamental bar disagreement with the rule. See supra notes 49 & 52.

n304 There is only one reported case upholding a claim for failure to disclose based upon New Jersey’s RPC 1.6(b). See *Philadelphia Reserve Supply Co. v. Nowalk & Assoc.*, 1992 U.S. Dist. LEXIS 12745 (E.D. Pa. Aug. 25 1992).

n305 The likelihood that rules of professional responsibility will be obeyed continues to affect the decisions to adopt particular code provisions. See e.g., Daniel J. Capra et al., *The Attorney’s Duties to Report Misconduct of Other*

Attorneys and to Report Fraud on a Tribunal, 47 The Rec. Assoc. of the Bar of the City of N.Y. 905, 927 (1992).

n306 See generally Zacharias, *supra* note 278, at 265 n.117 (noting that if particular rules never result in disciplinary proceedings, then it may cause lawyers to treat all rules as empty).

n307 Although lawyers are no longer entirely self-regulating, they remain actively involved in their own regulation. See Koniak, *supra* note 8, at 1395-1402.

n308 See *supra* notes 283-87 and accompanying text. Although mandatory disclosure rules arguably create a higher level of likelihood that the client information will be disclosed, a client is also entitled to know that a lawyer may reveal client information, unless the lawyer is confident that she would never reveal this information under any circumstances.

n309 The few New Jersey attorneys who did disclose to prevent nonbodily harm often did so out of self-interest and would have disclosed even without mandatory rules. See *supra* notes 223, 231-32 and accompanying text.

n310 It is quite possible that there will, however, be some lessening in efforts to dissuade. As previously noted, it is not possible to assess from the New Jersey study how many lawyers attempted to dissuade their clients because of the existence of a mandatory disclosure rule. See *supra* p.120. A withdrawal rule possibly may result in fewer efforts to dissuade wrongdoing because lawyers view withdrawal as less drastic than disclosure.

n311 The fact that one-quarter of the New Jersey lawyers threatened their clients who were contemplating causing financial injury or property damage with withdrawal reflects that they believe it is effective. See *supra* note 254 and accompanying text.