

Rethinking Confidentiality II: Is Confidentiality Constitutional?

In Zacharias, *Rethinking Confidentiality*, 74 *Iowa Law Review* 351 (1989), I considered the theoretical justifications for attorney-client confidentiality and the empirical support for those justifications. In this Article, I consider some of the ramifications of *Rethinking Confidentiality*'s conclusions.

By Fred C. Zacharias

Associate Professor, Cornell Law School. B.A. 1974, Johns Hopkins University J.D. 1977, Yale Law School; LL.M. 1981, Georgetown University Law Center. Numerous colleagues provided helpful comments on drafts of this article, including Professors Jack Barcelo, Roger Cramton, Ted Eisenberg, Rob Hillman, Sheri Johnson, John Leubsdorf, David Luban, Stewart Schwab, Gary Simson, John Siliciano, and Chuck Wolfram. My wife, Sharon Soroko, and research assistant, Marcia Kenney, provided indispensable technical support.

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[*601] The first amendment has long been a hotbed of theory. Responding to scholarly attempts to define free speech, the Supreme Court has espoused varying interpretive philosophies and rhetoric. Yet dictum aside, the decisions set rules, or "tests." Strictly applied, the tests appear wooden. When bypassed, they give the impression that judges balance values in ways defying rational prediction of results. n1

This Article analyzes one narrow first amendment question under these tests: whether attorneys in exceptional cases have a constitutional right to disclose confidential client information. The exercise illustrates how applying the terms of current first amendment doctrine can lead to problematic results. If in practice judges would circumvent the rules, that too reveals flaws in the prevailing analytic methodology.

My purpose in considering confidentiality, however, is not to propose a shift in first amendment theory. Although the analysis touches on the fringes of the ongoing first amendment debate, other scholars have already addressed the tension between rule-oriented analysis and the need for flexibility in decisionmaking. n2 My primary focus lies elsewhere: to underscore the importance of empirical evidence -- both in determining constitutional issues and in assessing the validity of strict confidentiality provisions.

The rule-oriented first amendment doctrine and most proposed alternatives emphasize fact-sensitive determinants. n3 They invite litigants to introduce data supporting their assertions. Whatever theoretical approach courts adopt, the constitutionality of strict confidentiality rules is thus likely to depend on the available evidence concerning confidentiality's mechanics. Nevertheless, scholars have uniformly ignored calls for empirical investigation of confidentiality. Working through the constitutional issues illustrates just how much the academic community underestimates the value of factual research.

[*602] My starting point is a small-scale study of Tompkins County, New York, lawyers and clients, in which I tested the bases for attorney-client confidentiality. n4 The study produced tentative evidence suggesting that confidentiality's justifications do not support inflexible provisions. Despite those findings, one might expect courts to uphold limits on lawyers' right to reveal client information. n5 Courts tend to defer to state decisionmakers on matters of regulatory policy. On the surface at least, the ethical restrictions seem justified on the basis of normative choices concerning lawyers' proper role. Nonetheless, if the Tompkins County data is correct about how poorly strict confidentiality rules work, the rules probably do not satisfy the existing first amendment standards.

This Article will aid courts in deciding whether and how to apply the first amendment tests in an appropriate case. It may also prompt drafters of professional codes to review the lawfulness of their own confidentiality provisions. More importantly, however, viewing confidentiality through the lens of first amendment principles should cause academia to rethink traditional assumptions about the effects of confidentiality rules. If indeed the constitutional issue turns on the evidence for and against those assumptions, both proponents and critics of the rules have an interest in a pool of accurate information. n6 The analysis thus illustrates why scholars concerned either with the operation of the first amendment doctrine or the workings of confi-

confidentiality strictures should embrace and contribute to empirical work. n7

[*603] I. BACKGROUND

To judge whether strict confidentiality rules are constitutional, it is useful to look at cases presenting the strongest possible challenge. Assume a jurisdiction which, like New York State, guarantees tight secrecy. Rules adopted by the highest court and enforced by a state-sanctioned body n8 acknowledge only one significant exception: a lawyer may reveal a client's intention to commit a future crime. n9 The following pages assess the constitutionality of applying such an inflexible code in situations in which a substantial "public interest" favors disclosure.

The Appendix lists and annotates a variety of hypothetical fact patterns implicating substantial public interests. A lawyer in some of the hypotheticals might wish to reveal client information to avoid harm to third parties. For example:

A client tells a lawyer the location of a "missing child" or kidnapping victim. The client is not implicated in the person's disappearance, but does not want the lawyer to disclose the information because the client "doesn't want to get involved." The client will not accept the lawyer's assurance that the lawyer could act without naming the client.

or

The general counsel to a firm that produces a metal alloy used in the manufacture of airplanes learns of a company study that suggests that in some high-altitude flight patterns the alloy might weaken and cause a plane to explode. The alloy does, however, meet the minimum safety standards set by the government. The lawyer urges the Board of Directors to recall the alloy or at a minimum to inform users of its potential danger. The Board decides that the study is too inconclusive to warrant action, in light of the dire financial consequences of disclosure to the company.

In other examples, the hypothetical lawyer has reason to suspect fraud or possible harm to the state:

A lawyer represents reputed organized crime figures in civil litigation. During a deposition of a key witness against them, the [*604] witness

reverses his testimony and tells a story that is completely favorable to the lawyer's clients. When confronted by the lawyer, one client admits that "a friend had a talk with the witness" but denies any subornation of perjury. The lawyer has no way of knowing what really happened.

or

A tax lawyer learns, from working with the books of a client, that the client has received large sums from the Russian government. The client will only say that the money is income for services rendered. The lawyer knows that the client has access to classified government documents.

A third set of hypotheticals present situations in which silence might offend the lawyer's own moral or political beliefs:

A lawyer for a political organization learns that the client is secretly a Nazi front.

or

There are rumors that a former Vice President who resigned after pleading nolo contendere to tax evasion charges plans to run for public office again. He publishes a book in which he asserts that he at all times protested his innocence of any wrongdoing to his attorney. The attorney remembers that, in fact, the Vice President admitted accepting graft.

In none of the fact patterns would disclosure benefit the lawyer financially. Nor are criminal defendants' special interests in secrecy implicated. n10 The hypotheticals, in short, pose cases in which lawyers' first amendment interests in breaching confidence are at their peak. Yet inflexible confidentiality rules like New York's probably would forbid revealing the information. n11

One can, of course, make credible policy arguments in favor of enforcing lawyer silence even in the Appendix's extreme situations. I take [*605] no position on the individual hypotheticals, largely because I believe the policy questions are intertwined with factual issues on which we have inadequate information. n12 But it is worthwhile to consider the separate legal/constitutional issue the hypotheticals present. Strict rules silence many lawyers who want to reveal client confidences for ethical, "good citizenship"

reasons. n13 Lawyers have not challenged the rules, n14 in part because the Supreme Court has only recently accepted the bar's claim to first amendment rights. n15 Since the late 1970s, however, the Court has scrutinized professional regulation of lawyer freedoms. n16 It seems inevitable that some lawyer will soon claim a right to disclose. n17

There are several reasons to believe judges might approach a constitutional challenge sympathetically. First, claimants like the hypothetical lawyers would not merely be seeking to further their own pecuniary interests. Their cases present a traditional first amendment clash of values; that is, the lawyer's (and society's) interest in preventing harm and pursuing political beliefs against the client's (and society's) countervailing interest in undivided loyalty.

Moreover, a decision in the lawyers' favor could be narrow. A court would not have to strike down attorney-client confidentiality in general, with all its attendant systemic benefits. Because the available empirical evidence illustrates that flexible rules allowing disclosure in exceptional cases can accomplish confidentiality's objectives, limited provisions can pass constitutional muster under any analytic framework. n18

[*606] Finally, judges might be convinced that invalidating strict rules would benefit society. If the Tompkins County evidence is correct, loosening confidentiality in limited situations would not undermine the role lawyers play in serving clients and making the legal system work. But it would open questionable client conduct to the type of public discussion the first amendment envisions. More importantly, recognizing lawyers' speech interests would comport with an emerging view that lawyers are moral and political actors, not simply clients' agents. n19 Allowing lawyers to speak out when moral dilemmas present themselves would make it more difficult for lawyers to ignore their personal ethical obligations. n20 That, in turn, might have a beneficial effect on lawyer conduct in general, and on society's attitude towards the profession. n21

Thus, a court would probably give a first amendment challenge to strict confidentiality serious consideration. At the threshold, the court would face two issues. First, does the first amendment apply to attorney-client confidentiality rules? Second, if so, how should the court evaluate the rules' constitutionality?

II. DOES THE FIRST AMENDMENT APPLY?

One method of upholding strict confidentiality would be to define "confidential communications" as outside the first amendment's scope. n22 The two theories that might support this categorization are discussed below. However, one theory seems farfetched and the other inapplicable.

[*607] A. *Commercial Speaker Categorization*

Judges would no doubt be tempted simply to treat lawyers as regulated businesspersons who, in qualifying to serve the public, forfeit first amendment rights whenever they act in a professional capacity. n23 Traditionally, the Supreme Court has been unwilling to disable whole categories of speakers from raising constitutional claims. n24 Moreover, recent cases specifically vest the bar with a full measure of first amendment protection. n25 [*608] Still, it is appealing to think of lawyers as unique.

A categorization approach to attorney-client confidentiality is plausible because the Court has interpreted the first amendment to uphold some occupational standards. n26 Whenever a state regulates entry into a speaking profession, it in effect decides who may speak. n27 Lawyers who benefit from receiving a license to practice should be willing to give something up in exchange. A bright line rule that deems the profession to have forfeited first amendment rights avoids difficult case-by-case balancing of countervailing constitutional interests.

Nevertheless, the contention that a state's licensing authority encompasses stripping lawyers of the plenary freedom to speak goes too far. Occupational regulations have always been decided in context. n28 States may prescribe qualifications assuring consumers the quality of service that the professional label promises. But no prophylactic justification exists for eliminating the professionals' constitutional protections across the board.

Courts and commentators have sometimes approved state regulations tying benefits to categorical forfeiture of rights by analyzing the regulations through the lens of the "unconstitutional conditions doctrine." n29 For a variety of reasons, this approach does not justify confidentiality rules. Under the doctrine, states may not withhold standard privileges as a means of influencing individuals' exercise of "fundamental" rights, including speech. n30 Even if lawyers can waive some personal freedoms voluntarily by

accepting admission to the bar, courts (despite some scholars' disapproval of the approach) are likely to consider the right to speak against illegal or wrongful conduct inalienable. n31

Analyzing lawyer regulations through a "conditions" framework is also not satisfying as a theoretical matter. By definition, every professional rule deprives a licensee of freedom. The unconstitutional conditions doctrine [*609] recognizes that some restrictions are more palatable than others. n32 One thus cannot justify (or denounce) confidentiality rules simply by referring to the doctrine; the mere exercise of a state's licensing power cannot support lawyer regulations per se. n33 Indeed, because the balancing implicit in unconstitutional conditions analysis is unrefined, the doctrine does not even suggest a framework for evaluating confidentiality rules. n34

In the final analysis, posing the question in terms of whether the first amendment applies to lawyers as a group or whether that group voluntarily gives up its rights misdirects the focus. The essence of the confidentiality issue is a more traditional first amendment inquiry: do the state interests in using particular speech-restrictive regulations outweigh lawyers' interests in free expression?

B. "Extrinsic Factor" Categorization

On rare occasions, the Supreme Court has ruled that something special about the setting, manner, or effect of a category of expression makes it regulable per se. These decisions justify speech restrictions by focusing on extrinsic factors, rather than on the worth of the speech itself or on the rights of the speaker. Following this line of analysis, a court might consider excluding the category of client information from the first amendment simply because of disclosure's possible impact on clients.

New York v. Ferber provides a starting point for the "extrinsic factor" analysis. n35 *Ferber* upheld a child pornography law. The Court agreed that the regulated material was not itself "obscene" and did not fall outside the first amendment's scope on that ground. Instead the Court focused upon the impact of the expression on the children used to make the pornographic films. The Court noted that the state interest in "safeguarding the physical well-being of a minor" is always "compelling." n36 It also viewed child pornography as having content of limited first amendment value because of [*610] its economic motivation n37 and its similarity to obscenity. n38

The Court concluded that "within the confines of the given classification [i.e. child pornography], the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required." n39

The Court has not provided meaningful guidelines for predicting other areas in which it will categorize on the basis of "extrinsic factor" analysis. But one can see immediately that "client information" bears similarities to *Ferber's* child pornography. In strictly regulating lawyer disclosures, the bar safeguards the interests of clients. Like child actors, some clients need unambiguous rules to protect them. As a group, clients may be unsophisticated and have difficulty dealing with the complex legal system. They may be unable to understand exceptions to confidentiality rules. Any exceptions may deter them from confiding at all. n40 Thus, the argument goes, states should be able to adopt a bright line rule governing the whole category of attorney-client information, a rule that avoids any case-by-case evaluation of particular disclosures.

On close examination, however, the analogy weakens. The Supreme Court has always treated children as meriting unique protection. n41 Because the *Ferber* law clearly was geared to protecting children, n42 the Court accorded great deference to the New York legislators' choice of means. n43

In contrast, the Court hesitates to let state regulators limit first amendment freedoms on the basis that consumers are incapable of interpreting what they are told (e.g., regarding what is confidential). n44 It ordinarily proceeds from the assumption that average citizens can filter information and order their use of services to maximize their own interests. n45 With respect to the bar in particular, the Court has never [*611] deferred to the legal profession's adoption of speech-restrictive regulatory standards, even when protection of clients has been the asserted goal. n46

Perhaps more significant, attorney-client confidentiality rules do not possess the characteristics the *Ferber* Court found essential for categorization. The rationales for inflexible confidentiality seem powerful at first glance. But as discussed below, when one examines them in light of the available empirical evidence, the rationales are not obviously compelling. n47 Moreover, to the extent the rules forbid speech in cases like the hypotheticals in the Appendix, one cannot argue that the proscribed expres-

sion is of limited first amendment significance. Nor can one assume that the need for the expression occurs infrequently, for empirically it appears that strict confidentiality rules have prevented many lawyers from disclosing information when “they personally believed that [they] should, as a good citizen, [have been] required to make [it] public.” n48 By categorizing, the *Ferber* Court accepted the inevitable loss of *rare* expression that would be protected under a balancing approach. A court considering strict confidentiality rules would be hard-pressed to conclude similarly that “the evil to be restricted so overwhelmingly outweighs the expressive interests . . . that no case-by-case adjudication is required.”

C. Facial Versus As Applied Analysis

Before leaving the subject of categorization, it is worthwhile mentioning the related practice of testing the constitutionality of laws “on their face.” That is because, in the confidentiality context, categorizing would be tantamount to considering a challenge only as a facial attack.

The lawyer claimant in a sympathetic case (like the hypotheticals in the Appendix) would question a strict confidentiality rule on an “as applied” basis. In other words, he or she would ask the court to decide how well confidentiality’s general justifications are served in the case before the court. The defending bar would attempt to justify the confidentiality provision as a broader proposition: does it, in general, implement -- or “serve” -- confidentiality’s underlying rationales? This distinction is significant, for the current data suggests that strict provisions have limited practical effect. Employing facial analysis -- like categorizing -- makes it far easier to support a rule that only sometimes works. A court’s assessment of confidentiality may ultimately depend upon whether the court considers it in the abstract or as applied.

Shapero v. Kentucky Bar Association n49 illustrates the two approaches and suggests courts would avoid facial consideration of confidentiality rules. In *Shapero*, the Kentucky Bar Association forbade a lawyer to use a solicitation [*612] letter, not on the basis that the letter was itself misleading, but rather because of the Bar’s view that mail solicitations as a whole tend to be untruthful and deceptive. n50 The Supreme Court rejected a facial analysis. It concluded that “unique circumstances” were required to justify an across-the-board ban on lawyer speech -- circumstances preventing the bar from effectively using or enforcing an alternative that might accommodate lawyer speech interests in individual cases. n51 The Court

scrutinized the application of the solicitation rule to *Shapero*’s letter and concluded that a total ban on mail solicitations violated the first amendment. n52

Shapero’s reasoning seems to control the confidentiality context. Because lawyers will only rarely have reason to breach secrecy, the enforcement problems that might justify a facial, across-the-board approach simply do not exist. n53 Strict confidentiality presents a fairly typical first amendment problem: how should the individual lawyer’s significant free speech interests be weighed against the “public welfare determination embodied in the [rules].” n54

III. SELECTING THE FIRST AMENDMENT STANDARD

A. The Options

Let us assume that professional confidentiality rules implicate lawyers’ first amendment rights. Under current first amendment doctrine, a court would have to select a “test” for balancing “state interests” against a lawyer-claimant’s freedom of expression. The choice of test typically turns on the reason for restricting speech and the phrasing of the regulation. n55

Absent a specific, doctrinal reason for making an exception, courts judge speech regulations strictly: “Where a government restricts the speech of a private person, the state action may be sustained only if the government [*613] can show that the regulation is a precisely drawn means of serving a compelling state interest.” n56 The mere fact that an attorney is the claimant would not by itself loosen the first amendment standard. n57 Nor do inflexible attorney-client confidentiality rules fit within any traditional “exception;” they regulate lawyers’ expression directly; n58 they turn upon the nature, or “content,” of the speaker’s message. n59 These factors militate for application of the strict first amendment test. n60 Several lower courts have used that test in assessing the constitutionality of other speech-restrictive ethical rules. n61

[*614] Nevertheless, applying a strict first amendment standard to attorney-client confidentiality could have significant ramifications in other contexts. Would courts be able to distinguish restrictions on how businesspersons speak -- for example in the federal securities laws or state credit reporting requirements? n62 Would courts have to treat occupational

licensing statutes as unconstitutional prior restraints? n63 Would the strict approach require courts to invalidate state statutes that impose confidentiality in medicine and other professions, protect trade secrets, maintain secrecy of grand jury testimony, n64 or provide a testimonial privilege for communications between husband and wife? n65 Even within the lawyers' ethics realm, would clearly laudatory speech restrictive rules -- such as mandatory exceptions to confidentiality and conflict of interest prohibitions limiting lawyer authorship of autobiographical books -- become vulnerable? n66

Discussing all of the possibly affected areas is beyond this Article's scope. I raise the slippery slope simply to illustrate factors that a judge may consider while applying the first amendment to confidentiality rules. If an intermediate balancing approach for testing confidentiality can be developed, [*615] the spectre raised by the other situations becomes less drastic. An intermediate standard would permit future courts at least to give weight to the governmental interests in each type of regulation.

Recent opinions suggest avenues through which judges might justify reduced scrutiny of confidentiality rules. In *Connick v. Myers*, n67 for example, the Supreme Court applied a sliding scale of speech protection to expression by public employees: n68 "[w]hether an employee's speech addresses a matter of public concern must be determined by the content, form, and context of a given statement. . . . n69 [T]he state's burden in justifying a particular discharge varies depending upon the nature of the employee's expression." n70 Some commentators view statements like *Connick's* as indicating the Court's willingness to evaluate speech restrictions according to an "eclectic balancing approach." n71

To the extent one can find "eclectic balancing" in the decisions, it has taken two forms. Justice Stevens, never commanding a majority, has encouraged the Court to focus on the content of particular speech and to accord some expression diminished constitutional protection. n72 A second line of decisions arguably takes a broader tack. It would adjust the level of protection on a case-by-case basis, according to the "whole context" in which speech occurs.

Under the Stevens "content" approach, expression "less valuable" than political speech may be regulated upon a showing of a substantial, rather than a compelling, state interest. n73 Unfortunately for confidentiality's [*616] proponents, a court assessing attorney-client information would have diffi-

culty denigrating its first amendment value across-the-board. n74 In the hypotheticals in the Appendix, for example, one can view the "value" of the confidences either from the perspective of the attorneys wishing to speak or the public wishing to hear. The politically prompted disclosures would merit full first amendment protection under any analytic theory. n75 Similarly, the hypothetical lawyers who wish to reveal a business client's wrongful activity n76 act as whistleblowers, common protagonists in the first amendment arena. They offer precisely the type of "speech of public concern" n77 that the courts have uniformly protected in the public employee context. n78

In some of the hypothetical cases, the lawyer may wish to disclose solely for personal moral reasons. n79 Because such expression does not necessarily involve newsworthy or political matters, it differs from the speech "of public concern" which the cases have traditionally focused [*617] upon. n80 Yet a court is unlikely to limit the first amendment's application in cases of speech that prevents harm; n81 this expression clearly has societal importance. n82 Nor could a court evaluating disclosures that prevent, expose, and rectify client misconduct n83 ignore the societal interest in avoiding crime. n84

There is another reason why courts would probably hesitate to dismiss the first amendment value of morally-based disclosures. The commentary in vogue assumes that one goal of the first amendment is to safeguard free expression as a means to individual self-fulfillment and self-realization. n85 The hypothetical fact patterns, in addition to underscoring *societal* interests in disclosure, highlight specific self-realization interests of lawyers which the courts would have to consider in the constitutional balance. A court might be able to brush aside the claims of a lawyer who wishes to speak [*618] solely for economic reasons. n86 But broad confidentiality rules like New York's also force lawyers to sublimate their personal ethics. Not only may lawyers have a general desire to express moral or political outrage, n87 but they may also feel tarnished through their unwitting association with clients' questionable activities. n88 Rules that require attorneys to suppress their own sense of morality displace the attorneys' autonomy and inevitably alter their self-fulfillment as individuals. n89

As a result, judges would be unlikely to rule that all attorney-client confidences lack content of significant first amendment value. n90 Even [*619] courts that have adopted a sliding scale approach in other areas n91 have accorded maximum protection to expression that is in the public inter-

est. Because the information that attorneys would be prevented from disclosing cannot be generalized as “lower content,” applying “lesser” balancing is inappropriate. n92

Arguably, however, the Supreme Court has not consistently focused on content alone in its “sliding scale” or “eclectic balancing” decisions. Professor Shiffrin suggests that the Court considers the bulk of first amendment cases in context and weighs a whole host of factors. n93 In Shiffrin’s view:

[T]he assumption of general balancing is that the values of speech interact with other values in such complicated ways that the Court may need discrete doctrinal tools to resolve particular problems. At their best, the rules the Court has formulated are fashioned to reflect the complex accommodations needed in each context. n94

Expression that might be protected through strict scrutiny in some contexts receives less protection in others. n95

This alternative balancing methodology has particular appeal in the realm of attorney speech. Lawyers do not always *seem* to deserve the highest level of first amendment protection. They are a peculiar hybrid -- in some respects private individuals, in others “officers of the court.” Although lawyers label themselves “professionals,” they often act identically to businesspersons, entrepreneurs, and agents. One might therefore expect courts to treat lawyers as “*sui generis*” and accord reduced first amendment protection to some kinds of lawyer speech. n96 Or, courts might attempt to [*620] identify the “legally operative role” the lawyer is playing in each case -- private citizen, officer of the court, businessperson, or fiduciary -- and accord the protection that that type of litigant deserves. n97

One line of recent decisions suggest that the special context in which lawyers obtain confidential information might indeed affect the applicable first amendment standard. These cases involve speech restrictions that are justified on the basis that a speaker has obtained information only by virtue of a unique status conferred by the state. In *Connick v. Myers*, the Court applied a sliding scale first amendment analysis to public employee speech involving job-related information. n98 In *Seattle Times Co. v. Rhinehart*, the Court employed a reduced first amendment standard in assessing rules that forbid publication of materials produced in litigation under judicial seal. n99 And in *Snepp v. United States*, the Court assumed that the trust rela-

tionship between Central Intelligence Agency employees and the government authorized government regulation of the employees’ speech. n100

[*621] As in these cases, the intuition that strict attorney-client confidentiality rules are valid stems from a sense that lawyers have access to client information only because of their status. Because clients have little hope of navigating the legal system alone, the system imposes significant incentives for clients to give lawyers secrets. Like the government employer (which needs to give information to its employees) and litigants who must provide discovery, clients give up limited access to secrets out of a feeling of necessity. n101 At least as strong a trust relationship exists between lawyer and client as between bureaucracy (e.g., the Central Intelligence Agency) and employee.

Yet cases like *Connick*, *Rhinehart*, and *Snepp* are not direct precedent for applying limited first amendment scrutiny to confidentiality rules. The most obvious reason is that prohibitions against disclosing confidences are not limited to information received from a client. The Model Rules encompass all information “relating to the representation.” n102 The Code of Professional Responsibility refers to information that is “privileged” or “gained in the professional relationship.” n103 Even under the *Connick/Rhinehart/Snepp* reasoning, the confidentiality rules are, as a constitutional matter, too broad.

Perhaps more significant, unlike litigants under court order or institutional employers which cannot operate without employees, clients *need* not give information to their lawyers. n104 Moreover, the Court has always treated speech in the trial context n105 and the government sector as unique. n106 The cases thus clearly do not control the situation of the private [*622] citizen who voluntarily shares information with a professional from whom he or she seeks help. The cases at best support the general notion that in contexts involving a strong interest in nondisclosure, the Court may be willing to relax countervailing first amendment guarantees. n107

Even under a contextual analysis, the government’s ability to prevent lawyer speech would be limited. n108 Common law forbids agents and fiduciaries to disclose their principals’ confidential information to enrich themselves. A principal’s rights are, however, subject to the “superior interests of [the agents themselves] or of a third person.” n109 In the public employee context, the Supreme Court recognizes a similar distinction for purposes of constitutional law; the potential importance of the speech -- the

degree to which it is “speech of public concern” -- may help overcome the government’s interest in secrecy. n110 If a court applies a potentially restrictive contextual first amendment approach to lawyer-client communications, the interest of third persons or the public in hearing the lawyer’s information may sometimes also expand the lawyer’s ability to speak at the client’s expense.

The practical effect of using a “context” approach to confidentiality is, therefore, that courts would have to select appropriate first amendment standards on a case-by-case basis. The nature of particular attorney-client relationships and the circumstances under which the clients confide would determine how judges evaluate each confidentiality rule. In criminal cases, for example, a court might conclude that the need to protect strict [*623] confidentiality is at its peak. n111 In contrast, a court would have to scrutinize a confidentiality rule silencing lawyers engaged in functions that nonlawyers -- with unrestricted speech -- also perform. n112

Under the contextual analysis, the content and motive for the speech at issue would also affect the selection and formulation of the first amendment standard. The cases favor political and moral expression and disfavor commercial speech. n113 Many possible disclosures of client information fall within the less protected commercial category. n114 Between politically and commercially based expression, however, lawyers have a range of noncommercial but “exploitative” n115 reasons for wishing to disclose a client [*624] confidence n116 which the language of the precedents treats the same as political/moral expression. n117

Under a variable approach, a court could defer more to rules targeting technically noncommercial expression that still benefits only the lawyer. n118 A lawyer who accepts a license to represent clients within a trust relationship, like the CIA agent in *Snepp* or the public employee in *Connick*, is more readily seen as giving up the right to breach confidentiality for “non-professional” profit or even aesthetic motives. n119 Moreover, a court would be able to emphasize appropriately societal interests in forbidding different kinds of exploitative speech. For example, lawyers who become authors or discuss client confidences to trade securities exercise a semi-commercial right to moonlight. n120 A state has a special reason to require these lawyers [*625] to concentrate on their primary responsibility of representing clients. A court might reasonably accord states extra leeway to prohibit lawyers from engaging in secondary work activities that interfere

with their performance. n121

A court that adopts an adjustable first amendment standard would have to analyze how each challenged confidentiality rule operates. Inflexible rules such as those prevailing in the New York State and model codes would be judged strictly. They forbid virtually all disclosures, regardless of their value, the lawyer’s role, or the client’s conduct. In contrast, a more deferential first amendment standard might apply to rules that attempt to safeguard only the core of the attorney-client relationship and that regulate only aesthetic, exploitative, and purely commercially motivated disclosures. Under a variable approach, the more closely the bar tailors its attorney-client confidentiality rules, the more likely the rules are to pass constitutional muster.

B. Choosing the Appropriate Test

Most mechanisms for controlling the quality and behavior of professionals also limit how and when the professionals may express themselves. n122 As Justice White notes in *Lowe v. Securities & Exchange Commission*, the Supreme Court has employed a variety of approaches to regulations of speaking professionals: n123 “At some point, a measure is no longer a regulation of a profession, but a regulation of speech . . . ; beyond that point, the statute must survive the [strict] level of scrutiny demanded by the First Amendment.” n124 The problem, of course, comes in finding the point where strict scrutiny should begin. n125 Even Justice White’s concurrence [*626] in *Lowe* reflects the difficulty of drawing a line. It applies both the traditional compelling state interest test and a lesser balancing approach to the investment advisor regulation before the Court. n126

The Court has always purported to apply neutral principles in selecting among potentially applicable first amendment tests. Yet the results suggest the Justices are influenced by the identity of the regulator. They seem far more willing to defer to factual conclusions about the effects of regulations when the regulator has no apparent self-interest.

New York v. Ferber n127 presents a classic example. Under what appeared to be governing obscenity standards, New York’s ban on child pornography should have fallen. But the law was geared towards its asserted purpose of protecting children. The Court took into account the fact that other bodies with motives beyond reproach shared the state legislature’s view of the statute’s likely effects. n128 As a result, the Court adopted a

first amendment standard that deferred entirely to the legislators' choice of means.

Similarly, in *Hazlewood School District v. Kuhlmeier*,¹²⁹ The Court upheld a principal's decision to censor a student newspaper as "reasonable." This deference to the principal's judgment probably was prompted by the Court's confidence in the principal's disinterestedness. Presumably the Justices deferred to the principal's expertise in determining the students' best interests. The Court has not adopted a similarly deferential standard in other school contexts in which school officials have had possibly self-serving or political reasons for taking speech-restrictive action.¹³⁰

[*627] Thus, while the regulator's expertise is usually the explicit justification for judicial deference,¹³¹ the regulator's good faith often appears to play a role.¹³² Judges rarely defer to the assertions of regulators who have identifiable personal interests in restricting speech.¹³³ How courts test strict confidentiality rules may, accordingly, depend on how judges view the rulemakers -- the bar.

In considering whether courts would defer to the bar, one might expect federalism concerns to assume special significance. In many ways, the professional codes structure states' administration of their justice systems.¹³⁴ Most ethical provisions, including confidentiality rules, ostensibly rest on rationales that relate to maintaining citizens' access to legal representation and redress. In promulgating and enforcing the rules, state bars operate under the aegis of the state courts, the authority of which federal judges are loathe to question.¹³⁵

Yet in practice, state bar regulations have not been immune to constitutional challenge.¹³⁶ The Supreme Court has considered professional rules governing lawyers at least ten times in the last fifteen years.¹³⁷ [*628] In all but one, the Court rejected the bar's justification for regulating.¹³⁸ On occasion, the Court provided hints at its reasons for not deferring to the bar's conclusions: self-serving attributes of the rules stripped them of judicial respect.¹³⁹

[*629] I, and others, have already discussed how strict confidentiality provisions may serve the profession's self-interest.¹⁴⁰ On an economic level, the ability to guarantee secrecy when alternative service providers cannot¹⁴¹ allows lawyers to charge higher fees. Confidentiality provi-

sions also enable lawyers to represent unpopular clients with less fear of public criticism and its concomitant effect on their practices.¹⁴² Hypotheticals (9), (10), and (12) illustrate this effect. Confidentiality rules shield the lawyer who represents a spy, a closet Nazi, or a deceitful public official. If the client's identity or untruthful comments later come to light, the lawyer can intimate that the public would approve of his or her conduct if only the lawyer were allowed to discuss it in detail.

On a more personal level, strict confidentiality rules relieve lawyers of the obligation to make moral choices. In New York State, for example, a lawyer is ordinarily forbidden to disclose information simply to save a third party from harm. A lawyer would not have to choose between displeasing a client and saving the endangered kidnapping victim in hypothetical (1), the innocent criminal defendant in hypothetical (2), the mortally injured adversary in hypothetical (3), or passengers of planes constructed from potentially defective materials in hypothetical (4). Financially, this prohibition enables lawyers to avoid deciding whether disclosing will help or hurt their future practices; some clients will be drawn to "moral lawyers," others are likely to be driven away. But far more significantly, lawyers need not face the ethical dilemma of whether they should, as good citizens, reveal the information. Committing lawyers to inflexible rules frees them from the psychological costs of making decisions involving morality.

One cannot know to what extent these considerations are responsible for the existing confidentiality provisions. To the extent strict rules reinforce the hired gun model of lawyering, many observers consider them socially desirable.¹⁴³ My point is simply that courts cannot help but identify the possibility that selfish interests motivate inflexible codes, in whole or in part.¹⁴⁴ That alone will probably keep judges from accepting the bar's [*630] justifications unquestioningly (e.g. by adopting a categorical first amendment approach).¹⁴⁵ It may also prompt the courts to apply a first amendment standard that allows substantial scrutiny of strict confidentiality rules.¹⁴⁶

[*631] IV. APPLYING THE FIRST AMENDMENT

The foregoing pages illustrate the different frameworks courts might use to analyze strict confidentiality's constitutionality. But it is interesting to note how limited the options are. All but the "eclectic" balancing approach require judges to apply tests, rather than implement a general evaluation of a particular regulation's worth. On the one hand, the tests may prompt courts

to decide woodenly, to act as if there is a simple recipe for deciding cases that should, in fairness, provoke wrenching debate. On the other hand, the existence of defined rules avoids knee-jerk decisions; that is, the danger a judge will uphold or reject a regulation on the basis of gut feeling.

It is fitting to apply these insights in the context of attorney-client confidentiality. In the past, lower courts and commentators have unthinkingly assumed that compelling interests justify restricting attorney speech. n147 For them, the fact that the codes turn on hortatory, normative ideals -- clients *should* be able to trust lawyers, clients *should* be treated as autonomous individuals n148 -- has been enough to render the codes' effectiveness beyond the point. The rule-oriented first amendment approaches, however, and even to some extent "eclectic balancing," purport to prevent such facile decision making. They require judges to assess a bar's proffered rationale for strict confidentiality at least to some degree. Ordinarily the burden of justifying a speech restriction falls on the government. n149

The strict first amendment test asks whether the underlying state interests are "compelling" and whether the inflexible regulation is a "narrowly tailored" means of accomplishing those goals. n150 The test is sometimes formulated as calling for "the least restrictive alternative" necessary to accomplish the regulation's objective. n151

The phrasing of an intermediate balancing standard would depend on the theory a court uses to depart from the strict approach. n152 Although an [*632] intermediate test might not require the proffered justification to rise to the "compelling" level, the significance of the governmental interest in regulating would certainly be relevant. n153

Any intermediate test is also likely to require that a confidentiality provision serve the asserted governmental interest fairly well. Justice Stevens' "content" theory would require scrutiny of the means-ends fit. n154 The "context" approach, by definition, insists that rules be written narrowly; for the precise nature, setting, and content of each disclosure determines the level of protection it receives. A confidentiality rule that forecloses a broad range of attorney disclosures is anathema to any constitutional theory demanding care and discrimination in the regulation of speech. n155

A. The Courts' Approach to Fact-Finding

All the first amendment tests establish a common starting point: words ordinarily are not dangerous. n156 Prescribing tiers of "scrutiny" requires courts, under each level of analysis, to look behind generalized justifications for speech restrictions -- to measure their beneficial effects at least to some degree. The protection speech receives in practice depends largely on how courts analyze the facts in any given constitutional case, in other words, how carefully judges determine whether the relevant tests are met.

Judicial inquiry into constitutional facts has not always been disciplined or consistent. n157 As a result, some scholars view the tiered first [*633] amendment standards as simply reflecting degrees of judicial presumption that a law in question is valid. n158 At a basic level, however, a tangible pattern does emerge. The more questionable a rationale for regulating speech is on the surface, the more likely courts are to demand factual or empirical support. n159 Although the Supreme Court has upheld inherently predictive justifications based on "common human experience," n160 it has tried, when possible, to limit speculative judgments. n161 Even under the lesser first amendment tests, generalized pleas for deference to the regulator have rarely sufficed. n162

[*634] How closely a court would examine data concerning a bar's defense of a confidentiality rule would, again, turn on the court's willingness to trust the rulemakers. n163 Because strict confidentiality's rationales are open to question, a court is likely to resist arguments for total deference. n164 The same fears about motivation that militate initially in favor of adopting a stringent first amendment standard also suggest a need for careful empirical analysis. n165

The nature of the available data should also play a role in shaping the court's perspective. Once a litigant establishes that the first amendment applies to the claim, "it is common to place the burden upon the government to justify impingements on [first amendment] interests." n166 Despite this burden, a judge's natural inclination is to shy from social science research. n167 Focusing on data necessarily raises the spectre that lower courts will reach inconsistent results and that issues will require relitigation as the empirical evidence changes. n168 Challengers of a particular confidentiality rule would thus improve their position dramatically by making a prima facie showing that the rule is not sufficiently "important" or fails to serve its rationales well.

New Jersey Citizen Action v. Edison Township n169 exemplifies this phenomenon. Plaintiffs challenged a door-to-door solicitation ordinance of a type courts previously had upheld on the assumption that it helped criminal law enforcement. Plaintiffs were able to present empirical evidence that convinced the district court the law did not deter or prevent crime. Their prima [*635] facie proof led the lower and appellate courts to doubt “whether assumptions and widely-shared beliefs have a role to play,” to analyze the facts supporting the government’s assertions, and ultimately to strike down the law. n170

In a case challenging strict confidentiality, each of the possible first amendment standards in theory puts the government to the test. However, as in *Edison Township*, producing data at the outset to negate a bar’s assertions can reduce judges’ willingness to excuse a failure of proof. n171 The following section briefly reviews the available data to determine whether such evidence exists.

B. The Data

Proponents of strict confidentiality rules generally rely upon three main justifications. n172 First, they argue that strict confidentiality is essential to maintaining the adversary system; without a secrecy guarantee, clients either would refrain from using lawyers or would undermine effective representation by hiding information. Second, some view strict confidentiality as a means of enhancing client-centered decisionmaking and thereby enhancing client dignity and autonomy. Finally, strict confidentiality is advocated as a tool for law compliance. By inducing clients to tell lawyers about potentially improper conduct, confidentiality gives the lawyers a chance to engage in a moral dialogue and dissuade the conduct.

Only two relevant studies exist, and both are tentative. n173 One, a Yale Law Journal project, focuses on attorney-client privilege. The other, my survey of lawyers and clients in Tompkins County, New York, addresses confidentiality directly.

The two studies suggest that the general principle of attorney-client confidentiality to some degree serves the rationales proponents assert. Of the clients surveyed in Tompkins County, thirty percent stated that they gave their attorneys information they would have withheld in the absence of a secrecy guarantee. n174 A large number of lawyers claimed that at some

point in their careers they had used the fruits of confidentiality to dissuade their clients from engaging in improper conduct. n175

At the same time, however, the studies cast serious doubt on the importance of confidentiality rules as strict as New York State’s. Less [*636] restrictive restraints, such as those governing ordinary agents and fiduciaries, may serve the objectives of attorney-client confidentiality rules adequately. While agents and fiduciaries may not reveal confidential client information for their own personal gain or to harm the interests of their clients, they may reveal information to protect “a superior interest of [themselves] or of a third person.” n176 Despite these differences in confidentiality requirements, the Tompkins County clients seem to confide equally in lawyers and nonlawyer professionals. n177 Indeed, in many of the hypothetical situations in the Appendix, the Tompkins County clients wrongly believed an exception to lawyer confidentiality paralleling that for nonlawyers existed. The Yale study confirms that clients have equal trust in professionals not bound by strict confidentiality guarantees; the quality of and need for effective service appears to be what generates confidence, rather than the strictness of confidentiality rules. If these conclusions are correct, they suggest that inflexible rules are not necessary to serve confidentiality’s general rationales and may not even substantially serve them.

The Tompkins County study raises even more serious doubts about the client autonomy rationale. For it appears that lawyers do not inform clients about confidentiality and may knowingly encourage them to overemphasize its scope. n178 Far from enabling clients to make informed decisions, this pattern of conduct tends to deceive clients into disclosing more than they otherwise would. To the extent clients as a result give lawyers information the lawyers may disclose, clients lose the autonomy to act upon the information as they see fit. In this and other ways, n179 the study suggests that the implementation of strict confidentiality rules undermines the client dignity rationale.

The empirical evidence does not even leave the dissuading misconduct rationale unscathed. Although many lawyers claimed to have used confidentiality in the hypothesized way, it appears that they did so only infrequently. n180 Even in those cases, a real possibility exists that the lawyers could have achieved the same results under a more flexible confidentiality regime. The Tompkins County lawyers themselves considered the dissuading misconduct justification to be of secondary importance. n181

Overall, both empirical studies revealed widespread misunderstanding of confidentiality's scope on the part of clients and some lawyers. n182 Many Tompkins County clients do not believe lawyers always follow the rules. n183 Most Tompkins County lawyers do not even tell clients about confidentiality [*637] and do not believe this omission affects their ability to obtain client information. n184 If confirmed, these findings strongly undermine the purported effectiveness of strict provisions.

C. Are Strict Confidentiality Rules Constitutional?

Let us assume that subsequent research confirms the Yale and Tompkins County results, that a court looks at the data, and that it applies the first amendment. Under the current doctrine, would it strike down a strict confidentiality rule?

(1) The Importance of the Underlying State Interests

Most of confidentiality's justifications are abstract. It is difficult to quibble with the general notion that "maintaining an orderly and adversary system of justice" is a compelling state interest. "Enhancing the quality of legal representation," "improving attorney-client relationships," and "preventing client misconduct," though perhaps of somewhat lesser significance, are nevertheless important goals. A court applying the first amendment tests according to their narrow terms might thus determine that the only real constitutional issues are the second order questions: n185 does the regulation "serve" the asserted justifications and, if so, how directly? n186

Most courts would, however, probe the importance of the asserted interests. To do otherwise would rob the first prong of the first amendment standard of its significance. The asserted justifications may simply be window dressing. n187 Upon simple reflection, it may become obvious that confidentiality does not produce the desired results; or, inflexible rules may not enhance the effect of more lenient provisions. n188 If courts accept the [*638] government's packaging without probing, the threshold interest inquiry loses all force. n189

Are the state interests on which strict rules rest "compelling" or "important" in nature? Consider first the claim -- offered in various forms -- that strict rules encourage clients to consult lawyers and thereby contribute to the proper operation of our adversarial system. The empirical evidence suggests

that some form of confidentiality *is* part and parcel of client trust; apparently, a broad "public interest" exception to confidentiality would cause one in three laypersons to hesitate to consult. n190 That conclusion alone does not, however, vindicate extreme confidentiality. The Tompkins County study suggests that incorporating clearly defined exceptions in the rules (e.g., allowing disclosures that prevent harm to third parties) would have only limited impact on client candor. n191 The best gloss one can put on inflexible confidentiality provisions is that they encourage some (i.e., a few) laypersons to seek counsel. Some judges would conclude that this effect lends credence to the proponents' abstract claim; in other words, that the effect shows a compelling justification for the rule exists, even if the means-end fit seems poor. Other judges would, however, confront the issue of whether so tenuously supported a justification could satisfy the threshold standard. n192

[*639] For similar reasons, a court may have difficulty pigeonholing the state interest in "enhancing the quality of legal representation." The justification again *sounds* compelling. But when stripped of rhetoric, that interest is more aptly described as "protecting clients who would, without confidentiality, injure themselves by lying or withholding information." n193 Although this justification has significance, it is patently less forceful than the more abstract version. The available empirical data suggests that lawyers themselves do not, as a whole, give much weight to the claim. n194

One can, in short, question the "compelling" nature of at least some of the state interests. n195 Arguably they do not even rise to the level of being important. n196 More extensive empirical evidence, one way or the other, [*640] could well have a dispositive effect on the way in which courts would evaluate the constitutional claim.

(2) Tailoring the Regulation

If proponents of strict confidentiality can hurdle the importance standard, they face yet a more difficult obstacle. Under the traditional first amendment test, the regulation must be "a precisely drawn means" of serving the governmental interest, in other words, the alternative "least restrictive" of lawyers' speech interests. n197 Under an intermediate balancing approach, strict confidentiality rules would still have to serve the asserted state interests directly. n198

In the confidentiality context, one can look at the tailoring requirements

from several different perspectives. First, strict rules may simply not have their desired effect. As a theoretical and empirical matter, a court could identify specific reasons why clients would use and confide in lawyers even without an ironclad form of confidentiality. n199 Unless clients would withhold information at a significant rate, exceptions are unlikely to affect lawyer competence. Broad confidentiality rules may hurt rather than enhance client dignity and trust. n200 The available studies suggest that broad confidentiality rules serve only the marginal “preventing client misconduct” rationale to any significant degree.

Nevertheless, the empirical evidence fails to establish that strict confidentiality rules are totally ineffective. n201 And if the bar can satisfy the courts that the rules produce even marginal changes in client behavior, the [*641] constitutional burden shifts. The challenger would have to show that more narrowly drawn measures would serve the state’s purpose equally well. Proponents of exceptions would, in other words, have to demonstrate that the marginal effects of a particular strict rule (e.g., in inducing client disclosures, preventing client misconduct, or enhancing client autonomy) could be replaced through other means. n202

Commentators have pointed to alternatives for accomplishing the objectives of strict confidentiality rules. Professor Burt, for example, has posited that clients decide whether or not to confide in lawyers depending on their innate trust of the individual lawyer. n203 If that is the case, requiring lawyers to engage in a frank dialogue with clients, as Professor Shaffer and others have proposed, n204 would promote confidence better than secrecy rules. Such a dialogue, perhaps combined with the adoption of an “informed consent doctrine” currently applicable to medical professionals, n205 would enhance client autonomy and client-centered decisionmaking to a far greater extent than inflexible confidentiality provisions.

The Tompkins County study highlights other potentially effective alternatives for encouraging clients to confide. For example, it reveals that few lawyers inform clients of confidentiality at all. Requiring lawyers to educate clients about limited attorney-client secrecy would probably encourage at least as much disclosure as maintaining a poorly understood, but exception-free, confidentiality rule. In addition, well-publicized enforcement of the rules -- even more liberal rules -- could increase client confidence. As the study suggests, some clients who are aware of confidentiality requirements believe lawyers currently disclose more than they should.

Nonetheless, a significant sticking point remains for advocates of disclosure exceptions. The available data is ambiguous on whether creating [*642] exceptions would enhance or detract from a lawyer’s ability to prevent client misconduct. In theory, loosening confidentiality might keep lawyers from obtaining information about client impropriety, and thus hinder their ability to dissuade. On the other hand, clients would still have good reasons to confide their intentions to their representatives; the existence of disclosure exceptions might simply strengthen the lawyer’s hand in encouraging the clients to act ethically. In light of these conflicting hypotheses, a court would have difficulty determining how well strict confidentiality serves the preventing misconduct rationale. The constitutional challenge thus becomes vulnerable. Absent further empirical evidence one way or the other, a court may have leeway to defer to a state bar’s view.

If this hurdle can be overcome -- either through the development of new data or a judge’s willingness to conclude as a theoretical matter that exceptions would not undermine lawyers’ ability to promote law compliance -- the tailoring requirement presents distinct problems for proponents of strict confidentiality. Not every accommodation of lawyers’ speech interests would keep a bar from furthering its interest in maintaining the adversary system or in preserving the attorney-client relationship. Codes can, and some do, include exceptions to confidentiality for situations in which lawyers learn of potential danger to third parties, n206 criminal conduct by a client, n207 matters important to national security, n208 mistruths told by the client (either to the lawyer or members of the public), or any other type of information specified by the lawyer at the beginning of the lawyer-client relationship that would offend the lawyer’s political or moral beliefs. n209 The Tompkins County data suggests that specifically and understandably worded exceptions would not significantly deter client disclosures. n210 In the face of these and other avenues for tolerating attorneys’ speech rights, n211 a court would find it difficult to characterize a [*643] strict rule as an alternative that adequately accommodates free speech. n212

(3) The Bottom Line

The point of this Article is not to prove that the interests in confidentiality are unimportant or that a court would strike down confidentiality rules. Rather, it is to demonstrate how current doctrine requires courts to delve into the facts. Under the existing state of the evidence, we cannot accept the effectiveness or the value of strict confidentiality rules without question. To

date, “their defense has ended where it ought to have begun, with a chorus of deeply felt but basically unexamined rhetoric.” n213

In assessing strict confidentiality’s constitutionality, it may well be that a court should distinguish among the hypotheticals in the Appendix. The Tompkins County data suggests that creating a judicial exception allowing disclosure in some of the hypotheticals might affect client conduct more than in others. For example, despite the strict New York rule, more than half of the Tompkins County clients believed lawyers could disclose in the three hypotheticals involving particular physical harm to third parties. n214 Over two-thirds of the surveyed lawyers said that a good lawyer would ignore the commands of strict confidentiality in hypotheticals where the likelihood of harm to third parties was nonspeculative. n215 A court has particular reason to conclude that strict rules are ineffective in such circumstances.

These issues are open. Appropriate empirical evidence might save many codes. But the available data cuts against the constitutionality of [*644] inflexible rules. It is incumbent upon their proponents to provide additional factual support. n216

If some rules fail constitutional scrutiny, it is because they do not even consider lawyers’ countervailing interests in expressing themselves. Tailored confidentiality provisions can survive. n217 But recognizing lawyers’ rights and personal ethical obligations would require the bar to adopt a new and more honest perspective to the codes.

V. CHANGING STRICT RULES

Let us suppose a jurisdiction, having reflected upon this constitutional analysis, determines that it wishes to revise a strict confidentiality rule to stave off constitutional question. Proposing particular exceptions is beyond this Article’s scope. Yet it is interesting to reflect on some of the considerations code drafters should weigh. n218

A. *Flexible, Rigid, and Compromise Rules*

It would be fairly easy to write flexible rules or exceptions satisfying any constitutional standard. n219 One could, for example, authorize or require disclosure when the “societal benefits in preventing harm outweigh the benefits of confidentiality.” n220 Alternatively, a rule might be tailored

[*645] from the perspective of clients’ interests in confidentiality: for instance, a lawyer may disclose matters of “public concern” whenever “confidentiality is not necessary, or has not been specifically promised, in order to secure information that is relevant to the representation.” n221

Flexible rules make the life of the drafter easier. They can be phrased in the terms of the applicable constitutional standards, referring specifically to the interests underlying confidentiality and the countervailing interests in free expression. The drafter need not actually choose among the competing interests nor attempt to direct the practitioner’s actions in the various contexts in which first amendment problems arise. In short, the tough choices shift to individual lawyers or the courts.

Too much flexibility in the rules, however, carries with it all the problems of vagueness. To the extent a rule requires disclosure in cases that satisfy the flexible standards, practitioners find themselves making untenable decisions of whether they must breach client confidences even if they do not feel morally compelled to do so. n222 This factor may militate in favor of placing the disclosure decision within the discretion of attorneys, rather than the courts. n223 But even if lawyers can live with vague standards, clients [*646] may not be able to. The more flexibility a lawyer has to disclose confidences, the less the client can tell what is likely to remain secret.

Tighter rules specifying when lawyers may make disclosures avoid many of the defects of vague rules. If lawyers and clients are informed that a lawyer may disclose “information that is likely to prevent injury to another” or “evidence of a criminal act that is not the subject of the representation,” few problems of interpretation are likely to arise. Rigid rules, however, have their own inherent problems. Because of the difficulty in imagining all possible situations in which a lawyer may have a first amendment interest in disclosing information, it may be hard to write a specific but meaningful rule broad enough to withstand all constitutional challenges. Inevitably, the determination of which disclosures to allow requires some balancing of factors that rigid rules usually cannot accommodate. n224

These considerations suggest a third generic alternative to “fixed” and “rigid rules.” A general rule of confidentiality might authorize the courts to hear a petition by an attorney who wishes to exercise a first amendment right to make a disclosure “in the public interest.” n225 Such a procedure incorporates many of the advantages and disadvantages of the other two. It is

vague, but does not place the client entirely at the mercy of the attorney's whims. n226 In some cases, it may not give the attorney's first amendment interests adequate regard, but it helps prevent lawyers from disclosing for the purpose of benefiting themselves. n227 It allows the type of judicial value balancing that the first amendment may require.

[*647] Perhaps the most significant impediment to such a rule is a practical one. Obtaining judicial approval for a disclosure will take time. Courts enamored of due process may require a full hearing to resolve the matter. The picture of a lawyer waging a legal battle against a client offends very basic notions of how attorney-client relationships should develop and appear. n228 Moreover, as this Article's hypotheticals illustrate, the value of many disclosures depends on how quickly they are made. n229 In constitutional terms, an approval rule could operate as an improper prior restraint. n230 The practical and legal viability of the middleground approach is thus open to serious question.

B. Determining Confidentiality Contractually

Allowing lawyers and clients to expand or narrow the scope of confidentiality contractually would probably insulate a code from constitutional challenge. n231 Unless future courts interpret the public's first amendment right to receive information more broadly than courts have in the past, the Constitution does not forbid lawyers to give up their personal right to speak. n232 The bar's freedom of expression is not significantly restrained [*648] if lawyers can refuse to represent clients who reject disclosure exceptions.

Nevertheless, code drafters should, for nonconstitutional policy reasons, hesitate before adopting such a rule. As I have discussed elsewhere, the practical results would probably be perverse. n233 Sophisticated clients and those with the most to hide would insist on strict confidentiality. The most unethical lawyers would be quickest to agree. In situations like the hypotheticals in the Appendix, allowing bargaining would not only undermine the benefits of liberalizing confidentiality, but might also reduce the possibility that a moral lawyer would persuade the client to "do the right thing."

To some extent, lawyers governed by a discretionary exception may achieve the same result by declining ever to disclose on a case by case basis. That eventuality is, however, consistent with the first amendment perspective that free speech involves personal fulfillment and growth; people should be

able to speak out, but need not do so. From a professional responsibility standpoint, making lawyers decide whether or not to disclose may be beneficial in and of itself. It forces them to engage in the moral self-examination they can avoid under a strict confidentiality rule. Once forced from the pure hired gun pedestal, one suspects that at least some lawyers might prefer to follow their moral instincts rather than sell their silence. n234

[*649] CONCLUSION

This Article does not specify disclosure exceptions that the Constitution might require. That depends largely on empirical evidence illustrating the impact of particular types of provisions on clients and the bar. In identifying directions for future research, I have already noted avenues for investigation that are potentially fruitful.

What I do suggest is that the constitutional issue is worth thinking about. From a theoretical standpoint, it seems that existing first amendment doctrine may be inadequate to cope with the core dilemma: the extent to which lawyers' free expression -- and its possible societal benefits -- should be forfeited to abstract justifications supporting general confidentiality principles. In practice, courts may circumvent the rigid requirements of the prevailing rule-oriented analysis. But when judges have done so in the past, they have been criticized for dishonest treatment of precedent. n235 How to handle the dilemma confidentiality rules present in light of the first amendment's mandates is a live question for courts and the bar.

But this Article also addresses the scholarly community. It highlights the need for careful empirical study of confidentiality's rationales. Confidentiality's justifications sound important. Inflexible rules may serve them, or they may not. Academia has a responsibility to provide the data that can resolve the doubts, one way or the other. It would be sad indeed if judges and code drafters must continue approaching the issues either on the basis of unsupported assertions or by relying exclusively on the crude empirical evidence produced to date.

[*650] APPENDIX -- HYPOTHETICALS n236

1. A client tells a lawyer the location of a "missing child" or kidnapping victim. The client is not implicated in the person's disappearance, but does not want the lawyer to disclose the information because the client "doesn't

want to get involved.” The client will not accept the lawyer’s assurance that the lawyer could act without naming the client.

2. An attorney obtains information from a client that would prove that another person falsely accused of a crime is innocent. The attorney could reveal the information without implicating the client in the crime. The client refuses to disclose the information voluntarily.

3. In a civil suit involving a serious automobile accident, the plaintiff is examined by defendant’s doctor. The doctor discovers a life-threatening aneurism. Although the aneurism was probably caused by the accident, plaintiff’s own physician has not discovered it. The condition is curable, but if defendant’s lawyer does not reveal the danger -- against the client’s wishes -- plaintiff may die. n237

4. The general counsel to a firm that produces a metal alloy used in the manufacture of airplanes learns of a company study that suggests that in some high-altitude flight patterns the alloy might weaken and cause a plane to explode. The alloy does, however, meet the minimum safety standards set by the government. The lawyer urges the Board of Directors to recall the alloy or at a minimum to inform users of its potential danger. The Board decides that the study is too inconclusive to warrant action, in light of the dire financial consequences of disclosure to the company.

5. From information given by and conversations with a client, an attorney becomes convinced that the client is mentally imbalanced, out of control, and will injure someone in the near future. The client has, however, not expressed any specific intention to commit a crime.

6. X negotiates directly with Y and agrees to buy Y’s house. Y agrees to provide “owner financing,” subject to the contingency that X supply certain information concerning X’s ability to pay. The only role X’s attorney is to play in the transaction is to write the final sale contract and preside over the closing. Right before the closing, X’s attorney learns from X’s accountant that the financing information X supplied to Y contained inaccurate information. If any fraud was committed, it occurred before the attorney became involved.

7. A client fortuitously receives an undeserved payment from the government (e.g. a duplicate welfare check or tax refund) and deposits it in a

savings account. The client then contacts his/her attorney who advises the client to return the money. The client refuses.

[*651] 8. A lawyer represents reputed organized crime figures in civil litigation. During a deposition of a key witness against them, the witness reverses his testimony and tells a story that is completely favorable to the lawyer’s clients. When confronted by the lawyer, one client admits that “a friend had a talk with the witness” but denies any subornation of perjury. The lawyer has no way of knowing what really happened.

9. A tax lawyer learns, from working with the books of a client, that the client has received large sums from the Russian government. The client will only say that the money is income for services rendered. The lawyer knows that the client has access to classified government documents.

10. A lawyer for a political organization learns that the client is secretly a Nazi front.

11. There are rumors that a former Vice President who resigned after pleading nolo contendere to tax evasion charges plans to run for public office again. He publishes a book in which he asserts that he at all times protested his innocence of any wrongdoing to his attorney. The attorney remembers that, in fact, the Vice President admitted accepting graft.

12. President Nixon announces publicly that the Watergate tapes show he knew nothing about any potentially illegal activities. Nixon’s lawyer listens to the tapes and urges Nixon to disclose its contents “in the national interest.” Nixon refuses and tells the press that he will not disclose anything about them because of his “duty to protect the presidency.”

13. A car manufacturer knows that the placement of the gas tank on its compact car will cause the vehicle to burst into flames in 5% of rear end collisions. Its accountants determine that moving the gas tank will cost more than the company would have to pay in tort liability for injuries caused by the car’s design. The company’s attorney concludes that the company would not violate any criminal statute by continuing to produce the car, but nevertheless urges recall and redesign of the “defect.” The company declines.

14. A lawyer represents a minister who regularly appears and solicits contributions on television and collects millions of dollars of contributions

annually. The lawyer learns that the client plans to embezzle and ultimately abscond with the money. The lawyer's functions do not include assisting the client in the wrongdoing.

15. A lawyer advises a client that she has not satisfied a two-year residence requirement for filing for divorce within the jurisdiction. He later learns that she has filed for divorce, using another attorney, and has falsely sworn that she has resided in the jurisdiction for two years.

FOOTNOTES (converted to endnotes):

n1 Zacharias, Flowcharting the First Amendment, 72 *Cornell L. Rev.* 936, 946-49, 951 (1987) and authorities cited therein.

n2 See generally Post, The Management of Speech: Discretion and Rights, 1984 *Sup. Ct. Rev.* 169, and authorities cited therein.

n3 For example, the importance of state interests and how well a speech regulation serves those interests.

n4 Zacharias, Rethinking Confidentiality, 74 *Iowa L. Rev.* 351, 379-97 (1989).

n5 Attorney-client confidentiality has existed long enough that judges may have internalized and, therefore, feel favorably inclined towards the rules. However, codes of professional conduct have evolved into their current forms only in the last century. See C. Wolfram, *Modern Legal Ethics* § § 2.3, 2.6.2-.3 (1986) (describing history of codes); Patterson, *Legal Ethics and the Lawyer's Duty of Loyalty*, 29 *Emory L.J.* 909, 914-15, 941 (1980) ("confidentiality as an ethical duty . . . made its first appearance in the Alabama Code [of Ethics]" in 1887). Strict rules of the type discussed here are of relatively recent origin. See Patterson, *supra*, at 946 (ABA's rejection of DR 7-102(B)(1), requiring lawyer to reveal clients' fraud and development of duty of confidentiality for the first time enabled "the lawyer to reject responsibility for nondisclosure"). See also L. Patterson, *Legal Ethics: The Law of Professional Responsibility* § 1.02 (2d ed. 1984) (describing history of United States ethical standards dating back to 1836). Even today, they are not uniformly recognized. See Zacharias, *supra* note 4,

at 352 and authorities cited at n.5. Thus, a court could not uphold the constitutionality of professional codes based on historical reasoning. Cf. *Marsh v. Chambers*, 463 U.S. 783 (1983) (upholding legislative prayer because practice existed at time first amendment framed).

n6 Professor Ewald notes a similar need for empirical evidence regarding lawyer advertising and solicitation rules. Ewald, *Content Regulation of Lawyer Advertising: An Era of Change*, 3 *Geo. J. Leg. Ethics* 429, 452 (1990). She notes a difficulty: "in jurisdictions where [regulated] conduct has been prohibited historically, there is no empirical evidence to support the state's assertion that particular conduct is misleading or susceptible to other substantial risks." *Id.* Nevertheless, as with the confidentiality provisions discussed here, Ewald concludes that "if the Court's treatment of lawyer advertising continues on its present course, states had better be prepared to demonstrate that the asserted risks truly exist and that regulations are narrowly tailored to advance the state's interest." *Id.*

n7 Twenty-two years ago, Harry Kalven described legal scholars' skeptical attitude toward empiricism. H. Kalven, Jr., *The Quest for the Middle Range: Empirical Inquiry and Legal Policy in Law in a Changing America* 56, 58 (G. Hazard, Jr., ed. 1968). As Professor Kalven noted, "a considerable number of legal premises do not need professional empirical buttressing and the legal system need not be irrational in declining the invitation to research them seriously." *Id.* at 67. In contrast, however, Kalven pointed to "a middle range of cases where the premises are not that unshakable" and where "it is nonsense to say that better documentation of fact cannot ever be relevant to law." *Id.* This Article illustrates Kalven's point.

n8 See C. Wolfram, *supra* note 5, at § § 2.2.1-.4, 3.2-.3 (discussing various ways lawyer codes are adopted and enforced).

n9 New York State Bar Ass'n, *The Lawyer's Code of Professional Responsibility* DR 4-101, reprinted in *N.Y. Judiciary Law* § 29, app. at 432 (McKinney 1975). Unlike the ABA codes, the New York rules do not authorize lawyers to disclose client confidences to prevent frauds. Compare *id.* DR 7-103(B)(1) (authorizing disclosure after fraud is perpetrated) with American Bar Ass'n, *Model Rules of Professional Conduct* Rule 3.3 (1987) [hereinafter *Model Rules*] (requiring disclosure of facts necessary to avoid assisting criminal or fraudulent act by client), and American Bar Ass'n, *Model Code of Professional Responsibility* DR 7-102(B) (1969) [hereinafter

Model Code] (authorizing disclosure of client fraud if such information is not privileged communication). On the other hand, the New York “future crime exception” is broader than that contained in Model Rule 1.6(b)(1) (limiting exception to dangerous crimes). These and other confidentiality rules are discussed in Zacharias, *supra* note 4, at 352-53 n.5.

n10 Criminal defendants may have constitutional interests in strict confidentiality. *See generally* Zacharias, *supra* note 4, and authorities cited at 357 n.26. The sixth amendment assures criminal defendants effective counsel and, thus, perhaps some degree of confidentiality. *See* Brazil, Unanticipated Client Perjury and the Collision of Rules of Ethics, Evidence, Constitutional Law, 44 *Mo. L. Rev.* 601, 623-24 (1979); Seidelson, The Attorney-Client Privilege and the Client’s Constitutional Rights, 6 *Hofstra L. Rev.* 693, 707-09 (1978); Subin, The Lawyer as Superego: Disclosure of Client Confidences to Prevent Harm, 70 *Iowa L. Rev.* 1091, 1127-34 (1985), and authorities cited therein. The privilege against self-incrimination prohibits government actions that require criminal defendants or their attorneys to provide evidence. *See* C. Whitebread, Criminal Procedure § 14.02 at 257 (1980) (fifth amendment extends to attorneys in order to encourage lawyer-client communications); Subin, *supra*, at 1091, 1119-27 and authorities cited therein. Commentators advocating strict confidentiality have also relied on the right to privacy, *see*, for example, Note, The Attorney-Client Privilege: Fixed Rules, Balancing and Constitutional Entitlement, 91 *Harv. L. Rev.* 464, 483-84 (1977) [hereinafter Note, The Attorney-Client Privilege], and a combination of the fifth and sixth amendments. *See id.* 485-86; Note, Functional Overlap Between the Lawyer and Other Professionals: Its Implications for the Privileged Communications Doctrine, 71 *Yale L.J.* 1226, 1236-37 (1962).

n11 Zacharias, *supra* note 4, at 390-92, discusses why the New York rule would forbid disclosure in most of the hypotheticals in the Appendix.

n12 *See id.* at 408.

n13 One third of the 62 lawyers responding to the Tompkins County study claimed to have asserted attorney-client confidentiality when they “personally believed that [they] should, as a good citizen, [have been] required to make information public.” A higher percentage, 44.2%, had “wanted to disclose a client confidence to a governmental agency, the press or an adversary, but refrained because of the [Model Code].” Moral reasons and

protecting “public health and safety” prompted much of the desire to disclose. *Id.* at 381-82.

n14 The only judicial comment on the relationship between the first amendment and confidentiality is Justice Stewart’s offhand observation in *In re Sawyer*, 360 *U.S.* 622, 647 (1959) (Stewart, J., concurring): “I doubt that a physician who broadcast the confidential disclosures of his patient could rely on the constitutional right of free speech to protect him from professional discipline.”

n15 *See In re Primus*, 436 *U.S.* 412, 432-35 (1978); *Bates v. State Bar of Arizona*, 433 *U.S.* 350, 379-82 (1977).

n16 Indeed, the Court has struck down such regulations almost as a matter of course. *See, e.g., Supreme Court of New Hampshire v. Piper*, 470 *U.S.* 274, 288 (1985) (privileges and immunities); *In re Primus*, 436 *U.S.* 412, 426 (1978) (political expression and association); *Bates v. State Bar of Arizona*, 433 *U.S.* 350, 383-84 (1977) (commercial speech). The trend is likely to continue. *See Nix v. Whiteside*, 475 *U.S.* 157, 174-76 (1986) (recognizing lawyers’ legal interest in avoiding participation in a client’s perjury, but couching decision in terms of society’s right to prevent misconduct).

n17 At first glance one might consider the issue a strawman; if a case like the hypotheticals arose, disciplinary authorities might decline to prosecute the code violation. Quite apart from the speculative character of this objection, it is important to note that a strict confidentiality rule implicates the first amendment regardless of whether the bar enforces the rule. The rule’s mere existence will prevent most lawyers from speaking out in cases like the hypotheticals. Thus, a court would probably entertain a prospective challenge to the rule unless the defending bar association agrees, *de facto*, to amend its code.

n18 *See infra* text accompanying notes 219-27.

n19 *See generally* the articles collected in D. Luban, *The Good Lawyer* (1984) and Gordon, *The Independence of Lawyers*, 68 *B.U.L. Rev.* 1, 26-30 (1988), which express the view that lawyers inevitably exercise political judgments and which discuss levels of possible attorney independence.

n20 Cataloguing modern professional responsibility scholarship, Professor Leubsdorf identifies two recent “models” that recast the lawyer’s role in this direction. The “public utility” model views lawyers as serving a quasi-governmental function; every lawyer is “a public figure who stands in the center of a web of effects and, therefore, a web of duties.” See Leubsdorf, Three Models of Professional Reform, 67 *Cornell L. Rev.* 1021, 1043 (1982). This model would subject lawyers to substantial regulation in the public interest. *Id.* at 1037. Contrary to a hired gun orientation, such regulation may not focus exclusively on clients’ desires. It must take into account societal and third party interests that clients and their representatives might harm. *Id.* at 1038. Professor Leubsdorf sees as one of the model’s strengths “its tendency to promote the reshaping of the economic and political context in which lawyers operate.” *Id.* at 1044.

The “personal responsibility model” takes an individualistic approach even more in tune with this Article’s view of the lawyer’s role. It requires lawyers to think about and “justify their behavior morally and socially without relying on a [fixed] code applicable only to lawyers.” *Id.* at 1045. It shares with the “public utility model” the view that lawyers should not be allowed to ignore their own responsibilities as moral and political actors in society.

n21 See Zacharias, *supra* note 4, at 376.

n22 For discussions of “categorization” in first amendment analysis, see generally, Ely, Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis, 88 *Harv. L. Rev.* 1482, 1496-1502 (1975); Scanlon, Freedom of Expression and Categories of Expression, 40 *U. Pitt. L. Rev.* 519, 537-50 (1979); Schauer, Categories and the First Amendment: A Play in Three Acts, 34 *Vand. L. Rev.* 265, 305 (1981); Schlag, An Attack on Categorical Approaches to Freedom of Speech, 30 *UCLA L. Rev.* 671, 706-31 (1983) (criticizing “categorical” approach) and authorities cited at n.1; *cf.* *Miller v. California*, 413 U.S. 15, 23-30 (1973) (obscenity); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-74 (1942) (fighting words).

n23 *Cf.* Gordon, *supra* note 19, at 13-16 (discussing historical vision of lawyering as “public profession”).

In considering equal protection and due process claims, courts have traditionally evaluated regulations of commercial/professional conduct under

a rationality analysis. See, e.g., *Schwartz v. Board of Bar Examiners*, 353 U.S. 232, 239 (1957) (bar requirement of “good moral character”); *Williamson v. Lee Optical Co.*, 348 U.S. 483, 490-91 (1955) (regulation of optical professions). *Cf. also* *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949) (“it has never been deemed an infringement of freedom of speech . . . to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed”). Some lower courts, without analysis, have concluded similarly that lawyers have lesser first amendment rights across the board. See, e.g., *In re Riley*, 142 *Ariz.* 604, 612, 691 P.2d 695, 703 (1984); *In re Frerichs*, 238 N.W.2d 764, 768 (*Iowa* 1976); *State v. Nelson*, 210 *Kan.* 637, 640, 504 P.2d 211, 214 (1972); *Kentucky Bar Ass’n v. Heleringer*, 602 S.W.2d 165, 168-69 (1980), cert. denied, 449 U.S. 1101 (1981); *In re Raggio*, 87 *Nev.* 369, 372, 487 P.2d 499-501 (1971); *In re Lacey*, 283 N.W.2d 250, 252 (S.D. 1979); *In re Gorsuch*, 76 S.D. 191, 198, 75 N.W.2d 644 (1956). The decisions, aside from being intuitively wrong, seem inconsistent with the holding of *In re Primus*, 436 U.S. 412, 434-45 (1978) (first amendment protects attorneys’ political expression).

n24 The Court has safeguarded the constitutional rights even of those groups society generally disfavors. The reasons to strip government employees and prison inmates of constitutional protections are, for example, far more compelling than the parallel rationale in the lawyer context. Federal, state and municipal employers have a right to demand loyalty from their employees in the exercise of speech rights. Employee expression can undermine the very government operation which the employee has been hired to further. See *Connick v. Myers*, 461 U.S. 138, 151-52 (1983) (survey circulated to coworkers undermines office moral); *Givhan v. Western Line Consol. School Dist.*, 439 U.S. 410, 415 n.4 (1979) (discussing effect on office operations of employee’s private communications with employer); *Derrickson v. Board of Educ.*, 738 F.2d 351, 352-353 (8th Cir. 1984) (discussing interrelationship between employee first amendment activity and inability to work in conciliatory manner); *Adamian v. Lombardi*, 608 F.2d 1224, 1226-28 (9th Cir. 1979) (discussing effect of professor’s participation in unauthorized student protest activities on professor’s duties), cert. denied, 446 U.S. 938 (1980). Free expression by prisoners may interfere with institutional procedures and discipline.

Nevertheless, the Supreme Court has emphasized the primacy of both

employees' and inmates' constitutional rights. In the public employee speech area, see, for instance, *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 283-84 (1977); *Pickering v. Board of Educ.*, 391 U.S. 563, 574 (1968). For prison cases, see *Baxter v. Palmigiano*, 425 U.S. 308 (1976) (right against self-incrimination); *Wolff v. McDonnell*, 418 U.S. 539, 557 (1974) (rudimentary due process); *Procunier v. Martinez*, 416 U.S. 396, 413-14 (1974) (expression). *But see Turner v. Satley*, 482 U.S. 78, 89 (1987) (first amendment regulation may be tested by lesser standard than outside prison context); *O'Lone v. Estate of Shabazz*, 482 U.S. 342, 350 (1987) (same for religion regulation); *Bell v. Wolfish*, 441 U.S. 520, 547-48 (1979) (burden rests upon inmates to prove prison's administrative concerns exaggerated).

n25 In *In re Primus*, 436 U.S. 412, 437-38 (1978), the Supreme Court applied the same strict judicial scrutiny to restrictions on attorneys' political activities as to regulation of laypersons' expression. The identical analysis was applied in *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 637-38 (1985) (upholding lawyers' constitutional right to engage in some advertising activities); *In re R.M.J.*, 455 U.S. 191, 203 (1982) (same); and *Bates v. State Bar of Arizona*, 433 U.S. 350, 381-82 (1977) (same).

n26 See, e.g., *Schwartz v. Board of Bar Examiners*, 353 U.S. 232, 239 (1957).

n27 Cf. Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 *Nw. U.L. Rev.* 1212, 1265-67 (1984) (noting how securities laws directly circumscribe what business employees may say).

n28 *Lowe v. SEC*, 472 U.S. 181, 230 (1985) (White, J., concurring) (discussing when and how first amendment standards apply to professional regulations).

n29 See generally French, *Unconstitutional Conditions: An Analysis*, 50 *Geo. L.J.* 234 (1961); Hale, *Unconstitutional Conditions and Constitutional Rights*, 35 *Colum. L. Rev.* 321 (1935); Comment, *Another Look at Unconstitutional Conditions*, 117 *U. Pa. L. Rev.* 144 (1968).

n30 See, e.g., *Sherbert v. Verner*, 374 U.S. 398 (1963) (exercise of religion); *Speiser v. Randall*, 357 U.S. 513 (1958) (speech). See also

Simson, Abortion, Poverty and the Equal Protection of the Laws, 13 *Ga. L. Rev.* 505, 509-510 (1979) (discussing Supreme Court's treatment of free speech, freedom of religion and freedom from self-incrimination) and authorities at 509 n.24.

n31 See Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 *U. Pa. L. Rev.* 1293, 1387-90 (1984) (discussing nonwaivable and inalienable rights); Sullivan, *Unconstitutional Conditions*, 102 *Harv. L. Rev.* 1415, 1479-86 (1989) (discussing problems of distinguishing some constitutional rights as "inalienable" for purposes of the unconstitutional conditions doctrine); Sullivan, *Unconstitutional Conditions and the Distribution of Liberty*, 26 *San Diego L. Rev.* 327, 330-31 (1989). The public's reciprocal right to receive information might also make it difficult for a court to conclude that lawyers have the power to waive their freedom.

n32 See Kreimer, *supra* note 31, at 1347-51 (morass of decisions suggest the Court's analysis has become an "eclectic balancing" approach).

n33 *Thomas v. Collins*, 323 U.S. 516 (1945), specifically rejects the notion that the economic or professional attributes of expression alone can deprive the speaker of first amendment protection. In *Thomas*, Texas prevented a union organizer from speaking to an assembly on the grounds that he had not complied with state registration requirements. The Court held that expression stemming from or furthering a business activity nonetheless fits within the first amendment's scope:

The idea is not sound therefore that the First Amendment's safeguards are wholly inapplicable to business or economic activity. And it does not resolve where the line shall be drawn in a particular case merely to urge . . . that an organization for which the rights of free speech are claimed is one "engaged in business activities" or that the individual who leads it in exercising these rights receives compensation for doing so. *Id.* at 531.

n34 See generally Sunstein, *Is There an Unconstitutional Conditions Doctrine?*, 26 *San Diego L. Rev.* 337-38, 344 (1989) (illustrating crude nature of unconstitutional conditions doctrine and noting that, without further development, the doctrine "cannot . . . do much of the work expected of it").

n35 458 U.S. 747 (1982).

n36 *Id.* at 756-57.

n37 *Id.* at 761-62.

n38 *Id.* at 762-63.

n39 *Id.* at 763-64. The Court has taken a similar categorization approach in some areas of libel law. Defamation of private persons on private subject matters may well have some first amendment value. At the very least, it may further the speaker's interest in self-expression. See *infra* text accompanying notes 85-89. Yet in this context, the Court has adopted a hands-off constitutional approach. For the most part, it has deferred to state courts and legislatures in defining their own private libel rules. See, e.g., *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 347 (1974) ("So long as they do not impose liability without fault, the states may define for themselves the appropriate standard for publisher or broadcaster of defamatory falsehood injurious to a private individual.").

n40 The argument is undercut by the existence of some exceptions, not all of which are entirely clear. See Zacharias, *supra* note 4, at 365.

n41 See, e.g., *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982).

n42 As Justice White noted, "[t]here are . . . limits on the category of child pornography which . . . is unprotected by the first amendment. . . . [T]he conduct to be prohibited must be adequately defined by the applicable state law." *Ferber*, 458 U.S. at 764.

n43 *Id.* at 757-758.

n44 See *Peel v. Attorney Registration & Disciplinary Comm'n*, 110 S. Ct. 2281, 2283 (1990) (Consumers of legal services "understand" minimal significance of "specialist certifications" by private organizations.).

n45 See, e.g., *id.* at 2290 ("We reject the paternalistic assumption that [clients and potential clients] are no more discriminating than the audience for children's television."). *Virginia State Bd. of Pharmacy v. Virginia*

Citizens Consumer Council, 425 U.S. 748, 770 (1976) (rejecting claim that advertising regulation is necessary to prevent consumers from being misled as "paternalistic").

n46 See *Bates v. State Bar of Arizona*, 433 U.S. 350, 384 (1977); cf. *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 781, 791-92 (1975) (striking down bar's fee schedule justified on consumer protection grounds). The question of the court's deference to the bar -- or lack thereof -- is discussed *infra* at text accompanying notes 134-39.

n47 See *infra* text accompanying notes 172-84.

n48 Zacharias, *supra* note 4, at 381-82 (reflecting responses of 37.7% of attorneys surveyed in Tompkins County).

n49 486 U.S. 466 (1988).

n50 *Id.* at 470-72.

n51 *Id.* at 477-78.

n52 *Id.* at 471.

n53 See *Peel v. Attorney Registration & Disciplinary Comm'n of Illinois*, 110 S. Ct. 2281, 2292 (1990) (rejecting blanket ban on potentially misleading specialization claims by lawyers on grounds that "[t]here has been no showing . . . bar associations and official disciplinary committees cannot police deceptive practices effectively").

n54 *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 781, 789 (1986) (Rehnquist, J., dissenting) (discussing pharmacist advertising).

The Supreme Court has not shied from addressing this conflict of values. Most recently, in *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 29-38 (1984), the Court considered a federal rule authorizing trial judges to forbid public disclosure of information produced in discovery. Intuitively, there was much appeal to the argument that information forcibly extracted from a party should not be considered in the public (first amendment) domain. Indeed, such material seems more private than information a client gives to a lawyer

voluntarily. Yet the Court resisted the temptation to hold that the category of forcibly disclosed information was exempt from first amendment principles. Instead, it recognized the tension between the speech interest and society's interest in protective orders and attempted to strike a balance consistent with traditional first amendment doctrine.

n55 See *Zacharias*, supra note 1, at 949-57 (1987) and authorities cited therein. There is, of course, no theoretical reason why one could not decide all first amendment cases, or at least large categories of first amendment cases, according to one generally applicable balancing standard. The courts, however, have chosen not to do so. See *id.* 957-63.

n56 *Consolidated Edison Co. of N.Y., Inc. v. Public Serv. Comm'n*, 447 U.S. 530, 540 (1980) (citations omitted); accord *First Nat'l Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978). In situations involving advocacy of action, the Court applies the equally strict, but differently worded, clear and present danger standard. See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam) (a state may only forbid advocacy "directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action" (citations omitted)).

n57 See *In re Primus*, 436 U.S. 412, 434 n. 27 (1978) (lawyer's political expression/association receives full measure of first amendment protection).

n58 Different first amendment standards apply where regulation of expression is "indirect." See *Wayte v. United States*, 470 U.S. 598, 611 (1985) (citing and applying *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968)).

n59 The Court traditionally has subjected government regulations that single out particular speech to the strictest of first amendment standards. See, e.g., *Carey v. Brown*, 447 U.S. 455, 459-63 (1980); *Erznoznick v. City of Jacksonville*, 422 U.S. 205, 211-12 (1975). Restrictions that do not explicitly mention speech content are subject to less stringent "balancing" tests. See *United States Postal Serv. v. Greenburgh Civic Associations*, 453 U.S. 114, 132 (1981) (place and manner restriction); *Heffron v. International Soc'y for Krishna Consciousness, Inc.*, 452 U.S. 640, 654 (1981) (same). See generally Emerson, First Amendment Doctrine and the Burger Court, 68 *Calif. L. Rev.* 422 (1980) (arguing that balancing analysis

undermines first amendment values); Farber, Content Regulation and the First Amendment: A Revisionist View, 68 *Geo. L.J.* 727 (1980) (discussing inconsistent application of strict scrutiny analysis); Stephan, The First Amendment and Content Discrimination, 68 *Va. L. Rev.* 203 (1982); Stone, Content Regulation and the First Amendment, 25 *Wm. & Mary L. Rev.* 189 (1983) (illustrating merits and limitations of content distinction); cf. Stone, Restrictions of Speech Because of Its Content: The Peculiar Case of Subject-Matter Restrictions, 46 *U. Chi. L. Rev.* 81 (1978) (describing puzzling results of the content distinction). Because confidentiality provisions focus on lawyer speech, they are "content-based" and thus subject to strict scrutiny.

n60 The court has, of course, applied a reduced level of protection to specific categories of speech, such as commercial speech. See *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 637 (1985) (White, J., plurality opinion) (commercial speech receives "less extensive" protection than ordinary speech); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 64-65 (1983) (same). But strict confidentiality rules do not limit themselves to attorney disclosures that "[relate] solely to the economic interests of the speaker and [his or her] audience." *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 561 (1980) (citations omitted). Nor do the rules simply regulate the "time, place and manner" of attorney speech. See *Heffron*, 452 U.S. at 647.

n61 See, e.g., *Hirschkop v. Snead*, 594 F.2d 356, 363, 371 (4th Cir. 1979) (per curiam) (upholding restriction of lawyer's speech as furthering state's interest in a fair trial); *Keller v. State Bar*, 181 *Cal.App.3d* 471, 226 *Cal. Rptr.* 448, 460, 467 (1986), reh'g granted, 190 *Cal.App.3d* 1196, 723 *P.2d* 1 (1987) (relying on state's interest in maintaining the judicial process), rev'd, 47 *Cal.3d* 1152, 767 *P.2d* 1020, 255 *Cal. Rptr.* 542 (1989), rev'd and remanded, 110 *S. Ct.* 2228 (1990). *State v. Russell*, 227 *Kan.* 897, 900-01, 610 *P.2d* 1122, 1126 (upholding "incidental limits" on exercise of speech based on state's interest in the administration of justice), cert. denied, *Russell v. Kansas*, 449 U.S. 983 (1980); *In re Donohoe*, 90 *Wash.2d* 173, 180-81, 580 *P.2d* 1093, 1097 (1978) (protecting dignity of judicial institutions justifies prohibition of false criticisms). Cf. *Doe v. Florida Supreme Court*, 734 *F. Supp.* 981 (1990) (striking down rule requiring complainants to maintain confidentiality of matters relating to bar grievances).

n62 To the extent these business communications constitute “commercial speech,” different first amendment standards apply. *See Central Hudson*, 447 U.S. at 561 (defining commercial speech). Moreover, the Court has already recognized that even if such speech does not involve matters of public concern, states have some leeway to regulate. *See Dun & Bradstreet, Inc. v. Greenmoss, Inc.*, 472 U.S. 749, 755-61 (1985) (Powell, J., plurality opinion) (authorizing state regulation of business communications of a “private” character). Courts may also be able to draw a distinction -- already evident in the commercial speech context -- between requiring disclosure of truthful information and forbidding speech altogether. *See Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 771 (1976) (“untruthful speech, commercial or otherwise, has never been protected for its own sake”).

n63 *See* Shiffrin, *supra* note 27, at 1264 n.312. As discussed below, the Supreme Court has already considered some types of occupational licensing and has concluded that sometimes strict scrutiny should apply. The Court has declared that the applicable test varies from case to case.

n64 The Supreme Court recently reviewed the constitutionality of one broad grand jury secrecy law. *Butterworth v. Smith*, 110 S. Ct. 1376 (1990). Consistent with this article’s analysis, the Court directly confronted the core speech issues; it did not embrace a categorical approach to exclude grand jury information from the first amendment’s scope.

The *Butterworth* decision is unclear as to the legal standard the Court applied. Its test appears to be slightly less demanding than traditional strict scrutiny. The Court rejected some asserted governmental interests as not “substantial” and others as not being directly “advanced” or “sufficiently served” by the law in question. *Id.* at 1377.

n65 In some of these examples, courts may be able to determine easily that the state interest in secrecy is more compelling than in the attorney-client confidentiality context. Other secrecy rules may be able to withstand constitutional challenge because they take into account the speakers’ potential interest in discussing matters of public concern. *See* *infra* text accompanying notes 217-30. For example, most standards for confidentiality of nonlegal professionals and agents include disclosure exceptions that shield them from attack. *See* Zacharias, *supra* note 4, at 362.

n66 It is important to recognize that some regulations of lawyer speech can survive even strict scrutiny. For example, an ethical requirement that lawyers disclose client perjury or fraud upon the court is easily justified as the only means of preventing abuse of the judicial system. Similarly, a court may find that a state’s interest in regulating speech to prevent conflicts of interest is more compelling than the interests underlying strict confidentiality. Likewise, when states regulate lawyer publications, they enforce clients’ privacy and commercial interests in their own biographies. As the clients’ agents, lawyers arguably owe a contractual duty to let the clients make their own commercial arrangements.

n67 461 U.S. 138 (1983).

n68 The analogy to the lawyer-client context is obvious, for lawyers are clients’ employees. The interplay between employees’ traditional duty of loyalty and the constitutional standards governing employee speech rights is discussed *infra* at text accompanying notes 98-103.

n69 *Connick*, 461 U.S. at 147-48; *accord Rankin v. McPherson*, 483 U.S. 378 (1987).

n70 *Connick*, 461 U.S. at 150.

n71 Shiffrin, *supra* note 27, at 1251-52 (the Court “has balanced the impact of challenged regulations on first amendment values against the seriousness of the evil that the state seeks to mitigate or prevent, the extent to which the regulation advances the state’s interest, and the extent to which the interest might have been furthered by less intrusive means”). *See also* Zacharias, *supra* note 4 (proposing model for comprehensive balancing).

n72 *See FCC v. Pacifica Found.*, 438 U.S. 726, 746-48 (1978) (Stevens, J., plurality) (indecent language); *Young v. American Mini Theatres, Inc.* 427 U.S. 50, 61 (1976) (Stevens, J., plurality) (pornography).

The Court’s majority has generally been unwilling to rank types of protected expression. *See Pacifica Found.*, 438 U.S. at 761 (Powell, J., concurring); *American Mini Theatres*, 427 U.S. at 73 n.1 (Powell, J., concurring); *Erznoznick v. City of Jacksonville*, 422 U.S. 205, 209 (1975). But individual Justices seem implicitly to have followed the Stevens approach. *See, e.g., Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*,

472 U.S. 749, 758-59 (1985) (Powell, J., plurality) (“not all speech is of equal First Amendment importance. It is speech on ‘matters of public concern’ that is ‘at the heart of the First Amendment’s protection.’” (quoting *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978))); id. at 763-64 (Burger, J., concurring) (joining in Powell’s public/private distinction); id. at 765, 773-744 (White, J., concurring) (same). In applying a moderate balancing standard to a regulation of pornographic films in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 49 (1986), Justice Rehnquist denied speech content was relevant. But it clearly played a role in the Court’s decision. Justice Rehnquist’s reasoning could not have upheld an ordinance regulating movies the Court deemed deserving of full first amendment protection.

n73 See also Sunstein, Pornography and the First Amendment, 1986 *Duke L.J.* 589 (arguing that pornography regulation should be permitted because of pornography’s “low value”). Cf. Alexander, Low Value Speech, 83 *Nw. U.L. Rev.* 547 (1989) (criticizing notion of distinguishing speech based on value).

Justice Stevens would afford “valueless” expression no first amendment protection. But he is vague on the standard he would apply to speech deserving some, but less than full, protection. In *Pacifica Found.*, Justice Stevens notes that evaluating regulations of indecent broadcasts “requires consideration of a host of variables.” 438 U.S. at 750. The opinion refers to the uniqueness of the forum of the speech, the availability of alternative fora, and the nature of the governmental interests in regulating. *Id.* at 748-50. Nowhere does Justice Stevens specify how to weigh these factors. All we can conclude is that, in order to regulate speech of lesser value, the government need not show a narrowly tailored “compelling state interest.” Cf. *American Mini Theatres*, 427 U.S. at 71 (Stevens, J., plurality opinion) (state interests in regulating erotic movies “must be accorded high respect”).

n74 In theory, a court might mistakenly focus on a wholly separate discourse, by a different speaker; that is, the initial communication between client and attorney. It could then analogize the information the client passes to his or her attorney to the credit information disclosed in *Dun & Bradstreet*. It is “speech solely in the individual interest of the speaker [the client] and its specific business audience [the attorney].” 472 U.S. at 762. It is by definition “private.” Moreover, because it arises through the semi-commercial lawyer-client relationship, it seems to possess none of the characteristics

we normally attribute to expression higher in the first amendment hierarchy: political speech, see, e.g., A. Meiklejohn, *Political Freedom* (1965), BeVier, *The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle*, 30 *Stan. L. Rev.* 299, 300 (1978), Bork, *Neutral Principles and Some First Amendment Problems*, 47 *Ind. L.J.* 1, 20 (1971), and speech furthering individual growth and self-expression. See, e.g., Baker, *The Process of Change and the Liberty Theory of the First Amendment*, 55 *S. Cal. L. Rev.* 293, 332 (1982); Baker, *Scope of the First Amendment Freedom of Speech*, 25 *UCLA L. Rev.* 964, 997 (1978) [hereinafter Baker, *Scope of the First Amendment*].

n75 See, e.g., *Pacifica Found.* 438 U.S. at 746-48 (Stevens, J., plurality). See also Quadres, *Content-Neutral Public Forum Regulations: The Rise of the Aesthetic Interest, the Fall of Judicial Scrutiny*, 37 *Hastings L.J.* 439, 441-42 (1986). See generally Bork, supra note 74, at 21-35; Meiklejohn, *The First Amendment is an Absolute*, 1961 *Sup. Ct. Rev.* 245.

n76 As in hypotheticals (4) and (13) in the Appendix.

n77 *Connick v. Myers*, 461 U.S. 138, 154 (1983).

n78 See, e.g., *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 284 (1977) (teacher’s comments upon matters of public concern protected); *Pickering v. Board of Educ.*, 391 U.S. 563, 574 (1968) (“statements by public officials on matters of public concern must be accorded First Amendment protection”).

n79 For example, neither the lawyer nor client has any legal obligation to exonerate a falsely accused defendant (hypothetical (2)) or to assist a fatally ill adversary (hypothetical (3)). The desire to help by speaking out stems solely from the sense that doing so is morally “right.”

n80 See *Callaway v. Hafeman*, 832 F.2d 414, 416 (7th Cir. 1987) (“The correlation implicit in premising free speech on the need for promoting social and political change, however, is that speech that does not have such concerns as its goal will be afforded less protection. . .”).

n81 See the Appendix, hypotheticals (1)-(5). See also *People v. Fentress*, 103 Misc. 2d 179, 425 N.Y.S.2d 485 (*Dutchess Cty. Ct.* 1980) (addressing extent of attorney-client privilege in criminal cases).

n82 Cf. *Abod v. Detroit Bd. of Educ.*, 431 U.S. 209, 231 (1977) (“our cases have never suggested that expression about philosophical, *social*, artistic, economic, literary, or *ethical* matters . . . is not entitled to full First Amendment protection.”) (emphasis added). In proposing first amendment protection against libel regulation for all “public speech,” Professor Meiklejohn suggests “[t]he crucial consideration is the assertion’s relevance to the formation of public opinion.” Meiklejohn, *Public Speech and Libel Litigation: Are They Compatible?*, 14 *Hofstra L. Rev.* 547, 556 (1986). He acknowledges, however, that this dividing line may sometimes be difficult to find. *Id.*

n83 See hypotheticals (6) through (9) in the Appendix. The lawyer’s ethical *obligation* to act in these circumstances has, however, been hotly debated. See D. Luban, *supra* note 19, 13-14 (describing the “political explosion both in the bar and in the national press” over proposed model rules on confidentiality) and authorities cited therein; 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 (1986) (“the legal profession has been engaging in an intense and sometimes acrimonious debate over the limits of the attorney’s ethical duty of confidentiality . . .”). See also ABA/BNA, *Lawyer’s Manual On Professional Conduct* § 55:901, at 106 (critics of greater disclosure argue it turns the attorney into a watchman or policeman, while proponents argue for more clarity in allowable disclosure); Redlich, *Disclosure Provisions of the Model Rules of Professional Conduct*, 1980 *Am. B. Found. Res. J.* 981, 991 (arguing that too much disclosure results in any benefits being outweighed by the harm to the lawyer-client relationship); Subin, *supra* note 10, at 1152 (noting that public may actually be better protected by more disclosures, and the client might be more fully deterred from intended illegal acts if confidences may be divulged).

n84 Indeed, in some jurisdictions lawyers may become civilly liable for failing to report client dangerousness. See *Hawkins v. King County*, 24 *Wash. App.* 338, 343, 602 P.2d 361, 365 (1979) (lawyer may have tort duty to warn potential victim). Cf. *Tarasoff v. Regents of Univ. of Cal.*, 17 *Cal.3d* 425, 441-42, 551 P.2d 334, 347, 131 *Cal. Rptr* 14, 27 (1976) (imposing duty on psychiatrists).

n85 See *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 783 (1985) (Brennan, J., dissenting); *Carey v. Brown*, 447 U.S. 455, 459-63 (1980); *First Nat’l Bank of Boston v. Belotti*, 435 U.S. 765, 804-05 (1978) (White, J., dissenting); *Police Dep’t of Chicago v. Mosley*,

408 U.S. 92 (1972). See also L. Tribe, *American Constitutional Law* 577 (1978); Baker, *Commercial Speech: A Problem in the Theory of Freedom*, 62 *Iowa L. Rev.* 1, 6-7 (1976); Baker, *Scope of the First Amendment*, *supra* note 74 at 977; Bollinger, *Free Speech and Intellectual Values*, 92 *Yale L.J.* 438, 454-55 (1983); Redish, *The Value of Free Speech*, 130 *U. Pa. L. Rev.* 591, 593 (1982).

n86 Cf. *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n*, 447 U.S. 557, 561-63 (1980) (defining commercial speech as “expression related solely to the economic interests of the speaker and its audience” and according it lesser first amendment protection). In *Ohralik v. State Bar Ass’n*, 436 U.S. 447 (1978), for example, the Court rejected a lawyer’s claim that sanctions for soliciting clients violated his first amendment rights *per se*. *Id.* at 455. The Court concluded that such commercial speech fell “within the State’s proper sphere of economic and professional regulation.” *Id.* at 459. See also *FTC v. Superior Court Trial Lawyer’s Ass’n*, 110 S. Ct. 768 (1990) (lawyer’s boycott lacks first amendment associational protections because of lawyers’ economic motives). The Court has had no trouble upholding commercial regulation that impinges on free speech in other contexts. See, e.g., *Posadas de Puerto Rico Assoc. v. Tourism Co.*, 478 U.S. 328, 346-48 (1986) (upholding restrictions of casino advertising in principle); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 650-53 (1985) (White, J., plurality opinion) (upholding requirement that advertising attorney make specific disclosures); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 64-68 (1983) (upholding regulation of informational pamphlets included in advertising mailing); *Central Hudson*, 447 U.S. at 562 n.5 (public speech may be regulated in commercial context); *Friedman v. Rogers*, 440 U.S. 1, 15-16 (1979) (upholding regulation of advertising that promotes quality of service provided). In *Ohralik*, however, the Court noted that if the lawyer’s speech had involved “political expression,” the Court could not have treated the claim so lightly. 436 U.S. at 458.

n87 Lawyers who clearly would feel tarnished in this way include the Jewish lawyer in hypothetical (10) of the Appendix who finds he has assisted the Nazi cause and the attorney in hypothetical (8) who senses that her case is based on illegally-suborned testimony.

n88 It is precisely this sense of guilt by association that has caused drafters of many codes to authorize disclosure when the lawyer has unknowingly participated in misconduct. See, e.g., *Model Rules, Rules 1.6(b)(2)*,

3.3(a)(4); ABA Comm'n on Evaluation of Professional Standards, Model Rules of Professional Conduct 44 (Proposed Final Draft 1981) and authorities cited therein. Interestingly, though, most of the codes' exceptions to confidentiality are not based on moral justifications. Instead, the drafters tend to rely on the fiction that the client who uses a lawyer to prepare for misconduct has not used the lawyer "in his professional capacity." Thus, the argument goes, the advice was obtained by fraud and the "professional" privilege against disclosure no longer applies. *See id.* at 44-45.

n89 Professor Eshete builds on Professor Wasserstroms's work and takes a detailed look at the moral/psychological toll performing within the adversarial system takes upon the individual attorney's character. Eshete, Does a Lawyer's Character Matter? ? in D. Luban, *supra* note 19, at 270.

n90 The Court has already rejected one invitation to characterize all attorney speech as warranting circumscribed first amendment protection. In *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), and *Ohralik v. Ohio State Bar*, 436 U.S. 447 (1978), it held that attorney advertising and solicitation deserve only limited constitutional protection. *See also Roberts v. United States Jaycees*, 468 U.S. 609, 631, 637 (1984) (O'Connor, J., concurring in part); *cf. Hishon v. King & Spalding*, 467 U.S. 69, 78 (1984) (although law firm partnership decisions "might be characterized as a form of exercising freedom of association protected by the First Amendment," discrimination laws apply). But *In re Primus* makes very clear that the *Bates/Ohralik* limited protection approach was based on the commercial nature of the particular speech in question rather than the profession of the speakers. 436 U.S. 412, 434, 437-40 (1978). *See also Jean v. Nelson*, 711 F.2d 1455, 1508-09 (11th Cir. 1983), *aff'd*, 427 U.S. 846 (1985).

n91 *See, e.g., Connick v. Myers*, 461 U.S. 138 (1983).

n92 In *Dun & Bradstreet v. Greenmoss Builders*, the Court specifically rejected the notion that its reasoning applied broadly to all credit reporting: "[t]he protection to be accorded a particular credit report depends on whether the report's 'content, form, and context' indicate that it concerns a public matter." 472 U.S. 749, 762, n.8 (1985) (Powell, J., plurality opinion).

n93 Shiffrin, *supra* note 27, at 1264-1270. Numerous other commentators, myself included, have suggested that the courts often do balance and should do so in a more systematic and comprehensive way. *See Zacharias*,

supra note 4, and authorities cited at nn. 97, 101.

n94 Shiffrin, *supra* note 27, at 1252.

n95 In general the Supreme Court has disavowed such a variable approach. *See, e.g., Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 769-71 (1976) (declining to vary protection of pharmacist advertising according to the danger that consumers might be misled). *See also* Shiffrin, *supra* note 27, at 1228-30 (noting unwillingness of courts and commentators to recognize that speech might deserve different protection depending on its context). The thrust of the first amendment case law has been to categorize, develop rules, and pronounce guidelines that restrict the Court's own freedom to make ad hoc decisions. *See Zacharias*, *supra* note 1, at 959-64. *See also id.* at 959-62 (discussing reasons for limiting courts' discretion to balance).

n96 *Compare In re Primus*, 436 U.S. 412 (1978) (lawyers associating for purpose of benefitting clients and political causes cloaked with first amendment protections) with *FTC v. Superior Court Trial Lawyers Ass'n*, 110 S. Ct. 768 (1990) (lawyers associating for purpose of benefitting themselves economically have no first amendment protection against antitrust regulation). It is important to distinguish a ruling that lawyers have lesser first amendment rights than other citizens from the more reasonable position that in particular contexts the interests of clients or the legal system outweigh lawyers' right to express themselves. Confidentiality rules are not, of course, the only code provisions that impose special speech-related responsibilities on lawyers. For example, as officers of the court, lawyers have long been required to report attorney wrongdoing or judicial misconduct. *See* Model Rules, Rule 8.3; Model Code, DR 1-103. Laypersons ordinarily have no duty to report. *See generally* Lynch, *The Lawyer as Informer*, 1986 *Duke L.J.* 491, 535-46 (arguing that lawyers should be treated more like laypersons).

n97 The courts have acknowledged that different first amendment standards may apply to individuals when they act as private citizens or in some other capacity. The Court has, for example, distinguished between the public employee speaking as employee or as private citizen. *See e.g., Pickering v. Board of Educ.*, 391 U.S. 563, 569-70 (1968) (school board may not interfere with expression of teacher speaking as a citizen on a matter of public concern). *See also Rankin v. McPherson*, 483 U.S. 378 (1987) (making public/private distinction); *Connick v. Myers*, 461 U.S.

138, 146 (1983) (if a public employee's expression cannot be considered as relating to a matter of public concern, the employer "should enjoy wide latitude in managing [its] offices"); *Givhan v. Western Line Consol. School Dist.*, 439 U.S. 410, 415-16 (1979) (the first amendment applies to employees speaking on issues of public concern, even if done privately with his employer). Similarly, courts have recognized that in some contexts commercial enterprises in the United States deserve the full protection of the first amendment, but in other contexts have lesser rights. See, e.g., *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950) (corporations do not have same privacy rights as individuals). Finally, courts have always tempered the freedom of fiduciaries in order to give due regard to client interests. See e.g., *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 355 (1985) (bankruptcy trustee); *United States v. Bane*, 583 F.2d 832, 834 (6th Cir. 1978) (the broadest possible fiduciary duty is imposed upon union officials and employees), cert. denied, 439 U.S. 1127 (1979); *Cinema 5, Ltd. v. Cinderama, Inc.*, 528 F.2d 1384, 1386 (2d Cir. 1976) ("a lawyer's duty to his client is that of a fiduciary"; as such the client is entitled to "undivided loyalty as its advocate and champion"); *Box v. Northrop Corp.*, 459 F. Supp. 540, 547 (S.D.N.Y. 1978) ("directors and majority shareholders stand as fiduciaries toward the corporation and the minority shareholders. . . . [T]hey may not pursue any narrow self-interest in dealing with the property of minority shareholders"), aff'd, 598 F.2d 609 (1979); *U.S. v. Podell*, 436 F. Supp. 1039, 1042 (S.D.N.Y. 1977) (public official), aff'd, 572 F.2d 31 (2d Cir. 1978).

n98 See supra text accompanying notes 67-71.

n99 467 U.S. 20 (1984). In *Rhinehart*, the Court declined to categorize court-ordered information outside the first amendment's scope. Instead the Court looked to whether "the practice in question [furthered] an important or substantial governmental interest unrelated to the suppression of expression." *Id.* at 32.

n100 444 U.S. 507, 510-511 (1980) (per curiam). The restriction at issue might have been constitutional under traditional first amendment analysis because of the government's "compelling" interest in maintaining the secrecy of covert operations. But the Court seemed to apply a far more deferential standard. *Id.* at 515-16.

Justice White's majority opinion in *Hazlewood School Dist. v. Kuhlmei-*

er, 484 U.S. 260 (1988) also appears to adopt a variable constitutional analysis. *Kuhlmeier* upheld a school's censorship of the student newspaper. The case's significance does not lie in the Court's application of a "lesser" first amendment test, for the Court has always treated schools distinctly. *Id.* at 266-67. See also, *Bethel School Dist. No. 403 v. Fraser*, 478 U.S. 675, 681 (1986); *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 506-07 (1969). *Kuhlmeier's* novelty rests on the Court's willingness to apply different first amendment standards *within* the school setting. It tested the newspaper censorship under a "reasonableness" standard, 484 U.S. at 267-70, while noting that in other contexts schools could limit student expression only when it would "substantially interfere with [their] work . . . or impinge upon the rights of other students." *Id.* at 271 (quoting *Tinker*, 393 U.S. at 509). See also Buss, School Newspapers, Public Forum and the First Amendment, 74 *Iowa L. Rev.* 505, 533 (1989).

n101 See, e.g., K. Kipness, Legal Ethics 76-77 (1986); Callan & David, Professional Responsibility and the Duty of Confidentiality: Disclosure of Client Misconduct in an Adversary System, 29 *Rutgers L. Rev.* 332, 395 (1976).

n102 Model Rules, Rule 1.6(a). All the model codes do embrace a common-sense exception to confidentiality for information that is "generally known."

n103 Model Code, DR 4-101(A).

n104 Clients disclose because they perceive a benefit in trusting their attorneys. In the Appendix's hypotheticals, Nixon, the hypothetical vice president, and the other clients faced with legal problems arguably need lawyers and probably would use them regardless of the prevailing ethical standards. See, e.g., Thurman, Limits to the Adversary System: Interests that Outweigh Confidentiality, 5 *J. Leg. Prof.* 5, 9 (1980); Note, The Attorney-Client Privilege, supra note 10, at 471-72. The clients' claim to confidentiality as of right may thus not be as strong as the claim of persons who have no choice in disclosing.

n105 Most significantly, the Court has upheld restrictions on speech by newspapers and participants in trials. See, e.g., *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539 (1976).

n106 *Connick v. Myers*, 461 U.S. 138 (1983); *Pickering v. Board of Educ.*, 391 U.S. 563 (1963).

n107 See generally Post, supra note 2. It is important to note that *Rhinehart* did not simply uphold protective orders based on wholly unsupported assumptions concerning their importance and effectiveness. The Court's test, though less demanding than strict scrutiny, still required a careful evaluation of the purposes of the discovery rule and how it worked. The Court undertook this analysis and concluded that the rule substantially served the important goals of eliciting information parties would otherwise not provide and preventing abuse of forcibly disclosed information. 467 U.S. at 32-36.

n108 *Snepp* does not suggest that a fiduciary has *no* right ever to disclose client information. Despite its broad language, *Snepp* presented a narrow fact pattern. CIA agent Snepp signed a contractual agreement "[to] publish . . . any information . . . relating to the Agency, its activities or intelligence activities generally, either during or after the term of [his] employment . . . without specific prior approval of the Agency." *Snepp*, 444 U.S. at 509. When Snepp published a book without submitting it for prepublication review, the district court imposed a constructive trust over the profits and issued an injunction against further publication. The Supreme Court ultimately approved this course of action, holding that Snepp's "trust relationship" with the agency required him to give it a prepublication opportunity to prevent the dissemination of classified information. *Id.* at 510-12.

The fiduciary nature of the relationship between Snepp and his employer was but one factor the Court considered in applying a deferential first amendment standard. Despite the CIA's broad contractual agreement with Snepp not to reveal information before the agency reviewed the proposed disclosure, the CIA argued only for the right to prevent publication of *classified* documents. *Id.* at 511. It in effect tailored the agreement to preclude disclosure only when the governmental interest in secrecy was high. Moreover, Snepp did not even give the CIA an opportunity to see what he proposed to publish, as he had agreed to do. In these circumstances, it was easy for the Court to conclude that Snepp had violated an agreement that was both constitutional and appropriate.

n109 Restatement (Second) of Agency, § 395, comment (1957). See *id.* §§ 395-96 and authorities cited in Zacharias, supra note 4, at 362 n.48.

n110 See, e.g., *Connick*, 461 U.S. at 147-48, quoted at text accompanying notes 67-70.

n111 *Nix v. Whiteside*, 475 U.S. 157 (1986), gives some indication of how the Court might approach the competition between lawyers' constitutional disclosure rights and criminal clients' special constitutional status. The Court acknowledges its responsibility to protect the attorney-client trust relationship in the criminal context. In general, it will not readily invalidate mechanisms, like confidentiality rules, which are designed to protect that relationship. *Id.* at 166. On the other hand, by holding that the attorney properly threatened his client with disclosure of incriminating information to prevent client perjury, the Court made clear that defendants' rights sometimes give way. *Id.* at 168-75.

The *Nix* Court set aside the defendant's interest in precisely the type of situation in which a criminal defense attorney might claim a personal constitutional right to disclose. However, the attorney in *Nix* did not raise such a claim; he asserted a duty to disclose under the local professional code.

n112 For example, an accountant or realtor.

n113 The courts have differentiated between the rights of lawyers to express themselves "politically" and "commercially." See *In re Primus*, 436 U.S. 412, 434 (1978). The Supreme Court initially defined commercial speech as "expression related solely to the economic interests of the speaker and its audience." *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 561 (1980). Subsequent cases, however, broadened the definition of commercial speech to include, more generally, most types of expression prompted primarily by economic motives. See *Bishop v. Committee on Professional Ethics & Conduct*, 521 F. Supp. 1219, 1227 (S.D. Iowa 1981), vacated as moot, 686 F.2d 1278 (8th Cir. 1982) (views made part of advertising regulable as commercial speech); *In re Superior Court Trial Lawyers Ass'n*, 107 F.T.C. 510, 584 (1986) ("the purpose and effect of [the lawyers' protest] was commercial, not political as evidenced by the fact that . . . their primary object was to promote their own economic well-being"), aff'd, 856 F.2d 226 (D.C. Cir. 1988), aff'd, 110 S.Ct. 768 (1990). The courts have adopted a "common-sense" approach to isolating commercial speech. See *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 637 (1985) (White, J., plurality opinion). See also *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 562

n.5 (1980) (advertising linking a product to a current public debate may still be regulated as commercial expression when its primary motive is economic); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455-56 (1978); *Ad World, Inc. v. Township of Doylestown*, 672 F.2d 1136, 1139 (3d Cir.) (issue is whether speech “as a whole relates solely to the economic interest of the speaker and its audience.”) (emphasis added), cert. denied, 456 U.S. 975 (1982).

n114 Self-aggrandizing tidbits designed to show how good the lawyer is and why other clients should retain the lawyer are equivalent to advertising. See *Roberts v. United States Jaycees*, 468 U.S. 609, 637 (1984) (O'Connor, J., concurring in part) (“ordinary law practice for commercial ends has never been given special First Amendment protection. ‘A lawyer’s procurement of remunerative employment is a subject only marginally affected with First Amendment concerns’”) (quoting *Ohralik*, 436 U.S. at 459). Cf. *In re R.M.J.*, 455 U.S. 191, 205 (1982) (attorney’s listing of membership in Supreme Court Bar in large letters could mislead public and is therefore subject to regulation); *Hirschkop v. Virginia State Bar*, 604 F.2d 840, 843 (4th Cir. 1979) (“self-laudatory statements . . . are not so easily verifiable” and are therefore subject to greater restraint); *Bishop*, 521 F. Supp. at 1225 (upholding regulation of lawyers’ advertising as to their “quality”).

n115 Many of the “exploitative” speech examples resemble, but are not in fact, commercial speech. Lawyers receive the confidential information initially through a commercial relationship with their clients. To the extent they wish to use it to benefit future clients or to profit themselves, the “speech” gains a further “commercial” taint. The motive underlying the disclosure is similar to the motives attributed to commercial speakers. See *Roberts v. United States Jaycees*, 468 U.S. 609, 637 (1984) (O'Connor, J., concurring in part).

n116 They may have an artistic or literary motive for telling about their clients and cases. Autobiographical books by lawyers abound in the literature. E.g., F. Bailey, *The Defense Never Rests* (1971); A. Dershowitz, *The Best Defense* (1986); M. Mosmanno, *Verdict* (1958); L. Nizer, *My Life in Court* (1961). Most of these consist of “case studies” which rely, for their impact, on technically confidential communications and observations by the lawyer about the clients and their causes. Lawyers may also wish to breach a former client’s confidence in order to assist a current client or to benefit themselves more directly (e.g. by discussing a timely purchase of securities).

n117 See, e.g., *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501-02 (1952) (expression in movies); *American Fed’n Labor v. Swing*, 312 U.S. 321, 325-26 (1941) (expression in labor picketing); *Thornhill v. Alabama*, 310 U.S. 88, 101-03 (1940) (dissemination of facts underlying labor dispute).

n118 See *Linhart v. Glatfelter*, 771 F.2d 1004, 1010 (7th Cir. 1985) (*Connick* “requires us to look at the *point* of the speech in question: Was it the employee’s point to bring the wrongdoing to light? Or to raise other issues of public concern, because they are of public concern? Or was the point to further some purely private interest?”) (emphasis in original). See also *FTC v. Superior Court Trial Lawyers Ass’n*, 110 S.Ct 768 (1990) (economic motive deprives lawyers of first amendment associational protections); *Callaway v. Hafeman*, 832 F.2d 414, 417 (7th Cir. 1987) (quoting and applying *Linhart*).

Consider, for example, the client solicitation rule upheld as a commercial speech regulation in *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447 (1978). Justice Powell’s opinion held that “the State . . . may discipline a lawyer for soliciting clients in person, *for pecuniary gain* under circumstances likely to pose dangers that the State has a right to prevent.” *Id.* at 449 (emphasis added). Had Mr. Ohralik simply referred the potential client to another lawyer, rather than ambulance-chasing for his own financial benefit, the Court might have looked at Ohralik’s “speech/conduct” in a more favorable light. *But see Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 787 (1985) (Brennan, J., dissenting) (“this Court has consistently rejected the argument that speech is entitled to diminished protection simply because it concerns economic matters or is in the economic interest of the speaker”).

n119 The law of agency generally requires agents to preserve their principals’ confidences, Restatement (Second) of Agency § 395 (1957), and forbids agents to profit personally from information the principal has disclosed in secret. *Id.* § 396, comment g. But “[a]n agent is privileged to reveal information confidentially acquired by him in the course of his agency *in the protection of a superior interest of himself or of a third person.*” *Id.* § 395, comment f (emphasis added); cf. *Pearson v. Dodd*, 410 F.2d 701, 705 n.19 (D.C. Cir. 1963) (noting argument that congressional staff members may have been privileged to take and disclose office documents revealing employer’s wrongdoing), cert. denied, 395 U.S. 947 (1969).

n120 One can stretch the analogy somewhat to include the disclosure of confidential information to benefit subsequent clients. Arguably, the lawyer's job is to represent existing clients. The representation of future clients may be viewed as moonlighting, which should not be allowed to interfere with lawyers' primary function of assisting existing clients. This analytic framework is consistent with traditional conflict of interest rules that forbid lawyers from accepting employment contradictory to the interests of their current clientele.

n121 This rationale shares the focus of a conflict of interest provision that, as part of a public or private employment contract, forbids employees to take second jobs. *Snepp v. United States*, 444 U.S. 507, 509 n.3 (1980) (per curiam), makes the analogy clear. The Supreme Court held that CIA agents, as part of their acceptance of employment, give up their literary first amendment interest in writing about specific aspects of their employment. *Id.* See also *Haig v. Agee*, 453 U.S. 280, 309 (1981) (holding former CIA agent's right to criticize the government, including publication and promotion of three books could be limited).

n122 See Shiffrin, supra note 27, at 1264-65.

n123 Numerous speaking professions might claim first amendment prerogatives. See generally *Village of Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620 (1980) (ministers and charitable fund-raisers); *Ambach v. Norwick*, 441 U.S. 68 (1979) (teachers); *Branzburg v. Hayes*, 408 U.S. 665 (1972) (newspaper reporters); *Thomas v. Collins*, 323 U.S. 516 (1945) (labor organizers); *Tarasoff v. Regents of Univ. of Cal.*, 17 Cal.3d 425, 551 P.2d 534, 131 Cal. Rptr. 14 (1976) (psychiatrists). See also Gellhorn, the Abuse of Occupational Licensing, 44 U. Chi. L. Rev. 6 (1970) (discussing various licensed professions).

n124 *Lowe v. SEC*, 472 U.S. 181, 230 (1985) (White, J., concurring). The *Lowe* Court struck down a regulation of the contents of an investment newsletter. The majority opinion avoided the constitutional issue by reinterpreting the federal legislation. *Id.* at 203-211.

n125 *Id.* at 228-30 (White, J., concurring). At first glance, Justice White's opinion seems to draw a simple distinction: either a regulation has nothing to do with the particular professional's speech, in which case the first amendment does not apply, or the regulation limits expression directly and

should be tested under traditional first amendment standards. As Justice White fleshes out the dividing line, however, the distinction disappears. He attempts to differentiate between licensing requirements and rules governing speech per se: "One who takes the affairs of a client personally in hand and purports to exercise judgment on behalf of the client in the light of the client's individual needs and circumstances is properly viewed as engaging in the practice of a profession," and so the government may regulate speech "incidental to the conduct of the profession." *Id.* at 232. But Justice White then contrasts "regulation of speaking or publishing as such, subject to the First Amendment's command. . . ." *Id.* He cites *Thomas v. Collins*, 323 U.S. 516, 547 (1945), for the proposition that "the distinguishing factor . . . [is] whether the speech in any particular case . . . [is] 'associat[ed] . . . with some other factor which the state may regulate so as to bring the whole within its official control.'" *Id.* at 231. The reference hardly helps; it merely restates the question.

n126 *Lowe*, 472 U.S. at 234-35.

n127 458 U.S. 747 (1982).

n128 The Court emphasized that New York's view of child pornography was shared by Congress and the legislatures of most other states. *Id.* at 758. In contrast, in *Butterworth v. Smith*, 110 S.Ct. 1376 (1990), the Court declined to defer to Florida's grand jury statute, in part because only fourteen states had adopted equivalent provisions. The Court considered this relevant because Florida's law had an apparent "potential for abuse . . . through its employment as a device to silence those who know of . . . irregularities on the part of public officials. . . ." *Id.* at 1383.

n129 484 U.S. 260 (1988).

n130 See, e.g., *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 511 (1969) (Vietnam protest). Some analysts of the school decisions view them as hopelessly inconsistent. One can, indeed, reasonably conclude from recent developments that *Tinker* is no longer good law -- that the current Justices are willing to defer to school authorities blindly and across the board. Nevertheless, the Court continues to reaffirm *Tinker's* vitality. See *Kuhlmeier*, 484 U.S. at 271-73.

Tinker can be reconciled with cases like *Kuhlmeier*, *Bethel School*

Dist. v. Fraser, 478 U.S. 675 (1986), and *Ingraham v. Wright*, 430 U.S. 651 (1977), if one considers the risk of improper motivation. In the latter cases, the worst possible motivation was a desire to use the easiest method for maintaining order and control in the schools. Courts may view such factors as valid considerations in school officials' performance of their professional duties. In contrast, the heated political issues involved in *Tinker* gave rise to a real danger that the principal was trying to impose his own political beliefs. *Board of Educ. of Island Trees v. Pico*, 457 U.S. 853, 855 (1982) (Brennan, J., plurality opinion), confirms the Supreme Court's unwillingness to adopt a deferential first amendment standard when the situation, realistically viewed, suggests a likelihood that school authorities are driven by personal interests. *Kuhlmeier* itself distinguishes *Tinker* based on Justice White's view that the *Tinker* principal had no valid reason for seeking to impose discipline. 484 U.S. at 265-67.

n131 See *FCC v. Pacifica Found.*, 438 U.S. 726, 749 (1978) (Stevens, J., plurality opinion); *Id.* at 757 (Powell, J., concurring) (deferring to FCC).

n132 In *Snapp*, for example, one would have expected the Court to uphold confidentiality agreements imposed upon CIA agents on the basis of the agency's superior ability to assess the national security need for the agreements. But the Court adopted a deferential standard only after noting that the CIA voluntarily limits enforcement. 444 U.S. at 515.

n133 In 1976, the Virginia State Board of Pharmacy justified restrictions on pharmacist advertising on consumer protection grounds. Yet the Court noted the possible anticompetitive effects of the regulation and heightened the applicable judicial review. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 752 (1976).

n134 Cf. *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975) ("[t]he interest of the states in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice").

n135 In *Peel v. Attorney Registration & Disciplinary Comm'n*, 110 S.Ct. 2281, 2298 (1990) (O'Connor, J., dissenting), Justice O'Connor specifically called on the Court to defer to the Illinois Supreme Court's expertise and inherent authority to adopt lawyer regulation. The majority,

however, rejected that approach. *Id.* at 2291-92.

n136 *Id.* at 2292 ("That the judgment below is by a State Supreme Court exercising review over the actions of its State Bar Commission does not insulate it from our review for constitutional infirmity").

n137 See, e.g., *Keller v. State Bar*, 110 S. Ct. 2228 (1990) (requirement to pay bar dues used to finance political activity); *Peel*, 110 S. Ct. at 2284 (regulations of specialization claims); *Supreme Court of Virginia v. Friedman*, 487 U.S. 59 (1988) (residency requirement); *Shapero v. Kentucky State Bar Ass'n*, 486 U.S. 466 (1988) (solicitation rule); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 286 (1985) (White, J., plurality opinion) (advertising/solicitation regulation); *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985) (residency requirement); *In re R.M.J.*, 455 U.S. 191 (1982) (advertising regulation); *In re Primus*, 436 U.S. 412 (1978) (rule prohibiting political expression and association through solicitation); *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977) (advertising rule); *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975) (fee regulation). Cf. *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978) (solicitation rule).

n138 In *Nix v. Whiteside*, 475 U.S. 157, 176 (1986), the Court held that a lawyer's compliance with professional rules forbidding him to present perjured testimony did not render the client's representation ineffective for purposes of the sixth amendment. It is important to note, however, that the interests of Whiteside's defense counsel coincided with the bar's. One might even interpret the decision as upholding the lawyer's right not to be required to violate his own moral beliefs.

One obvious area in which the bar's collective interests may conflict with individual lawyers' speech interest is regulation of comment to the press. The Supreme Court has upheld some "gag" rules, ostensibly protecting the litigants' -- and particularly criminal defendants' -- right to a fair trial. See, e.g., Model Rules, comment to Rule 3.6; Model Code, supra note 9, EC 7-33. See also *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 561 (1976); *Sheppard v. Maxwell*, 384 U.S. 333, 349-52 (1966); *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242, 249 (7th Cir. 1975), cert. denied, 427 U.S. 912 (1976). Yet ordinarily, the litigants themselves wish to speak out through their attorneys. See, e.g., *Chase v. Robson*, 435 F.2d 1059 (7th Cir. 1970); *In re Porter*, 268 Or. 417, 521 P.2d 345, cert. denied, 419

U.S. 1056 (1974). See also Cole & Spak, Defense Counsel and the First Amendment: “A Time to Keep Silent and a Time to Speak”, 6 *St. Mary’s L.J.* 347, 349-50 (1974) (“defense counsel, no less than counsel for the government, [have] been guilty of repeated infractions”); Comment, Silence Orders -- Preserving Political Expression by Defendants and Their Lawyers: *King v. Jones*, 6 *Harv. C.R.-C.L. L. Rev.* 595, 601 (1971). The primary beneficiary of “gag” rules is the collective membership of the legal system. The rules mute public criticism of prosecutors and judges in ongoing trials and create an aura that the legal system is working fairly, correctly, and needs no improvement. See *Chicago Council of Lawyers*, 522 *F.2d* at 250 (7th *Cir.* 1975) (discussing special ability of lawyers to act as check on government), cert. denied, 427 *U.S.* 912 (1976). See also Scheurich, The Attorney “No Comment” Rules and the First Amendment, 21 *Ariz. L. Rev.* 61, 69 (1979) (lawyer comments about sensational trials are particularly likely to receive widespread attention). In short, the rules insulate traditional methods of doing business, at the cost of individual lawyers’ freedom of expression.

n139 See, e.g., *Supreme Court of New Hampshire v. Piper*, 470 *U.S.* 274, 278 (1985) (noting appellate judges’ recognition that rule may “serve the less than commendable purpose of insulating New Hampshire practitioners from out-of-state competition”); *Bates v. State Bar of Arizona*, 433 *U.S.* 350, 377 (1977) (noting that advertising ban insulates bar from competition). Cf. *Shapiro v. Kentucky State Bar Ass’n*, 486 *U.S.* 466, 490 (1988) (O’Connor, J., dissenting) (“[i]mbuing the legal profession with the necessary ethical standards is a task that involves constant struggle with the relentless natural force of economic self-interest . . .”; because of “their inevitable anticompetitive effects, . . . [advertising and solicitation rules] should not be thoughtlessly retained or insulated from skeptical criticism”); *Zauderer v. Office of Disciplinary Counsel*, 471 *U.S.* 626, 642-43 (1985) (White, J., plurality opinion) (asserted interest in preventing lawyers from “stirring up litigation” reduces to improper desire to interfere with citizens’ access to judicial redress).

State courts have been more sympathetic to speech-restrictive ethical provisions. See, e.g., *In re Belli*, 371 *F. Supp.* 111 (D.D.C. 1971); *In re Glenn*, 25 *Iowa* 1233, 130 *N.W.2d* 672 (1964); *State ex rel. Hunter v. Crocker*, 132 *Neb.* 214, 271 *N.W.* 444 (1937). See also Note, Attorney Discipline and the First Amendment, 49 *N.Y.U. L. Rev.* 922, 925 (1974) [hereinafter Note, Attorney Discipline] and authorities in n.24; Note, Attorney’s Rights Under the Code of Professional Responsibility: Free Speech,

Right to Know, and Freedom of Association, 1977 *Wash. U. L. Q.* 687, 688-89 [hereinafter Note, Attorneys’ Rights]. Unfortunately, their analyses have been superficial. For the most part, they simply assume that lawyers who accept a license to practice give up their right to speak freely. See, e.g., *In re Vollintine*, 673 *P.2d* 755, 757 (Alaska 1983); *In re Woodward*, 300 *S.W.* 385, 393-94 (Mo. 1957) (en banc); *In re Porter*, 268 *Or.* 417, 425, 521 *P.2d* 345, 349, (en banc), cert. denied, 419 *U.S.* 1056 (1974).

n140 Zacharias, *supra* note 4, at 354-60.

n141 Accountants, for example, may be able to provide assistance similar to a lawyer’s in complying with securities regulations or estate and tax planning.

n142 Of course, society often wants lawyers to take on unpopular causes. My point is not that confidentiality rules are evil in promoting such representation, only that financial as well as social considerations may have prompted the rules.

n143 See generally M. Freedman, *Lawyers’ Ethics in an Adversary System* 1-8 (1975). Cf. Pepper, *The Lawyer’s Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*, 1986 *Am. B. Found. Res. J.* 613 (defending model of amoral lawyer).

n144 The administration of other speech-restrictive rules suggests that they serve the consideration of protecting the status quo as much as the asserted systemic justifications. Advertising and solicitation rules have, for example, often been applied to consumer organizations and legal clinics seeking to make cheaper, quality representation more widely available. See, e.g., *Bates v. State Bar of Arizona*, 433 *U.S.* 350, 354 (1977) (attorneys suspended for advertising legal clinic offering “legal services at very reasonable fees”); *Consumers Union of United States, Inc. v. American Bar Ass’n*, 427 *F. Supp.* 506, 511 (E.D. Va. 1976) (state bar threatens disciplinary action against attorneys listing selves in directory designed to provide information to consumers and published by nonprofit organization), vacated and remanded, 446 *U.S.* 719 (1980). The leading cases concerning gag orders involve either “public interest” lawyers who wish to criticize and reform the judicial system, see, e.g., *Hirschkop v. Snead*, 594 *F.2d* 356 (4th *Cir.* 1979) (per curiam), or criminal defense and civil rights attorneys

seeking to protect their own clients' interests in a fair trial; *see, e.g., King v. Jones*, 319 F. Supp. 653 (N.D. Ohio 1970), rev'd, 450 F.2d 478 (6th Cir. 1971), vacated, 405 U.S. 911 (1972). *See also In re Sawyer*, 360 U.S. 622 (1959) (reversing finding of contempt for criticism by criminal defense attorney). *See generally* Scheurich, *supra* note 138; Note, The "No Comment" Rules: A Delicate Balance of Fundamental Rights, 30 U. Miami L. Rev. 459 (1976); Note, Attorneys', *supra* note 139, at 694-97. Similarly, the anticriticism regulations have frequently targeted attorneys who attempt to air valid concerns about the system. *See, e.g., In re Snyder*, 472 U.S. 634, 646-47 (1985) (attorney suspended for criticizing federal court fee procedures); *In re Oliver*, 452 F.2d 111, 114 (7th Cir. 1971) (attorney reprimanded for commenting on pending litigation); *In re Frerichs*, 238 N.W.2d 764, 765 (Iowa 1976) (attorney censured for suggesting court "willfully avoided" constitutional issue); *In re Glenn*, 256 Iowa 1233, 1238, 130 N.W.2d 672, 676 (1964) (attorney sanctioned for asserting judicial cover-up); *Kentucky State Bar Ass'n v. Lewis*, 282 S.W.2d 321, 323 (Ky. Ct. App. 1955) (per curiam) (attorney suspended for asserting judicial bias and corruption); *In re Lacey*, 283 N.W.2d 250, 254 (S.D. 1979) (attorney censured for asserting incompetence of state judges). *But see State Bar v. Semaan*, 508 S.W.2d 429, 432 (Tex. Ct. Civ. App. 1974) (rejecting sanction for public criticism of judge and other attorneys). The economic interests of the bar clearly plays some role in at least the application, if not the adoption of these ethical provisions.

n145 Other "ethical" regulations of attorney's speech, if challenged, are also unlikely to receive total deference. *See, e.g.,* Model Rules, Rules 7.2-3 and Model Code, D.R. 2-201-06 (advertising and solicitation); Model Rules, Rule 3.6 and Model Code, D.R. 7-107 (trial publicity); Model Rules, Rule 8.2 and Model Code, D.R. 8-102-03 (statements concerning adjudicative officers and candidates). *See also Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626 (1985) (striking down lawyer advertising rules); *In re R.M.J.*, 455 U.S. 191 (1982) (same); *Bates v. State Bar of Arizona*, 433 U.S. 350, 383-84 (1977) (same). Some further lawyers' economic interests. *See* B. Christensen, *Lawyers for People of Moderate Means* 138-40, 146-50 (1970) (advertising rules anti-competitive); M. Freedman, *supra* note 143, at 113-24 (solicitation rules are anti-competitive); Rhode, *Solicitation*, 36 J. Leg. Educ. 317, 326 (1986) (solicitation rules serve primarily the profession); Hazard, Pearce, & Stempel, *Why Lawyers Should Be Allowed to Advertise: A Market Analysis of Legal Services*, 58 N.Y.U. L. Rev. 1084, 1107-09 (1983) (same). Others avoid external oversight of the profession. *See* Note,

Attorney Discipline, *supra* note 139, at 923-26 (discussing how rules forbidding lawyer criticism of judges enhance respect for legal system, but also eliminate a catalyst for reform and outside regulation by avoiding public confrontations and debate among lawyers). *See also In re Sawyer*, 360 U.S. 622, 640 (1959) (disciplining lawyer for challenging judge's impartiality); *In re Raggio*, 87 Nev. 369, 487 P.2d 499 (1971) (per curiam) (lawyer reprimanded for criticizing judicial decision); *In re Gorsuch*, 76 S.D. 191, 75 N.W.2d 644 (1956) (lawyer reprimanded for questioning political opponent's propriety); *In re Donohoe*, 90 Wash.2d 173, 580 P.2d 1093, 1096 (1978) (en banc) (lawyer disciplined for criticizing court of appeals). Although one cannot know that such effects rather than social benefits have motivated the rules' adoption, the mere existence of a possible self-interest should influence the courts to react to the bar nondeferentially, as in the past.

n146 The posture of a case also influences a court's reactions. If a litigant tries to attack a confidentiality rule on its face, rather than with respect to particular applications, a court has greater leeway to uphold the rule. Outside the first amendment context, the Supreme Court has required facial challenges to "establish that no set of circumstances exist under which the [law] would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). *See also Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.* 455 U.S. 489, 494 n.5 (1982). In the first amendment arena, overbreadth and vagueness doctrines increase the likelihood of a facial challenge, but only to a limited degree. *See* Pine, *Speculation and Reality: The Role of Facts in Judicial Protection of Fundamental Rights*, 136 U. Pa. L. Rev. 655, 698-702 (1988) and authorities cited at 699 n.193.

n147 *See, e.g., Hirschkop v. Snead*, 594 F.2d 356, 363, 371 (4th Cir. 1979) (per curiam); *Keller v. State Bar*, 181 Cal.App.3d 471, 226 Cal. Rptr. 448, 461, 467, reh'g granted, 190 Cal.App.3d 1196, 723 P.2d 1,229 Cal. Rptr. 144 (1986), rev'd, 47 Cal.3d 1152, 767 P.2d 1020, 255 Cal. Rptr. 542 (1989), cert. granted, 110 S. Ct. 46 (1989); *State v. Russell*, 227 Kan. 897, 900-01, 610 P.2d 1122, 1126-27, cert. denied, 449 U.S. 983 (1980); *In re Donohoe*, 90 Wash.2d 173, 180-81, 580 P.2d 1093, 1097 (1978). *See also* Landesman, *Confidentiality and the Lawyer-Client Relationship*, 1980 Utah L. Rev. 765, 774-82 (discussing common assumptions about confidentiality rules).

n148 Of course, even these generalized normative aspirations may overextend. The Tompkins County data revealed that lawyers, clients, and

laypersons in general believed there should be limits on how much and in what instances clients can confide without fear of disclosure. See Zacharias, *supra* note 4, at 391-95.

n149 See, e.g., *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 648-49 (1985) (government fails to carry its burden); *Board of Educ., Island Trees Union Free School Dist. No. 26 v. Pico*, 457 U.S. 853, 875, 880 (1982) (Blackmun, J., concurring in part) (Board must “be able to show” the reasons for its action); *Carey v. Population Serv. Int’l*, 431 U.S. 678, 702 (1977) (White, J., concurring) (state failed to demonstrate “that the prohibition . . . measurably contributes to the deterrent purposes which the state advanced”).

n150 See, e.g., *Consolidated Edison Co. of N.Y., Inc. v. Public Serv. Comm’n*, 447 U.S. 530, 540 (1980).

n151 See, e.g., *Widmar v. Vincent*, 454 U.S. 263, 269-70 (1981).

n152 Under the “content” based commercial speech doctrine, for example, the government may regulate if it can assert a *substantial* state interest. The regulation must “directly advance” the interest and “be no more extensive than necessary to serve that interest.” See, e.g., *Zauderer*, 471 U.S. at 638; *In re R.M.J.*, 455 U.S. 191, 203 (1982); *Central Hudson Gas & Electric Corp. v. Public Serv. Comm’n*, 447 U.S. 557, 566 (1980). But in the public employee area, where the Court developed an intermediate balancing approach from the “whole context,” the standard is far more flexible. See *Connick v. Myers*, 461 U.S. 138, 147-50 (1983).

Justice White, in *Lowe v. SEC*, seems to anticipate that a court would never afford less than the reduced commercial speech protections. 472 U.S. at 234-35. His reference to the traditional approach suggests that the first amendment protection may, depending on the context, be higher. Cf. *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32 (1984) (requiring “substantial” interest and least restrictive alternative).

n153 Justice Stevens’ failure to adopt the commercial speech formula suggests that he would not embrace it for speech fitting his lesser value theory. But Justice Stevens seems to require that the interest be at least “significant.” See *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 63 n.18 (1976) (Stevens, J., plurality opinion).

n154 *FCC v. Pacifica Found.*, 438 U.S. 726, 748-50 (1978).

n155 At the very least, the approach would require confidentiality provisions to focus on particular categories of speech -- such as commercial or exploitative -- or upon distinct areas of practice (e.g., criminal).

n156 See *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 770 (1976) (ordinarily, public is better protected by giving more information rather than withholding it); *Whitney v. California*, 274 U.S. 357, 372, 375 (1927) (Brandeis, J., concurring) (“discussion ordinarily affords adequate protection” against noxious speech); *Gitlow v. New York*, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting) (same).

n157 See Shaman, *Constitutional Fact: The Perception of Reality by the Supreme Court*, 35 *U. Fla. L. Rev.* 236, 237-42 (1983) (“the Supreme Court’s treatment of constitutional facts has been most undisciplined”) and authorities cited therein. In *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32, 34 (1984), for example, the Court acknowledged that it was required to look into the substantiality of the government’s interest in allowing courts to limit the disclosure of information parties receive in discovery. In practice, however, the Court’s scrutiny was limited. It assumed a potential danger of abuse, without assessing the actual extent of the danger.

n158 See Karst, *Legislative Facts in Constitutional Litigation*, 1960 *Sup. Ct. Rev.* 75, 86-95; Shaman, *supra* note 157, at 242-45. According to these scholars, adoption of a compelling state interest test signals a court’s intent to scrutinize the evidence. See, e.g., *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 503 (1981) (White, J., plurality opinion); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 71 (1981). Cf. *Wood v. Georgia*, 370 U.S. 375, 384 (1962) (government must support its claim of a clear and present danger factually). Application of lesser balancing standards reflects a greater willingness to entertain government justifications supported only by theory. See *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 652 (1985) (upholding disclosure requirement for advertising attorneys on basis of “hardly speculative” assumption that “substantial numbers of potential clients would be . . . misled”). But see *id.* at 649 (rejecting advertising ban based on “general argument that the usual content of advertisements may, under some circumstances, be deceptive or manipulative”); *In re R.M.J.* 455 U.S. 191, 204-06 (1982) (examining and rejecting state’s

assertion that advertising in question is misleading); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 464 (1978) (examining state's "perception of the potential for harm" and determining that it "is well founded"); *Carey v. Population Serv. Int'l*, 431 U.S. at 696 (state must provide evidence that advertising ban is "rational means" to accomplish its goals). See also *Bates v. State Bar of Arizona*, 433 U.S. 350, 372-74 (1977) (State's asserted interest insufficient to justify total ban on advertising).

n159 See *Zauderer*, 471 U.S. at 648 (rejecting State's claim that illustrations in advertising are prone to abuse because State failed to provide supporting evidence); *Buckley v. Valeo*, 424 U.S. 1, 45-46 (1976) (rejecting claimed interest in preventing corruption because of lack of factual support).

n160 *Nebraska Press Ass'n v. Stuart*, 427 U.S. 539, 562 (1976) (Burger, J., plurality opinion).

n161 See *id.* at 565 ("The more difficult prospective or predictive assessment that a trial judge must make also calls for a judgment as to whether other precautionary steps will suffice"). See also *Shapero v. Kentucky State Bar Ass'n*, 486 U.S. 466 (1988) (rejecting as "facile" bar's generalized justifications for anti-solicitation rule); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 770 (1976) (Court scrutinizes demographic statistics concerning spending on prescription drugs to establish that the free flow of price information outweighs the societal interests in advertising regulation).

On occasion, courts have skirted the factual bases for state claims by manipulating the applicable legal tests. In overbreadth and vagueness cases, for example, the Supreme Court has sometimes avoided examining the strength of the government justifications by denying a litigant standing to question application of a regulation in contexts beyond the litigant's own case. See, e.g., *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). See also *Pine*, supra note 146, at 698-702 and authorities cited at 699-700 n.193.

n162 *Peel v. Attorney Registration & Disciplinary Comm'n*, 110 S. Ct. 2281 (1990), illustrates the Court's approach in the context of attorney regulation. The Illinois Bar censured Peel for violating a blanket rule against claiming a professional "specialty" based on certification by a private educational organization. The Court rejected the Bar's specific assertion that

such claims mislead clients because the bar lacked "empirical evidence to support its claim of deception." *Id.* at 2291. The Court then considered the Bar's general assertion that specialization claims are inherently misleading and also rejected it as unsupported and speculative. *Id.* See also *Board of Educ., Island Trees Union Free Dist. No. 26 v. Pico*, 457 U.S. 853, 859 (1982) (school must establish its decision truly served its general interest in "transmit[ing] community values" to students); *Buckley v. Valeo*, 424 U.S. 1, 140 (1976) (statute not shown to further the valid interest in preventing corruption); *Street v. New York*, 394 U.S. 576, 593-94 (1969) (government claims not supported by the record); *High Ol' Times, Inc., v. Busbee*, 456 F. Supp. 1035, 1043 (N.D. Ga. 1978), aff'd, 621 F.2d 141 (5th Cir. 1980) (same); *Ewald*, supra note 6, at 452 ("For the most part the Court has rejected unsubstantiated claims."); *Shaman*, supra note 157, at 246 (same).

It is important to distinguish first amendment from equal protection and other constitutional litigation where minimal judicial scrutiny may govern. Under rationality analysis, a court is not obliged to analyze the state's claims deeply. See authorities cited in *Shaman*, supra note 157, at 241. In contrast, a court's determination that first amendment principles apply automatically imposes upon the government some significant burden of justifying its regulation.

n163 See *Shaman*, supra note 157, at 247-52. Professor *Shaman* also offers the more cynical view that courts manipulate their willingness to analyze the facts in such a way as to steer decisions towards congenial results. *Id.* at 241.

n164 See *Zacharias*, supra note 4, at 358-70. See also supra text accompanying notes 44-46.

n165 Interestingly, even in deferring to the legislature in *Ferber*, see supra text accompanying notes 127-28, the Supreme Court first looked at research concerning the consequences of sexual exploitation of children, to satisfy itself concerning the state's claims. 458 U.S. at 758 n.9.

n166 *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 n.5 (1984). See *Shapero v. Kentucky State Bar Ass'n*, 486 U.S. 466 (1988) (noting lack of evidence that alternative, less restrictive rules would be more burdensome to state or less effective).

n167 Monahan & Walker, *Social Authority: Obtaining, Evaluating, and Establishing Social Science in Law*, 134 *U. Pa. L. Rev.* 477, 477-78 (1986) (“reliance upon the social sciences, while no longer remarkable, is less evident . . . than might be expected”). See also Pine, supra note 146, at 668-77 (explaining hesitance to rely on social science data).

n168 See Cahn, *Jurisprudence*, 30 *N.Y.U.L. Rev.* 150, 167 (1955); Pine, supra note 146, at 669-700. There is, in addition, a danger that courts will rely on empirical evidence that is not scientifically sound. See Monahan & Walker, supra note 167, at 501-05.

n169 797 *F.2d 1250* (3d Cir. 1986), cert. denied, 481 *U.S.* 279 (1987).

n170 *Id.* at 1259.

n171 As Rachel Pine discusses in Pine, supra note 146, at 703-06, an analogous process appears in recent death penalty cases. In *McCleskey v. Kemp*, 481 *U.S.* 279 (1987), the Court rejected a discrimination challenge to Georgia’s capital punishment system. The Court upheld the statute’s facial validity, but only after examining statistics the defendant produced. The Court emphasized that had those statistics been persuasive, it would have approached the issues differently. It would not have evaluated the Georgia law on its face, but instead would have scrutinized the available evidence regarding the law’s application. See Pine, supra note 146, at 705 and authorities cited therein.

n172 These justifications and variations on them are discussed and annotated in detail in Zacharias, supra note 4, at 358-61.

n173 In the following pages, I refrain from repetitive citations to the findings of the two studies; they can all be found in Zacharias, supra note 4, at 377-96.

n174 *Id.* at 381.

n175 *Id.* at 381-89.

n176 Restatement (Second) of Agency § 395, comment f(1958); cf. Restatement of Torts § 757, comment d (1934) (noting privilege to reveal

trade secrets “to protect [a conflicting] interest of the actor”).

n177 These findings are discussed in Zacharias, supra note 4, at 384-85.

n178 See generally *id.* at 382-88, n.181.

n179 See *id.* at 388 n.191.

n180 Over 56% of lawyers surveyed never or “rarely” used confidentiality to prevent misconduct; 40.3% claimed to have done so “occasionally” and only 2.3% “frequently.” *Id.* at 381 n.146.

n181 *Id.* at 389.

n182 *Id.* at 392-96.

n183 *Id.* at 383.

n184 *Id.* at 382-85.

n185 In *Seattle Times Co. v. Rhinehart*, 467 *U.S.* 20 (1984), for example, the Supreme Court purported to look at the importance of the government’s interest in preventing “annoyance” to litigants through use of materials disclosed under protest in the course of litigation. Yet, in practice, its examination was virtually nonexistent. Ironically, had the Court analyzed the facts at issue carefully, it easily could have established the danger and seriousness of “annoyance.”

n186 Professor Gottlieb has noted the judicial tendency to slough over the abstract claim that a government interest is compelling. He proposes a theoretical realignment in the way courts consider the value of asserted governmental interests. Gottlieb, *Compelling Governmental Interests: An Essential but Unanalyzed Term in Constitutional Adjudication*, 68 *B.U.L. Rev.* 917, 969-78 (1988). Professor Gottlieb is right that the judicial methodology for assessing the value of governmental interests has been haphazard. Some courts probe, others do not. *Id.* at 941-45. In most cases, the decision of whether an interest is “compelling” has depended on the judge’s personal evaluation -- either intuitive or based on evidence -- of the interest’s significance.

n187 In virtually any first amendment case, the government can dress up a justification to make it assume significance. The higher the level of abstraction, the more important the justification seems. A blanket regulation of political advertising could, for example, be justified as a means to “assure voters aren’t misled” or “maintaining a high level discourse focused on the issues.”

n188 A recent decision striking down Florida’s grand jury secrecy rules on first amendment grounds illustrates, in an analogous context, that courts will scrutinize abstract assertions of strong governmental interests. *Butterworth v. Smith*, 110 S. Ct. 1376 (1990). The Court acknowledged that total confidentiality of grand jury proceedings had some beneficial effect and that secrecy rules could stand. Yet it ruled that “the invocation of grand jury interests is not ‘some talisman that dissolves all constitutional protections.’” *Id.* at 1379 (quoting *United States v. Dionisio*, 410 U.S. 1, 11 (1973)). The Court pierced Florida’s abstract description of the governmental interests. In evaluating the importance of the interest in preventing witness subornation, the Court concluded “the additional effect of the ban here in question is marginal at best, and insufficient to outweigh the First Amendment interest in speech involved.” *Id.* at 1380.

n189 *See Bates v. State Bar of Arizona*, 433 U.S. 350, 379 (1977) (“we are not persuaded that any of the proffered justifications rise to the level of an acceptable reason for the suppression of . . . advertising”). Of course, the broader the government’s claims, the more difficult it becomes to prove a regulation serves the asserted justifications. In a sense, the second order questions serve as a brake on the government’s manipulation of the first. For that reason, I do not propose that courts should expend too much energy scrutinizing the accuracy of the asserted justifications. But courts should, perhaps, engage in at least a surface inquiry to determine whether highly abstract justifications make any sense.

n190 *See Zacharias*, supra note 4, at 404, n.260.

n191 *See id.* at 400-01.

n192 *See Bates*, 433 U.S. at 368-69 (acknowledging the bar’s special interest in maintaining professionalism but concluding that, realistically, few attorneys -- not none -- would engage in the “self-deception” the bar hypothesized to support its rule).

The attorney-client relationship is, of course, not the only one in which a party may assert confidentiality is important. *University of Pennsylvania v. EEOC*, 110 S. Ct. 577 (1990) suggests that the Supreme Court generally is prepared to question the assertion. *See also Butterworth v. Smith*, 110 S. Ct. 1376 (1990) (rejecting claim that state’s interest in blanket grand jury secrecy statute is “compelling”).

In *University of Pennsylvania*, the issue arose in the context of confidentiality for reviewers in a university tenure process. The University defended confidentiality as a matter of evidentiary privilege and academic freedom. The Court faced a question similar to the first-order constitutional issue in the attorney-client confidentiality context: did confidentiality, in encouraging reviewer candor, promote “sufficiently important interests” to outweigh the need for disclosure? The Court held that the interest in candor was not weighty enough. Significantly, its decision rested on an empirical evaluation of the effect of strict confidentiality. 110 S. Ct. at 581 (noting the “speculative” nature of the University’s claims and refusing to “assume the worst” about reviewers’ willingness to confide without a guarantee of secrecy).

n193 *See Zacharias*, supra note 4, at 366.

n194 *See id.* at 381 n.146. Most proponents of strict confidentiality have not relied heavily on the contention that enhancing the dignity and trust of individual clients or occasionally enabling attorneys to prevent client misconduct justify circumscribing first amendment rights. Both as a theoretical and empirical matter, these rationales are of limited operational significance. *See id.* at 367-69.

Professor Burt also points out serious abstractness problems in the term “enhancing trust.” Mandatory disclosure rules might “enhance mutual trust between attorneys and clients generally, even though such rules would require attorneys to forfeit trust with some specific clients by disclosing their communications to third parties.” Burt, *Conflict and Trust Between Attorney and Client*, 69 *Geo. L.J.* 1015, 1018-19 (1981). He concludes that “the decision for or against more wide-ranging disclosure rules should turn on a comparative evaluation of the prevalence of each kind of case and the relative importance to legal practice of the different problems created by each.” *Id.* at 1034. This Article encourages empirical research as a means a producing such an evaluation.

n195 The courts have tended to label governmental interests indiscriminately. The terms “substantial,” “important,” and “compelling” often seem interchangeable, *see Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 507-08 (1981) (“substantial”); *Schad v. Borough of Mount Ephraim*, 452 U.S. 61, 68 (1981) (same); *Carey v. Brown*, 447 U.S. 455, 461 (1980) (same); *Nixon v. Administrator of Gen. Servs.*, 433 U.S. 425, 467-68 (1977) (“important”); *Linmark Assocs., Inc. v. Township of Willingboro*, 431 U.S. 85, 95 (1977) (same); *United States v. O’Brien*, 391 U.S. 367, 377 (1968) (same); *Wayte v. United States*, 470 U.S. 598, 611 (1985) (“compelling”), *Minneapolis Star & Tribune Co. v. Minnesota Comm’r of Revenue*, 460 U.S. 575, 585 (1983) (same); *First Nat’l Bank of Boston v. Bellotti*, 435 U.S. 765, 795 (1978) (same). *See generally* Tushnet, *Anti-Formalism in Recent Constitutional Theory*, 83 *Mich. L. Rev.* 1502, 1512-16 (1985). Yet the thrust of the Court’s intent is clear. “Important” and “substantial” do not rise to the “compelling,” or strictest scrutiny, level.

Deciding what is “compelling” is, of course, substantially subjective. The significance of a particular interest is, at least in part, an empirical question. I have argued elsewhere that requiring courts to make fine distinctions among state interests imposes too great a burden. *See Zacharias*, *supra* note 1, at 1000. It would probably be easier for courts simply to decide whether given interests are “important.” *Id.* The Supreme Court has, however, not yet adopted such an approach.

n196 Arguably, a court engaged in free-wheeling balancing should consider the negative effects of a regulation as well. If substantial, such effects may shake the court’s confidence in the importance of the asserted justifications.

This Article has already noted how confidentiality’s restriction of free expression impacts severely on lawyer integrity. It enables lawyers to rationalize conduct that would otherwise transgress their moral precepts. It eliminates their freedom of thought and choice. *See, e.g.,* M. Frankel, *Partisan Justice* 78 (1980); Flynn, *Professional Ethics and the Lawyer’s Duty to Self*, 1976 *Wash. U.L.Q.* 429, 436, 444; Landesman, *supra* note 147, at 776, 785-86. It allows lawyers to avoid having to explain questionable conduct. *See* Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 *Hum. Rts.* 1, 9 (1975); Wolfram, *Client Perjury*, 50 *S. Cal. L. Rev.* 809, 838-39 (1977). And in doing so, it makes the legal profession as a whole

look bad. *See* Thurman, *supra* note 104, at 19. These considerations do not, however, undermine the positive justifications for confidentiality that would be before a court. They merely provide separate policy arguments which rulemakers might consider.

n197 *See, e.g.,* *Widmar v. Vincent*, 454 U.S. 263, 269-70 (1981); *Schad*, 452 U.S. at 73-74. But *see* Justice Rehnquist’s dissent in *Carey v. Brown*, 447 U.S. 455, 475 (1980), which correctly notes that application of the strictest first amendment tests may, in some circumstances, require the state to adopt a neutral alternative that is generally *more* restrictive of speech.

n198 Indeed, when the Supreme Court has departed from its traditional approach and employed a lesser first amendment test, it often has still required precise tailoring as a means of protecting first amendment values. *See, e.g.,* *Shapero v. Kentucky State Bar Ass’n*, 486 U.S. 466, 472-78 (1988); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm’n*, 447 U.S. 557 (1980); *United States v. O’Brien*, 391 U.S. 367 (1968).

n199 *See* Zacharias, *supra* note 4, at 394-95.

n200 *Id.* at 367-69.

n201 If the data showed confidentiality has no effect in furthering the underlying state interests, one might argue persuasively for the unconstitutionality of all confidentiality provisions. Yet invalidating all confidentiality would go too far. The available evidence merely calls into question the effectiveness of strict rules. The data does not support the counterintuitive assumption that confidentiality never works. What makes strict rules constitutionally vulnerable is that they fail to accommodate lawyers’ countervailing individual interests and society’s separate interests in political and moral disclosures. In cases like hypotheticals (11) and (12) of the Appendix, strict rules also maximize the adverse effect on the public’s right to receive information; they keep the public from receiving important news about potential wrongdoing by elected officials to which only the lawyer has access. *See, e.g.,* *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 761 (1976) (establishing public’s right to receive information); *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985) (applying *Virginia Pharmacy* rationale to attorney speech); *In re R.M.J.*, 455 U.S. 191, 201-03 (1982) (same); *Bates v.*

State Bar of Arizona, 433 U.S. 350, 383-84 (1977) (same). See also Note, Attorneys' Rights, supra note 139, at 689 n.10 (lawyers often in the best position to inform the public about problematic aspects of litigation or the legal system).

n202 Federalism concerns ordinarily lead courts to grant states latitude in ordering priorities as they see fit. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 280, 311 (1932) (Brandeis, J., dissenting) (states may "serve as a laboratory and try novel social . . . experiments . . ."). First amendment doctrine embodies this approach by making constitutional claimants offer alternatives both less restrictive of their rights and equally effective in accomplishing the asserted state goals.

Marston v. Lewis, 410 U.S. 679 (1973), in applying this doctrine to the voter residency context, illustrates how the Supreme Court tolerates inefficient regulation when no equally efficient alternative is apparent. Although the Court had noted in *Dunn v. Blumstein*, 405 U.S. 330, 348 (1972), that "30 days appears to be an ample period to prevent fraud," the *Marston* Justices upheld a 50 day residency requirement in difference to "a state legislative judgment that the period is necessary to achieve the State's legitimate goals." 410 U.S. at 681. Significantly, the law's challengers were unable to proffer an adequate substitute for the admittedly porous regulation. Cf. *Consolidated Edison Co. of N.Y. v. Public Serv. Comm'n*, 447 U.S. 530, 540 (1980) (striking down prohibition of bill inserts because protection of customers' privacy interests can be accomplished "simply by [their] transferring the bill insert from envelope to wastebasket").

n203 Burt, supra note 194, at 1032.

n204 Shaffer, The Practice of Law as Moral Discourse, 55 *Notre Dame L. Rev.* 231, 239-40 (1979). See also Pepper, supra note 143, at 630-32. The Supreme Court has held that rules requiring attorneys to make disclosures to their clients or potential clients ordinarily do not violate the first amendment. See *Zauderer*, 471 U.S. at 650-53.

n205 See, e.g., Martyn, Informed Consent in the Practice of Law, 48 *Geo. Wash. L. Rev.* 307, 310-12 (1980); Spiegel, Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession, 128 *U. Pa. L. Rev.* 41, 73 (1979).

n206 Such an exception has in fact been proposed. See, e.g., D. Luban, Lawyers and Justice 181-85 (1988); Redlich, supra note 83, at 984; Subin, supra note 10, at 1151-59, 1179 (the information to be disclosed should be determined by the seriousness of the injury, rather than by the legal category of the act). For a catalogue of states that have adopted broader disclosure exceptions, see Zacharias, supra note 4, at 352-53 n.5.

n207 By this I refer to prior criminal conduct which the lawyer does not agree to defend and which the lawyer discovers after he has undertaken the client's representation. Information concerning some future crimes is already excepted under most codes. See, e.g., Model Code DR 4-101(C)(3); Model Rule 1.6(a). As to prior conduct, if a client could not, in the initial interview, discuss the matters on which he or she seeks representation, the legal system would truly be hampered.

n208 Unless the terms of such an exception are well-defined, it has risks. Lawyers may -- particularly in periods like the McCarthy 1950s and the Vietnam 1960s -- feel compelled to disclose the activities of unpopular groups perceived as "agitators," "communists," or otherwise desirous of "overthrowing the government." This Article takes no position on what exceptions code drafters should adopt.

n209 The Model Rules contain a provision that seems to allow lawyers, by advance agreement with the client, to except specified information from the confidentiality requirements. Model Rule 1.6(a).

n210 See, e.g., Note, Attorney-Client Privilege for Corporate Clients: The Control Group Test, 84 *Harv. L. Rev.* 424, 426 (1970); Note, The Attorney-Client Privilege and the Corporation in Shareholder Litigation, 50 *S. Cal. L. Rev.* 303, 309 (1977).

n211 One could, for example, adopt a lesser or wholly different level of confidentiality for corporate clients. See, e.g., Hoffman, On Learning of a Corporate Client's Crime or Fraud -- The Lawyer's Dilemma, 33 *Bus. Law.* 1389, 1402 (1978); Weissenberger, Toward Precision in the Application of the Attorney-Client Privilege for Corporations, 65 *Iowa L. Rev.* 899, 901 (1980). The SEC has already differentiated the obligations of securities attorneys. See *SEC v. National Student Mktg. Corp.*, 457 F. Supp. 682 (D.D.C. 1978) (enforcing SEC Rule of Practice 2(e)). See also Comm. Reports, Report of the Special Committee on Lawyers' Role in Securities

Transactions, 32 Record of the Ass'n of the Bar of the City of New York 345, 345-46 (1977); Gross, Attorneys and Their Corporate Clients: SEC Rule 2(e) and the Georgetown "Whistle Blowing" Proposal, 3 Corp. L. Rev. 197, 211 (1980); Sonde, Professional Responsibility -- A New Religion or the Old Gospel?, 24 *Emory L.J.* 827, 848 (1975) (discussing appropriate role of securities lawyers); Sonde, The Responsibility of Professionals Under the Federal Securities Laws -- Some Observations, 68 *Nw. U.L. Rev.* 1, 12 (1973). Likewise, we could distinguish the confidentiality lawyers owe clients according to the role played. See, e.g., Lorne, The Corporate and Securities Adviser, the Public Interest, and Professional Ethics, 76 *Mich. L. Rev.* 425, 472 (1978) (lawyer as adviser); Marquis, An Appraisal of Attorneys' Responsibilities Before Administrative Agencies, 26 *Case W. Res. L. Rev.* 285, 286 (1976) (administrative lawyer); Schwartz, The Professionalism and Accountability of Lawyers, 66 *Calif. L. Rev.* 669, 671 (1978) (lawyer as advocate, negotiator, or counselor); Williams, Corporate Accountability and the Lawyer's Role, 34 *Bus. Law.* 7, 10-13 (1978) (lawyer as corporate director and corporate counsel).

n212 A lawyer might challenge a confidentiality rule on overbreadth grounds. In such litigation, the tailoring of the particular rule might also be key. But before considering an overbreadth claim, a court would have to consider the core constitutional issues discussed here; that is, whether lawyers ever have a first amendment right to reveal client secrets and what first amendment standard applies to confidentiality rules.

n213 Subin, supra note 10, at 1097 (quoting Luban, The Adversary System Excuse in D. Luban, supra note 19, at 90).

n214 That is, hypotheticals (1), (3), and (4).

n215 That is, hypotheticals (1), (2), and (3).

n216 See generally Karst, Legislative Facts in Constitutional Litigation, 1960 *Sup. Ct. Rev.* 75, 81 ("[w]hatever one's taste in opinions may be, it is plain that a judge cannot successfully balance interests, of constitutional or other dimensions, without information as to the probable effects of his decision").

n217 For example, code drafters have a fair amount of leeway in limiting commercial speech. See, e.g., *Zauderer v. Office of Disciplinary Coun-*

sel, 471 U.S. 626, 638 (1985); *In re R.M.J.*, 455 U.S. 191, 203 (1982). At a minimum, that category includes speech that "does no more than propose a commercial transaction." See, e.g., *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 562 (1980); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455-56 (1978). Significantly, however, commercial speech also encompasses disclosures that, when viewed realistically, can be characterized as economic in nature. See *Zauderer*, 471 U.S. at 637 (commercial nature of speech depends on a variety of factors, including motive for the lawyer's speech, whether it refers to a specific product or service the lawyer provides, and similarity or dissimilarity to traditional advertising). See also *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 68 (1983); *In re Superior Court Trial Lawyers Ass'n*, 107 F.T.C. 510, 588 (1986), aff'd, 856 F.2d 226 (D.C. Cir. 1988), aff'd, 110 S.Ct. 768 (1990). A large portion of confidences that lawyers would wish to volunteer in the absence of confidentiality rules probably fit within this commercial category. Cf. *Peel v. Attorney Registration & Disciplinary Comm'n*, 110 S. Ct. 2281, 2293 (1990) (Marshall, J., concurring) (emphasizing state's authority to enact regulation of lawyer specialization claims other than a total ban).

n218 It is important to note that, as a practical matter, lawyers are unlikely to seize the opportunity to disclose very frequently, with or without professional confidentiality rules. Lawyers remain subject to common law agency principles that forbid using secrets for personal gain or against the client's interests. See supra text accompanying notes 176-77. In addition, knowing that competitors can tell prospective clients that they rarely disclose client information, lawyers have a professional and economic incentive not to exercise first amendment disclosure rights haphazardly.

n219 Particular applications of vague standards by the enforcement authority may, however, prove to be unconstitutional. See generally G. Gunther, *Constitutional Law* 1148-49 (11th ed. 1985) and authorities cited therein.

n220 In states following the Model Code, future or ongoing crimes are already disclosable. Model Code, DR 4-101(C)(3). Under the Model Rules, however, nonviolent future crimes remain subject to confidentiality. Model Rules, Rule 1.6(b).

Arguably, rules requiring lawyers to disclose against their will are also

subject to first amendment attack. If, however, such exceptions are tied to particular types of harm to third persons, courts are likely to sustain them under any constitutional test, for they clearly serve a compelling state interest.

n221 *Cf. Connick v. Myers*, 461 U.S. 138, 147-48 (1983) (distinguishing between right to reveal information of “public” and “private” concern). The public employee’s relationship with a government employer can be analogized to the lawyer’s relationship with the client. In each context, the speaker/employee has a fiduciary obligation to the employer to preserve the employer’s interests. Sometimes that obligation conflicts with the speaker’s personal freedom of expression. Under the flexible approach *Connick* adopts for public employee speech, the more the employer needs confidentiality to maintain its operations, the more circumscribed the employee’s right to speak out. *Id.* at 151-52.

Flexible rules are discussed in Callan & David, *supra* note 101, at 354-56. Despite the temptation to discard as useless a rule that depends on whether “confidentiality was necessary,” there are situations in which it may work. It is important to remember that not all confidential information is of the same type. Some may be embarrassing or dangerous to the client. Other data may in fact be positive, though personal. *See Landesman*, *supra* note 147, at 774. Clients may not have the same hesitation to disclose the various categories of information to their attorneys.

n222 In *In re Callan*, 66 N.J. 401, 407, 331 A.2d 612, 616 (1975), an attorney was sanctioned for failing to make a disclosure required because “the integrity of the law was at stake.” Arguably, such vague mandatory confidentiality exceptions are constitutionally overbroad. *See Zacharias*, *supra* note 1, at 988-90 (discussing overbreadth and vagueness doctrines) and authorities cited therein. *Cf. Abel*, *Why Does the ABA Promulgate Ethical Rules?*, 59 *Tex. L. Rev.* 639, 642 (1981) (“The very lawyers who drafted the [Model] Rules would be the first to attack them as unconstitutionally vague if they were defending a client accused of violating them.”); Comment, *ABA Code of Professional Responsibility: Void for Vagueness?*, 57 *N.C.L. Rev.* 671, 680-92 (1979). Lawyers have challenged other speech-restrictive ethical provisions on the grounds that they are unconstitutionally overbroad or vague. *See, e.g., Hirschkop v. Snead*, 594 F.2d 356 (4th Cir. 1979) (per curiam); *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242 (7th Cir. 1975), cert. denied, 427 U.S. 912 (1976).

n223 A discretionary rule allows attorneys to weigh the competing interests of the client, society, and themselves without fear of sanction. The ability to individualize decisions to the particular circumstances gives attorneys leeway to reach better decisions and to negotiate with the client to correct or avoid improper conduct. *See Callan & David*, *supra* note 101, at 365. There are, however, disadvantages to according lawyers too much discretion. *See Kaufman*, *A Critical First Look at the Model Rules of Professional Conduct*, 66 *A.B.A. J.* 1074, 1077-78 (1980) (discussing dangers of lawyer discretion proposed in Model Rules).

n224 *See Levine*, *Self-interest or Self-defense: Lawyer Disregard of the Attorney-Client Privilege for Profit and Protection*, 5 *Hofstra L. Rev.* 783, 825 (1977).

n225 Several commentators have suggested *in camera* review of allegedly privileged communications that resembles this middleground approach. *See, e.g., Note*, *Attorney-Client Confidentiality: A New Approach*, 4 *Hofstra L. Rev.* 685, 699 n.61 (1976); *Note*, *The Lawyer-Client Privilege: Its Application to Corporations, the Role of Ethics, and Its Possible Curtailment*, 56 *Nw. U.L. Rev.* 235, 259 (1961-62). A few courts have followed the suggestion. *See, e.g., In re Berkley & Co.*, 629 F.2d 548, 553 (8th Cir. 1980). Others have required the party seeking disclosure to establish a prima facie case. *See, e.g., United States v. Shewfelt*, 455 F.2d 836, 840 (9th Cir.), cert. denied, 406 U.S. 944 (1972). *See also Whetstone v. Olson*, 46 *Wash. App.* 308, 311-12, 732 P.2d 159, 161 (1986) (requiring a factual foundation for the exception).

n226 Allowing lawyers to disclose client information for “moral reasons” gives attorneys significant power over clients. Without a disclosure exception, lawyers may be helpless in the face of a client’s refusal to take corrective action voluntarily. *See Zacharias*, *supra* note 4, at 369-70. On the other hand, if a lawyer can blackmail the client into disclosing information, the lawyer perhaps assumes undue dominance. *See Leubsdorf*, *supra* note 20, at 1046 and authorities cited therein. Such concerns have prompted several commentators to propose a requirement that lawyers initially engage in a “moral dialogue” in the hope of persuading the client to act ethically. *See, e.g., Burt*, *supra* note 194, at 1027-35; *Pepper*, *supra* note 143, at 630-32; *Shaffer*, *supra* note 204, at 241-50.

n227 A lawyer’s practice, for example, may benefit from appearing to

take a high road and revealing negative information about a public figure. Ordinarily, confidentiality rules and traditional fiduciary obligations forbid self-serving disclosures. But a lawyer who can dress up the disclosure as furthering political beliefs may be able to take advantage of discretionary exceptions prompted by first amendment concerns.

n228 The notion that attorneys should “avoid even the appearance of professional impropriety” has long been engrained in the legal professional ethos. See Model Code EC 9. To some extent, the legal system depends on maintaining the view that lawyers act exclusively as clients’ trustworthy allies. See Alschuler, *The Preservation of a Client’s Confidences: One Value Among Many or a Categorical Imperative?*, 52 *U. Colo. L. Rev.* 349, 351-52 (1981). But cf. C. Wolfram, supra note 5, at 319-21 (noting general vulnerability of “appearance of impropriety” rationale). If a lawyer, for high-minded reasons, discloses a client’s communication after warning the client of the possibility of disclosure, see supra text accompanying notes 204-05, the public should be able to understand and accept the need for the lawyer’s actions. Cf. Note, *Functional Overlap Between the Lawyer and Other Professionals: Its Implications for the Privileged Communications Doctrine*, 71 *Yale L.J.* 1226, 1262 (1962) (substantial percentage of laypersons believe lawyers should be allowed to disclose more frequently). In contrast, when a lawyer goes to court against the client, the public will -- at least initially -- learn nothing of the merits. Society will perceive only the fact that the attorney has proceeded against the client’s interests. Litigation thus poses a serious threat to the public’s (appropriate) current image of the lawyer-client relationship. Cf. Model Code EC 2-23 (a lawyer “should not sue a client for a fee unless necessary to prevent fraud or gross imposition by the client”).

n229 In hypotheticals (1), (3), (4), and (5), delay may, for example, be fatal to some third party. In hypotheticals (8) and (14), waiting for a court to act can be tantamount to enabling the wrongdoer to escape with impunity.

n230 See, e.g., *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963); *Near v. Minnesota*, 283 U.S. 697 (1931). For a discussion of the prior restraint doctrine, see Blasi, *Toward a Theory of Prior Restraint: The Central Linkage*, 66 *Minn. L. Rev.* 11 (1981); Jeffries, *Rethinking Prior Restraint*, 92 *Yale L.J.* 409 (1983); Redish, *The Proper Role of Prior Restraint Doctrine in First Amendment Theory*, 70 *Va. L. Rev.* 53 (1984). *Snepp v. United States*, 444 U.S. 507 (1980), cuts against the prior restraint argu-

ment. In the CIA confidentiality context, where the government sometimes has a valid interest in requiring silence, the Court held that the government could lawfully impose temporary restrictions tailored to safeguarding that interest. *Id.* at 509 n.2.

n231 That is not to say, however, that an agreement reached by the parties could not be void as against public policy. See Zacharias, supra note 4, at 405. Model Rule 1.6 already seems to allow the converse type of negotiation. It allows lawyers to request advance client approval for unorthodox methods of practice. But the comments to the rule require any resulting arrangements to “accord with the Rules of Professional Conduct.”

n232 Cf. *Snepp v. United States*, 444 U.S. 507 (1980) (upholding confidentiality agreement between CIA and agent).

n233 See Zacharias, supra note 4, at 405.

n234 Because recognition of a constitutional right to disclose client information would be a novelty, jurisdictions authorizing disclosure should take care to harmonize the common law governing attorney-client relationships. In the past, clients have won litigation against lawyers who have breached confidences. See, e.g., *Sherman v. Klopfer*, 32 *Ill. App. 3d* 519, 537, 336 *N.E.2d* 219, 232 (1975) (attorney liable for breaching fiduciary obligations by reporting client’s financial matters to the Internal Revenue Service); *Lakoff v. Lionel Corp.*, 207 *Misc.* 319, 323, 137 *N.Y.S.2d* 806, 809 (*N.Y. Sup. Ct.* 1955) (patent attorney liable for telling a client of another client’s invention). See also *Universal Sav. Corp. v. Morris Plan Co.*, 234 *F.* 382, 386 (*S.D.N.Y.* 1916) (remedy for breach of confidences “is at law to recover for the damages sustained”); *Savard v. Selby*, 19 *Ariz. App.* 514, 518, 508 *P.2d* 773, 777 (1973) (dismissing conspiracy and malpractice claims for failure to allege existence of confidential relationship); *State v. Sandini*, 395 *So. 2d* 1178, 1181 (*Fla. Dist. Ct. App.*), petition for rev. denied, 408 *So.2d* 1095 (1981), cert. denied, 456 U.S. 926 (1982) (remedy for violation of the privilege is civil proceedings against attorney); *Zeiden v. Oliphant*, 54 *N.Y.S.2d* 27, 28 (*N.Y. Sup. Ct.* 1945) (damages recoverable for “misconduct of an attorney in revealing confidential matter”); *Lott v. Ayres*, 611 *S.W.2d* 473 (*Tex. Civ. App.* 1981) (dismissing tort action because plaintiff failed to establish breach of confidence). In individual cases, clients will continue to expect lawyer silence even if some right to disclose exists.

The presence of a tort remedy casts a shadow on the attorney's right to disclose. Lawyers should not be able to escape the traditional fiduciary duty to avoid breaching confidence in bad faith. *See* R. Mallen & V. Levit, *Legal Malpractice* § 94 at 136-40 (1977) and authorities at nn. 48-50 (noting that in most reported cases, attorneys held liable have breached confidentiality for reasons of revenge, private gain, or the advantage of another client). But if steps are not taken to limit alternative causes of action, these may undermine the constitutional right to disclose. Attorneys aware of an optional disclosure provision, on the one hand, and a substantial risk of liability for disclosure, on the other, will inevitably take the safe course of remaining silent. *Cf.* R. Mallen & V. Levit, *Legal Malpractice* § 67 at 139 (1981) and authorities cited at n.23 (noting that most jurisdictions limit the remedy for ethical violations -- including breach of confidentiality -- to disciplinary action, unless elements of independent intentional tort can be established; describing policies underlying that limitation).

n235 *See* Post, *supra* note 2, at 170 (discussing failure of *Seattle Times* Court to recognize its departure from precedent).

n236 These hypothetical cases are annotated and discussed in Zacharias, *supra* note 4, at 409-411 nn.278-88. In some of the cases, an argument can be made that one or the other model code would allow the hypothetical lawyer to disclose. But states with strict confidentiality rules, like New York, forbid disclosure in most, if not all, of the cases.

n237 *Spaulding v. Zimmerman*, 116 N.W.2d 704 (Minn. 1962), discussed in G. Hazard, Jr. & W. Hodes, *The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct* 114 (1985) and Luban, *The Adversary System Excuse* in D. Luban, *supra* note 19, at 115.