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Comparing Exceptions to Privilege and Confidentiality Relating to Crime, Fraud, and Harm -- Can Hard Cases Make Good Law?

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Abstract

The article begins by describing some scenarios – the hard cases – that illustrate the tension between the lawyer’s obligation to his client and what many would view as basic standards of decency and humanity. The cases include (1) the recent case of an innocent man who spent 26 years in jail for a crime he did not commit while the attorneys for the real perpetrator protected the information that their own client had committed the crime, (2) cases involving the extent of the exception to confidentiality to prevent death or substantial bodily harm, (3) a case in which attorneys protected client information that would have revealed the location of murder victims whose families did not have final confirmation of their death, (4) a case in which information properly revealed under a confidentiality exception nonetheless retained its protection under attorney-client privilege, (5) a case dealing with the admissibility of the “fruits” of such information, and (6) a case dealing with the protection of information after the death of the client.

The article then briefly discusses why the rules concerning evidentiary privilege and those related to the ethical duty of confidentiality are confused, and compares the purpose and structure of each set of rules. The article then compares the purpose and structure of the crime-fraud exception to privilege and the “death or substantial bodily harm” exception (and related exceptions) to confidentiality.

Using the “hard cases” to illustrate, it suggests making some changes to confidentiality rules, and in other cases leaving the rules as they are. The removal of the client crime requirement to the confidentiality exception to prevent death or substantial bodily harm is appropriate and should be more widely adopted. Further, a new exception should be added allowing revelation to prevent a substantial loss of liberty. However, because of the importance of protecting confidential information, the exceptions should limited and should be permissive, not mandatory. Thus, the information about the location of the bodies discussed above would continue to be protected.

Some problems could be solved by refining privilege rules or by carefully maintaining the distinctions between evidentiary privilege and the ethical rules concerning confidentiality. Both threats to commit a crime and questions regarding potential criminal activity should be initially protected by attorney-client privilege, and that the crime-fraud exception would not allow revelation unless and until the client commits, or prepares to commit, the crime. Further, a revelation under an exception to confidentiality should not necessarily destroy privilege as to the
communication revealed. The fruits of information that is thus protected by privilege should also be protected unless it was, or would have been, discovered independently of the revelation. Finally, the article explains how the suggested changes address many of the concerns raised by the protection of information after the death of a client.

Comparing Exceptions to Privilege and Confidentiality
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I. Introduction

Clark Client hires Adam Attorney to represent him in a criminal proceeding. During the representation, Adam obtains information indicating that his client might be guilty of an unrelated murder for which another man has been charged. When he confronts Clark, Clark admits that he committed the murder.1 Adam, being a good and ethical criminal defense

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1The “hypothetical” is based on a case reported in a 2008 60 Minutes report. The following excerpt is reported in the latest edition of a popular ethics casebook:

Alton Logan was convicted of killing a security guard at a McDonald’s in Chicago in 1982. Police arrested him after a tip and got three eyewitnesses to identify him. Logan, his mother and brother all testified he was at home asleep when the murder occurred. But a jury found him guilty of first degree murder. Logan, who maintains he didn’t commit the murder, thought they were “crazy” when he was arrested for the crime.

Attorneys Dale Coventry and Jamie Kunz knew Logan had good reason to think that, because they knew he was innocent. And they knew that because their
attorney, understands that his obligation is to maintain privilege and confidentiality with respect to the information. While some may criticize a system that demands Adam’s silence, Adam would not be a criminal defense attorney if he did not believe in the nobility of providing a defense to the accused and in protecting client confidences that he obtains while providing that defense.

Adam is somewhat relieved when he hears that the innocent man has been spared the death penalty, but it is a relief that comes at a terrible cost. Had the man been given the death penalty, Adam might have spoken out based on the exception in the ethics rules that allows him to reveal a client confidence if he “reasonably believes” revelation is necessary “to prevent reasonably certain death or substantial bodily harm.”

Unfortunately, given that the accused received a life sentence, the exception does not seem to fit. Of course one can be seriously harmed in prison, but the reasonably certain requirement would be more than a stretch. Perhaps the exception in Adam’s jurisdiction requires that the death or bodily harm be the result of a

client, Andrew Wilson, whom they were defending for killing two policemen, confessed to them that he had also killed the security guard at McDonald’s – the crime Logan was charged with committing.

“We got information that Wilson was the guy and not Alton Logan. So we went over to the jail immediately almost and said, ‘Is that true? Was that you?’ And he said, ‘Yep it was me,’” Kunz recalled. “He just about hugged himself and smiled. I mean he was kind of gleeful about it. It was a very strange response,” Kunz said, recalling how Wilson had reacted.

“How did you interpret that response?” Simon asked.

“That it was true and that he was tickled pink,” Kunz said.


2 MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(1) (2008).

client crime, making the rule even less applicable to his circumstances. Adam reluctantly concludes that he cannot reveal the information.

In spite of his firm belief that he must guard the information, as the process continues, his confidence in his decision is shaken. Can he really let an innocent man go to jail for a crime he did not commit? He wants the answer to be no. He reads and rereads the rules on confidentiality. After a few sleepless nights, he revisits the dilemma. Maybe, he reasons, this is a situation in which he should just follow his conscience, and live with the consequences. How bad could the consequences be? Who could really fault him for revealing such information to save an innocent man? Then Adam considers what will happen if he reveals the information. Because his goal is to protect the innocent man, he considers whether the information will in fact save him. As he considers the rules on privilege, he focuses on the fact that the information is privileged, and that the privilege belongs to his client. Thus it appears that even if he breached his duty of confidentiality, the evidence would be inadmissible. He would harm his own client.

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4 The earlier version of the Model Rules had such a requirement. The exception provided that a lawyer could reveal confidential information “to the extent the lawyer reasonably believes necessary . . . to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm . . . .” MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(1) (2001). Some states retain the criminal act component. See infra note 23.

5 http://www.cbsnews.com/stories/2008/03/06/60minutes/main3914719.shtml

6 RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §68, cmt. c (1998)(“The modern conception of the privilege . . . protects client, not lawyers, and clients have primary authority to determine whether to assert the privilege . . . or waive it . . . .”).

7 Id. Dale Coventry, one of the attorneys in the case upon which this hypothetical is based stated in the CBS interview: “I could not figure out a way, and still cannot figure out a way, how we could have done anything to help Alton Logan [the wrongly convicted man] that would not have put Andrew Wilson [his client] in jeopardy of another capital case.”
without helping the innocent man. Of course, he can reveal the information with his client’s consent, but his client, understandably, if not graciously, is more concerned with saving himself than with the plight of the innocent man. However, the client is willing to have the information revealed after his death. So Clark waits until his client’s death to reveal the information. At last, after 26 years in jail for a crime he did not commit, the innocent man is released.

Scenarios such as this one, and other thorny privilege and confidentiality issues, have people, especially lay people, shaking their heads over a system that allows such travesties to occur. When the ethical rules do not make sense to lay people, it seems there are two possible reasons: (1) Lay people just do not understand the role of an attorney, or (2) The rules actually do not make sense, and should be changed. Considering the first possibility, it is true that the contempt lay people sometimes feel for certain actions of lawyers may be due to a failure to appreciate the lawyer’s role in our system of justice. Lawyers may in turn blame some of their actions on a flawed system of rules, arguing that the rules should be changed. Others may simply be resigned to a belief that rules that in most cases serve the greater good can at times create inescapable “collateral damage.” Sadly, such belief sometimes may, due to the inherent difficulty in crafting unfailing and unassailable rules, reflect the hard reality. However, for some

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8In the same interview, the attorneys insisted that “as a violation of attorney-client privilege, [the information] would never have been allowed in court.” Id.

9Even this would normally not have been allowed under the rules without the client’s consent. See Swidler & Berlin v. United States, 524 U.S. 399 (1998).

10The release took some time after the revelation. See supra note 5.

11See, e.g., Lloyd B. Snyder, Is Attorney Client Confidentiality Necessary?, 15 GEO. J. LEGAL ETHICS 477, 516 (2002)(“A common complaint [by attorneys] is that the public is ignorant of the role of attorneys, and if only they understood the profession better, they would
rules, change may be in order. It may be possible to tweak the rules to reduce untoward consequences. If modification could avoid injustice, even in a few cases, the endeavor would be well worth the effort.

Before one starts tweaking rules, however, one must consider the reason for the rules, how well they serve their purpose, and how changes would either disrupt or further their purpose. Complicating the endeavor here is the fact that two different sets of rules, each with its own exceptions, are involved – the evidentiary rule concerning attorney-client privilege and the ethical duty of confidentiality. Each has similar goals, but they are not, and should not be, identical. Problems may be created when the line between the two sets of rules is blurred, and, conversely, some relief may be found in the differences between the two sets of rules.

This article will begin by describing some scenarios – the hard cases (one of which has been described in this introduction) – that illustrate the tension between the lawyer’s obligation to his client and what many would view as basic standards of decency and humanity. It will then briefly discuss why the rules concerning evidentiary privilege and those related to the duty of confidentiality are confused, and compare the purpose and structure of each set of rules. The comparison will necessarily be from a general law standpoint, given that both sets of rules vary by jurisdiction, although specific variations will at times be included. The article will then

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12 See generally infra Part III.A.

13 Restatement (Third) of the Law Governing Lawyers §1, cmt. b (1998) ("[P]rofessional discipline of a lawyer in the United States is conducted pursuant to regulations contained in regulatory codes that have been approved in most states by the highest court in the jurisdiction in which the lawyer had been admitted.") (regarding confidentiality rules) and id., ch.5, tit. A, introductory note ("Every American jurisdiction provides – either by statute, evidence code, or common law – that generally neither a client nor the client’s lawyer may be not hold lawyers in contempt.")
compare the purpose and structure of the crime-fraud exception to privilege and the “death or substantial bodily harm” exception\(^{14}\) (and related exceptions) to confidentiality. Using the “hard cases” to illustrate, it will suggest that some of the problems are solved by changes already in effect in some jurisdictions, and suggest that these rules, plus a new exception to the rules, should be adopted more generally. It will further suggest that some problems could be solved by carefully maintaining the distinctions between evidentiary privilege and the ethical rules concerning confidentiality, and by appropriate analysis of what is covered by privilege and its exceptions. Lastly, the article will point out that in some cases, any attempt to change the rules to deal with some of the difficult cases will result in too much damage to other important interests, and that for those situations the rules should remain unchanged.

II. The Hard Cases

A. The Criminal Act Requirement

Spaulding v. Zimmerman\(^{15}\) is a staple in professional responsibility casebooks. The facts are compelling, and provide fertile ground for classroom discussion. Theodore Spaulding brought an action on behalf of his minor\(^{16}\) son, David Spaulding, who had sustained injuries in

\[\text{required to testify or otherwise to provide evidence that reveals the content of confidential communications between client and lawyer in the course of seeking or rendering legal advice or other legal assistance.}^{)}\]

\(^{14}\) The exception, under the current version of the Model Rules allows revelation “to prevent reasonably certain death or substantial bodily harm. . . .” MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(1) (2008).

\(^{15}\) 116 N.W.2d 704 (Minn. 1962).

\(^{16}\) David was 20 years of age, which, under the law at the time, made him a minor. Id. at 706.
an automobile accident.17 Almost two years after the case settled, the settlement was vacated.18 The initial settlement was made without the plaintiff’s knowledge that the accident likely caused a potentially fatal aorta aneurysm – a fact known to the defendants’ counsel at the time.19 The plaintiff’s age and the attorney’s failure to present the facts to the court in seeking approval of the settlement loomed large in the court’s decision.20 It is not clear that the decision would have come out the same way without those factors.21

The appeal of the case for classroom discussion goes beyond the specific holding. The compelling facts provide much to discuss regarding the pull between the professional obligations of an attorney under the various rules, and the attorney’s obligation to “do the right thing.” The court, in affirming the vacatur, noted that “no canon of ethics or legal obligation . . . required [defendant or his counsel] to inform the plaintiff” about the aneurysm, but did not state that the attorney’s silence was required.22 The situation becomes even more troubling if the ethics rules mandate the attorney’s silence, as in fact some versions of the Rules would.23 If the state had in

17 Id.

18 Id.

19 Id. The plaintiff’s doctor did not discover the aneurysm, but it was discovered by the doctor hired by the defendant’s attorney to examine plaintiff. Id. at 707.

20 Id. at 709-10,

21 In fact, it seems most likely that it would not have. See id.

22 Id. at 710.

23 For example, the exception in an earlier version on the Model Rules allowed revelation “to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm . . . .” MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(1) (2001). See also Texas Rule 1.05(e) (“When a lawyer has confidential information clearly establishing that a client is likely to commit a criminal or fraudulent act that
force a rule that required the imminent death or substantial bodily harm to be the result of a client crime, then the information would clearly be protected, setting up a stark dilemma for the attorney. Does he protect the information, as required by the rules, or give the information to the young man who will almost certainly die if he does not get appropriate treatment?

The criminal act requirement has created similar difficulties in other cases. A confidential communication indicating that a client is about to commit suicide provides another instructive example. If one is in a jurisdiction with a criminal act requirement for revelation, the right to reveal seems to turn on whether suicide is a crime in the jurisdiction. If it is, then the information fits within the exception. If it is not, the information is protected and there is seemingly no ethical way to reveal.24

A last example is based on a hypothetical in an earlier edition of a leading Professional Responsibility casebook:

My name is Susan Espinoza. I was appointed by the court to represent a man named Lewis Hale, who was arrested for selling drugs. It was a small quantity.

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is likely to result in death or substantial bodily harm . . . the lawyer shall reveal confidential information . . . to prevent the client from committing the . . . act.”) TEX. DISCIPLINARY R. PROF’L CONDUCT 1.05(e), reprinted in TEX. GOV’T CODE ANN., tit 2, subtit. G app. A (Vernon 2005 (TEX STATE BAR R. ART. X, § 9). Under a proposed Texas rule, an exception would be added allowing revelation to prevent death or substantial bodily harm. Proposed Disciplinary Rule 1.05(c)(3)(iv), reprinted in 72 TEX. B.J. 853 (2009).

24 At least one state has solved this dilemma by considering the strong public policy of protecting human life, and also the dictates of fidelity to the best interests of one’s client, by condoning the revelation even though suicide was not a crime, and thus the exception did not technically apply. N.Y. State Bar Op. 486 (1978)(printed in N.Y. State Bar J. 1978), cited with approval in People v. Fentress, 425 N.Y.S.2d 485, 497 (Cty.Ct. 1980). The court approved the attorney’s reporting of the client’s intent to commit suicide, stating that “to exalt the oath of silence, in the face of imminent death, would, under these circumstances, be not only morally reprehensible, but ethically unsound. . . . If the ethical duty exists primarily to protect the client’s interests, what interest can there be superior to the client’s life itself?” Id.
Hale doesn’t have a serious record, so I think I can strike a deal for maybe six months or at most a year. I went to visit Hale yesterday, a few days after his arrest, and we talked about the charge. He told me that when he was arrested, the police searched him but they did not discover a small gun that he had hidden in his boot. The police put him in the back of the police car alone, and even though he was handcuffed, he was able to reach down into his boot, retrieve the gun, and push it down into the seat behind him so it could not be seen. He says it is probably still there. He also says that it might be loaded. Now I am worried that the police might arrest someone else who will discover it there and use it. I asked Hale to let me tell the police, even anonymously, that the gun is there, but he told me that he had used the gun in a convenience store robbery in which he fired at the video camera, and he is afraid that a ballistics test will identify him as the robber. He figures his fingerprints are on the gun.\(^\text{25}\)

Again, the facts indicate an urgent dilemma for the attorney in a jurisdiction that requires for revelation that the death or substantial bodily harm be the result of a client crime.

B. The Dead Bodies

In People v. Belge\(^\text{26}\) the client told his attorneys about three murders he had committed, including information about where he left one of the bodies.\(^\text{27}\) One of the attorneys viewed the body, but did not reveal the confidential and privileged information at that time, even though the family of the victim did not yet have final confirmation of her death.\(^\text{28}\) When the attorney eventually, with his client’s consent, revealed the information about the other murders in an effort to establish an insanity defense, the public and the families of the victims involved were

\(^{25}\text{STEPHEN GILLERS, REGULATION OF LAWYERS: PROBLEMS OF LAW AND ETHICS 38-39 (6th ed. 2002). The hypothetical then adds the twist that another has been arrested for the convenience store robbery, id. at 39, raising the issue discussed in the introduction.}\)

\(^{26}\text{372 N.Y.S.2d 798 (Co.Ct. 1975), aff’d, 359 N.E.2d 377 (1976).}\)

\(^{27}\text{Id. at 799.}\)

\(^{28}\text{See id. at 802.}\)
outraged. Those affected by the tragedy, and others who empathized with their pain, could not understand how a lawyer’s obligation to the client could take precedence over the need to provide answers and closure to the grieving families. The wrenching facts again underscore the pressures between obligations to clients and decency to third parties.

C. Information that is Privileged, but not Confidential

A case that underscores the important differences between privilege and confidentiality is Purcell v. District Attorney. In that case Joseph Tyree consulted an attorney, plaintiff Jeffrey Purcell, in connection with Tyree’s discharge from his position as a maintenance man at the apartment building where he lived. During the consultation Tyree threatened to burn down the apartment building. Purcell notified a Boston police lieutenant of the threats. When constables and police officers went to Tyree’s apartment to evict him, they found “incendiary materials, containers of gasoline, and several bottles with wicks attached. Smoke detectors had been disconnected, and gasoline had been poured on a hallway floor.” Tyree was subsequently indicted for attempted arson.

29 Id. at 799, 801-02.
30 372 N.Y.S.2d at 801-02.
32 Id. at 437.
33 Id. at 437-38.
34 Id.
35 Id. at 438.
36 Id.
His first trial, in which Purcell successfully avoided testifying, ended in a mistrial.\textsuperscript{37} The judge in the second trial ordered Purcell to testify, rejecting Purcell’s argument that Tyree’s statements to him were protected by attorney-client privilege.\textsuperscript{38} On appeal, the Superior Court found the conversations to be privileged.\textsuperscript{39}

In so finding, the court uncovered an apparent anomaly in the application of the rules on confidentiality and privilege. It held that Purcell appropriately revealed the information pursuant to a discretionary disciplinary rule,\textsuperscript{40} but further found that the crime-fraud exception to attorney-client privilege did not apply.\textsuperscript{41} Thus, the information was not protected by confidentiality obligations, but was protected by privilege. The fact that information might be privileged, but not confidential, underscores the difference between the two doctrines. Understanding and respecting that difference opens avenues for solving some of the hard cases.

D. The Fruits of the Communication

The Texas Court of Criminal Appeals cited Purcell in a 1997 case, Henderson v. State.\textsuperscript{42} The considerations raised in Henderson again provide fertile ground for discussion of the intersection between privilege and confidentiality.\textsuperscript{43} The defendant, babysitter Cathy Lynn

\textsuperscript{37}Id.

\textsuperscript{38}Id.

\textsuperscript{39}Id. at 441.

\textsuperscript{40}Id. at 440-41.

\textsuperscript{41}Id.

\textsuperscript{42}962 S.W.2d 544 (Tex. 1997), reh. denied March 4, 1998.

\textsuperscript{43}In the opinion of this author, as will be discussed later, the court’s reasoning comes up
Henderson, was convicted of the capital murder of Brandon Baugh, her three-and-a-half-month-old charge.\textsuperscript{44} Law enforcement officers recovered the baby’s body using maps drawn by Henderson and given to her attorney.\textsuperscript{45} The attorney had resisted turning over the maps, claiming they were protected by attorney-client privilege,\textsuperscript{46} but the district judge granted the State’s motion to compel production pursuant to a grand jury subpoena.\textsuperscript{47} The maps themselves were not introduced at trial, nor were they referenced in any way.\textsuperscript{48} Thus, as the court pointed out, “any reversible error with regard to obtaining the maps must necessarily turn upon other evidence obtained as a result of the information contained in the maps (i.e. “fruits” of the maps) that was introduced into evidence at trial.”\textsuperscript{49} Because the maps led to recovery of the body, the question was whether the body was discovered illegally.\textsuperscript{50} The court held that it was not,\textsuperscript{51} considering both the attorney’s obligation to his client and the need to protect human life.\textsuperscript{52} In short in some parts of the case in dealing with questions that admittedly defy clear resolution – hence, the hard questions description.

\textsuperscript{44} 962 S.W.2d at 548.
\textsuperscript{45} Id. at 550.
\textsuperscript{46} Id. at 549-50.
\textsuperscript{47} Id. at 550.
\textsuperscript{48} Id. at 551.
\textsuperscript{49} Id.
\textsuperscript{50} Id.
\textsuperscript{51} Id. at 557.
\textsuperscript{52} Id. at 557.
considering how the facts of this case inform the discussion, it is important to consider, first, whether the maps themselves (or other such communications) would be protected by privilege, and second, whether the fruits of the communication (in *Henderson*, the discovery of the body) are protected.

E. Eternal Privilege

Another “hard case”, which is somewhat related to the first case discussed in this article, is the dilemma created for an attorney who knows that his client, now deceased, committed a crime for which another person has been charged and/or convicted, but is bound to silence by a privilege and confidentiality obligation that does not end with the client’s death. The United State Supreme Court declined to create an exception to allow revelation of privileged information following the death of the client (then Deputy White Counsel Vincent Foster) in *Swidler & Berlin v. U.S.* The dissent, however, stresses the problem created when the privileged information is needed to prevent the conviction of an innocent person. In fact, but for the client’s consent to a revelation following his death, the “innocent man” case discussed at the beginning of this article would be a tragic illustration of Justice O’Connor’s concern, and the wrongly convicted man may well have spent the remainder of his days in jail. The very real

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53 *Id.*


55 *Id.* at 413.

56 In their own defense, the attorneys in that case point out that the fact that they had information that would exonerate the innocent man came to light because they had secured the client’s agreement to eventually reveal the information. They further speculate that there could be other attorneys with similar information that do not suffer the same public reprobation simply because they never reveal the information. *See supra* note 5.
possibility that an innocent man could be in jail for life because of an attorney’s obligation of silence to a now dead client again cries out for a solution capable of avoiding such a result.

III. Privilege and Confidentiality Compared

A. Similarities and Distinctions

Before suggesting possible changes or refinements in privilege and/or confidentiality rules to enable attorneys to make more palatable choices in some of the cases discussed, it is important to take a closer look at each set of rules and their exceptions. Both privilege and confidentiality arise in the context of clients seeking legal advice, and require protection of client information. Both are justified in part by the need to allow the client to communicate with his attorney without fear that his communications will be revealed. Because of these similarities, the two are often confused. It has been suggested, in fact, that the two should be

57 Restatement (Third) of the Law Governing Lawyers §59 (1998) (“Confidential client information consists of information relating to the representation of a client . . . .”)(Emphasis added) and §72, cmt. b (“The claimant of the privilege must have consulted the lawyer to obtain legal counseling or advice . . . .”).

58 Model Rule 1.6 states that a lawyer “shall not reveal information relating to the representation of a client,” subject to enumerated exceptions. Model Rules of Professional Conduct Rule 1.6(a) (2005). Concerning privilege, the Restatement states that a “lawyer . . . from whom a privileged communication is sought must invoke the privilege when doing so §86 (1998).

59 Id. §60, cmt. b (“It is recognized that the [confidentiality] rule better protects legitimate client expectations about communications to their lawyers and that permitting divulgence would be inconsistent with furthering the lawful objectives of clients.”) and §68, cmt. c (“The rationale for the privilege is that confidentiality enhances the value of client-lawyer communications . . . . It is assumed that, in the absence of such frank and full discussion between client and lawyer, adequate legal assistance cannot be realized.”)
merged—a suggestion with which this author takes exception. Further confusing the doctrines is the requirement that information, in order to be protected by privilege, be communicated in confidence (be confidential). Confidential information, in fact, is sometimes defined as including privileged information. Regardless of the definition, however, virtually all privileged information is also protected by the ethical duty of confidentiality. The rare case in which it is not also protected by confidentiality in part provides the inspiration for this article.

While both privilege and confidentiality protect information and make for better attorney-client communication, the scope of privilege is much more circumscribed than that of the

60Fred C. Zacharias, Harmonizing Privilege and Confidentiality, 41 S. Tex. L. Rev. 69, (1999). See also Snyder, supra note 11, pointing out both historical congruence, id. at 486, and interaction between, id. at 493, the two rules, but suggesting that the confidentiality rules be discarded entirely. Id. at 521.


62Restatement(Third) of the Law Governing Lawyers §68 (defining privilege as relating only to communications made “in confidence”). See also Fisher v. U.S., 425 U.S. 391, 403 (1976) (“Confidential disclosures by a client to an attorney made in order to obtain legal assistance are privileged.”).

63See, e.g., Texas Disciplinary Rules of Professional Conduct, Rule 1.05(a) (“Confidential information includes both privileged information and unprivileged client information.”)(2005). See also, In re Marriage of Decker, 606 N.E.2d 1094, 1102 (Ill. 1992)(“[T]he attorney’s rule of confidentiality . . . encompasses the attorney-client evidentiary privilege as well as the attorney’s fiduciary duty to his client.”).

64Restatement (Third) of the Law Governing Lawyers §60, cmt. a (“The duty to safeguard entails the corollary duties to . . . assert privileges and other legal protection applicable to confidential client information such as the attorney-client privilege . . . .”) Cf. Id. § 59 cmt. c (“This definition [of confidentiality] covers all information relating to representation of a client . . . .”) (emphasis added).

65See supra note 59.
broader duty of confidentiality.\textsuperscript{66} This is necessarily so given that confidentiality protects all information related to the representation,\textsuperscript{67} and privilege protects only client communications,\textsuperscript{68} and only in an evidentiary context.\textsuperscript{69} Thus, in non-litigation representations – a significant portion of all representations – privilege will generally not be an issue. Confidentiality,

\textsuperscript{66}The definition of confidential information “covers information gathered from any source, including sources such as third persons whose communications are not protected by the attorney-client privilege. . . .” \textit{Restatement (Third) of the Law Governing Lawyers} §59, cmt. b. \textit{See, e.g.}, Adams v. Franklin, 924 A.2d 993, 996-97 (D.C. Cir. 2007)(“[T]he lawyer’s ethical duty to preserve a client’s confidences and secrets is broader than the attorney-client privilege.”), In re Rules of Professional Conduct and Insurer Imposed Billing Rules and Procedures, 2 P.3d 806, 822 (Mont. 2000)(“We emphasize that by its plain language, Rule 1.6, M.R.Prof.Conduct, . . . is . . . broader in both scope and protection than the attorney-client privilege . . . .”), Diversified Group, Inc. V. Daugerdas, 139 F.Supp.2d 445, 455 (S.D.N.Y. 2001)(“The ethical duty of confidentiality imposed upon attorneys goes beyond the limited evidentiary, attorney-client privilege.”), People v. Curry, 272 N.E.2d 669, 672 (Ill. App. 1971)(comparing the “limited attorney-client privilege” with “the broader ethical obligation and professional responsibility of a lawyer to guard the confidences and secrets of his client.”).

\textsuperscript{67}\textit{Id.} §59 (“Confidential client information consists of information relating to representation of a client . . . .”). \textit{See, e.g.}, Newman v. State, 863 A.2d 321, 332 (Md. 2004)(“Confidentiality is not limited to ‘matters communicated in confidence by the client but also to all information relating to the representation,’ whether obtained from the client or through the attorney’s independent investigation [citation omitted], whereas the attorney-client privilege only protects communications between the client and the attorney.”)(emphasis added), State v. Meeks, 666 N.W.2d 859, 868 (Wis. 2003)(The confidentiality rule applies not merely to matters communicated in confidence by the client, but also to all information relating to the representation, whatever its source.”). In re Marriage of Decker, 606 N.E.2d 1094,1102 (Ill. 1992)(“Unlike the evidentiary attorney-client privilege, the rule of confidentiality applies not only during judicial proceedings, but at all times, and to client’s secrets, as well as confidences.”)(emphasis added).

\textsuperscript{68}The definition of privilege specifies that a communication must be involved. \textit{Id.} §68.

\textsuperscript{69}\textit{Id.} §86, cmt. a (referring to privilege as “a rule of evidence employed in adversary proceedings”).
however, is a fundamental obligation owed to the client. Given the greater scope of confidentiality, and the critical need to protect privileged information, it seems to go without saying that all privileged information is also confidential. As indicated, the definition of confidentiality may be crafted as such. Further, because privilege must be carefully protected to avoid waiver, that trust relationship would seem to require protection of privileged information, making such information also confidential. Yet when exceptions are considered, it appears that this is not necessarily always the case. There may be a few rare situations in which information can be revealed under a confidentiality exception without losing the protections of privilege. Such exceptions, carefully circumscribed, may go a long way toward solving some of the “hard cases” while maintaining the purposes and protections of privilege and confidentiality.

In addition, the rationales behind privilege and confidentiality differ in important ways. Attorney-client privilege is justified by the need for free and honest communication between attorney and client, so that the attorney can adequately represent the client and communicate

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70 MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6, cmt. 2 (2005)(referring to the duty to maintain confidentiality as a “fundamental principle in the client-lawyer relationship”).

71 See supra note 63.

72 See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §79 (1998)(“The privilege is waived if the client, the client’s lawyer, or another authorized agent of the client voluntarily discloses the communication in a non-privileged communication.”)

73 Upjohn Co. v. United States, 449 U.S. 383, 389 (1981) (The purpose of the attorney-client privilege is “to encourage full and frank communication between attorneys and their clients . . . .”) See also Fisher v. United States, 425 U.S. at 403 (“The purpose of the privilege is to encourage clients to make full disclosure to their attorneys.”).

74 “[I]f the client knows that damaging information could more readily be obtained from the attorney following disclosure than from himself in the absence of disclosure, the client would be reluctant to confide in his lawyer and it would be difficult to obtain fully informed legal
legal advice to the client. This in turn serves the “broader public interests in the observance of law and administration of justice.” In defining privilege, the tension is between the need to protect information to provide adequate representation for the client and the need to have the information in the search for truth. Because of the strong policies favoring availability of information in the search for truth, information that does not fall within the carefully defined purview of privilege is not protected.

The ethical duty of confidentiality on the other hand is justified not only by the need to encourage full and frank communication to provide better representation, but also by the duties of trust and loyalty owed to the client by the attorney as an agent and fiduciary. The agency relationship between attorney and client and the fiduciary duty of the attorney to protect all

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75 Id. at 389. (“[S]ound legal advice or advocacy depends upon the lawyer’s being fully informed by the client . . . .”)

76 Id.

77 Id. §68, cmt. c (“The law accepts the risks of factual error and injustice in individual cases in deference to the values that the privilege vindicates.”)

78 Fisher v. U.S., 425 U.S. at 403 (“[S]ince the privilege has the effect of withholding relevant information from the fact-finder, it applies only where necessary to achieve its purpose. Accordingly it protects only those disclosures necessary to obtain informed legal advice which might not have been made absent the privilege.”)

79 MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6, cmt. 2 (2005)(stating that by protecting all information relating to the representation of the client “the client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer . . . .”)

80 Id. (stating that the confidentiality obligation “contributes to the trust that is the hallmark of the client-lawyer relationship”).
information relating to that relationship are key elements in the obligation. The basic definition of the duty is all-inclusive. Without either express or implied consent of the client, an exception is required to allow revelation of confidential information. Unlike privilege, in which the competing policies involved affect the basic (and narrow) definition of privilege, the fundamental (and broad) definition of confidentiality is informed only by the policies favoring protection of the information, with the exceptions dealing with competing policies. Given the broader scope of confidentiality, it again seems unlikely that any information could be protected by privilege and not by confidentiality. Closer inspection reveals how this can be so.

B. Comparing the exceptions

While there is much confusion between the crime-fraud exception to privilege and the “death or substantial bodily harm” exception to confidentiality, the exceptions are nonetheless distinct, and serve different purposes. The crime-fraud exception to privilege is based on the reasoning that, while a client may be entitled to a defense for a past crime, he is not entitled to

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81 RESTATMENT (THIRD) OF THE LAW GOVERNING LAWYERS §59, cmt. b (2000)(“The expansive definitive of client information not protected by the attorney-client privilege that nonetheless a lawyer is obliged to keep confidential comes primarily from the law of agency and the rules of professional regulation.”).

82 RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §59 (defining confidential information as consisting of “information relating to representation of a client, other than information that is generally known”).

83 MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(a) (2005).

84 U.S. CONST. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right . . . the have the assistance of counsel for his defence.”); THOMAS A MAUET AND WARREN D. WOLFSON, TRIAL EVIDENCE §8.12 at 267 (2009).
legal assistance in committing a crime in the future. Therefore, a client communication by which the client seeks assistance in committing a crime or fraud is not protected. In fact, one can look at the crime-fraud exception as not really being an exception at all: advice that is sought in order to help a client commit a crime or fraud cannot fairly be called “legal” (as opposed to illegal) advice, and is therefore not protected under the basic definition of privilege. In such a situation, the policy favoring availability of information in the search for truth in litigation outweighs any need to protect the information to further representation goals, especially given that no legitimate representational goals are at stake.

On the other hand, given that confidentiality is not an evidentiary issue at all, the tension in crafting exceptions is between the need to maintain client confidentiality based on the

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85 Mauet and Wolfson, supra, note 84.


87 See id., § 68(4) indicating that for the communication to be privileged, it must be made “for the purpose of obtaining or providing legal assistance for the client.” (Emphasis added.).

88 United States v. Zolin, 491 U.S. 554, 562-63 (1989) (“The attorney-client privilege must necessarily protect the confidences of wrongdoers, but the reasons for that protection – the centrality of open client and attorney communication to the proper functioning of our adversary system of justice – ‘ceases to operate at a certain point, namely, where the desired advice refers not to prior wrongdoing, but to future wrongdoing.’” (emphasis in original). See also Snyder, supra note 11 at 483 (“It is no surprise that the privilege has a number of exceptions that apply where countervailing values outweigh the value of nondisclosure.”).)

89 Cf. Nix v. Whiteside, 475 U.S. 157, 173 (1986) in which the court stated that an attorney’s “admonitions to his client [to prevent the client’s perjury] can in no sense be said to have forced respondent into an impermissible choice between his right to counsel and his right to testify as he proposed for there was no permissible choice to testify falsely.” Likewise, in the case of privilege, there is no right to assistance in committing a crime, therefore there can be no serious complaint that the rules of evidence should protect a client who is seeking such assistance.
lawyer’s professional obligations to the client and the need to reveal information to further a strong public policy such as preventing death or substantial bodily harm.90 Because the trust relationship between attorney and client is so important,91 one must move carefully in creating any exceptions.

When comparing the policy of truth-seeking and the policy of providing adequate legal counsel for the accused, greater protection (and thus fewer exceptions) can be justified on the basis that without privilege, the “evidence” would not exist in the first place.92 One must be careful in crafting a rule that purports to create a privilege, encourages communication that in the mind of the client is privileged, and then creates a “gotcha” exception on the basis that the information is needed in the search for truth. But for the promise of protection, the client likely would not have communicated at least some of the information, and there would have been no “evidence” to discover.93 In a sense, the promise of privilege could result in seducing clients to essentially provide evidence against themselves. While such a result certainly makes it easier to get information in litigation, it is not appropriate under our legal system. Forcing clients to

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90 Model Rules of Professional Conduct Rule 1.6, cmt. 6 (2005)(“[A]lthough the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, . . . the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm.”).

91 See supra, note 80.

92 See Swidler & Berlin, 524 U.S. at 408. In deciding that the privilege applies posthumously, the court stated that “[w]ithout assurance of the privilege’s posthumous application, the client may very well not have made disclosures to his attorney at all, so the loss of evidence is more apparent than real.”

93 Id.
testify against themselves directly would aid in the search for truth also, but is not consonant with constitutional principles. Clients should not be cajoled into indirectly providing information to be used against them either.

On the other hand, comparing the policy of protecting a client’s secrets and trust with the policy of preventing death or substantial bodily harm, the arguments supporting revelation are much weightier than those in the evidentiary context. Instead of weighing the need to protect the information versus the need to facilitate the search for truth in litigation, we may be weighing protecting the information versus saving a life or protecting some other vitally important interest. Further, a rule can be crafted that still protects the evidentiary aspect of the information while promoting the policy of protecting innocent third parties.

C. How Communications can be Privileged, but not Confidential

While it is conceptually accurate, without taking exceptions into account, to consider anything that is privileged to also be confidential, it is nonetheless possible, albeit unlikely, to have a situation in which information is not protected by confidentiality based on an exception, but remains protected by evidentiary privilege. The question becomes whether the decision that the information can be revealed under an exception to confidentiality should necessarily

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94 U.S. CONST. amend. V (“No person shall be . . . compelled in any criminal case to be a witness against himself . . .”).

95 See Henderson v. State, 962 S.W.2d at 555-56 (“[T]he ethical rules embody strong policy interests that we believe can require the privilege to yield in a limited fashion to accommodate the policy interest in question.”).

96 See supra notes 71 and 72 and accompanying text.

97 See infra note 103.
destroy the evidentiary protection.\textsuperscript{98} I submit that it must not,\textsuperscript{99} for the following reasons.

If the evidence is being revealed under an exception, it is being revealed without the client’s consent. If the client were willing to consent, the exception would not be needed.\textsuperscript{100} Based on the attorney’s duties of consultation with the client,\textsuperscript{101} consent would be the preferable option before relying on an exception. Granted, for evidentiary privilege, waiver, not consent, is the appropriate test for loss of the privilege.\textsuperscript{102} However, an attorney revelation after his client has refused consent should not be considered a waiver, and without waiver the privilege should remain.\textsuperscript{103} The privilege, after all, belongs to the client, and it is the client’s prerogative to waive

\textsuperscript{98}The situation may arise more often in light of the recent changes in the Rules allowing disclosure in more situations. Mitchell M. Simon, \textit{Discreet Disclosures: Should Lawyers Who Disclose Confidential Information to Protect Third Parties be Compelled to Testify against Their Clients?}, 49 S. TEX. L. REV. 307, 309 (2007) (“The attorney-client privilege question will likely become more prominent since many states, following the ABA’s new Model Rules, have liberalized their voluntary disclosure rules. Courts will thus increasingly be forced to interpret the impact of such disclosures on the attorney-client privilege.”).

\textsuperscript{99}For a thorough analysis by another author supporting the same conclusion, albeit using a different approach, see Simon, \textit{supra} note 98.

\textsuperscript{100}\textsc{Model Rules of Professional Conduct} Rule 1.6(a) (2005)(“A lawyer shall not reveal information relating to the representation of a client \textit{unless the client gives informed consent} . . . .”)(Emphasis added.)

\textsuperscript{101}\textsc{Model Rules of Professional Conduct} Rule 1.4(a)(2) (2005)(providing that a lawyer shall “reasonably consult with the client about the means by which the client’s objectives are to be accomplished . . . .”

\textsuperscript{102}See \textsc{Restatement (Third) of the Law Governing Lawyers} § 78 cmt. b (“Waiver of the privilege must be contrasted with a lawyer’s use or disclosure of confidential client information with client consent . . . .”).

\textsuperscript{103}Cf. Purcell. The fact that the court found that the evidence was protected by privilege necessarily leads to the conclusion that the revelation under a confidentiality exception did not
it or not. While it is true that the privilege can be waived on the client’s behalf by his attorney as his authorized agent, there is neither express nor implied authority for the attorney to reveal the information in the confidentiality exception scenario. The privilege must be honored.

Continued recognition of attorney-client privilege, even after revelation under a confidentiality exception, also makes sense when considering the different interests that are protected under each doctrine. Each should be evaluated independently, focusing on the interests protected by the doctrine. Compare, for example, what happens when the situation is reversed. When information is revealed in an evidentiary setting, its confidential nature is not thereby destroyed, due to the continuing obligations of the attorney to protect the information as much

constitute a waiver. The Maryland Court of Appeals stated that it agreed with this conclusion in Newman v. State, 863 A.2d 321, 333 (Md. 2004). See also, Simon, supra note 98 at 322 ([A]n attorney’s voluntary disclosure of confidential information should not constitute waiver of the privilege.”).

104 RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 78 cmt. b (“The attorney-client privilege is personal to the client whose interests it protects. A client can relinquish its protection.”)

105 Id., cmt. c (“A lawyer generally has implied authority to waive a client’s confidentiality rights in the course of representing the client . . . .”).

106 Implied revelation, such as that which is “impliedly authorized in order to carry out the representation,” MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(a) (2005), or “impliedly authorized” when “taking protective action” for a client with “diminished capacity,” MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.14(c) (2005), appears to be implied on the basis that it is in the best interest of the client, not a third party.

107 RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 59 cmt. d (1998) (“[T]he fact that information has become known to some others does not deprive it of protection if it has not become generally known in the relevant sector of the public.”).
The converse should also be true.

What are these different interests, and how do they inform the analysis? The focus on encouraging full communication between attorney and client found in attorney-client privilege analysis is fairly straightforward. Privilege exists in an evidentiary context, protecting certain communications from revelation in the proceeding. The privilege is narrow, but the protection is strong. The Maryland Court of Appeals recognized the importance of protecting the interests implicated by attorney-client privilege even after disclosure under the exception to prevent death or substantial bodily harm, in extending the protection not only because of the chilling effect of the obverse, but also because it pits the attorney, as advocate and advisor, against the client, when the client is charged with a crime. To permit a Rule 1.6 disclosure to destroy the attorney-client privilege and empower the attorney to essentially waive his client’s privilege without the client’s consent is repugnant to the entire purpose of the attorney-client privilege in promoting candor between attorney and client.109

On the other hand, confidentiality rationale involves more than encouraging communication between attorney and client110. The confidentiality obligation is broad-based, not limited to evidence, and protects all client information that is not covered by an exception, 

108 Model Rule 1.6 cmt. 14 provides:

Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified. . . . If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

109 863 A.2d at 333.

110 See supra notes 80-81 and accompanying text.
unless the client consents to disclosure or “the disclosure is impliedly authorized in order to carry out the representation.” The concept of implied authorization can cover a lot of information, which may in fact provide a key to why the information is protected. Surely the “sharing” of relevant information to appropriate parties is often an integral part of effective representation.

What, then, is not impliedly authorized? Obviously, in many cases most of what is left (and therefore confidential) are those things a client would not want revealed – in other words, private or secret information, or information the revelation of which would in some way harm the client or his interests.

111 Model Rule 1.6(a).


113 See, e.g., Michigan Rule 1.6, defining Confidential information to include both privileged information and “secret” information (“other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.”). Mich. Rules of Prof’l Conduct, Rule 1.6 (1998).

114 See id. A comment to the Restatement, discusses the reality that, while confidentiality rules literally protect virtually all information, in reality the ethical concern is with whether revelation would create “an unreasonable risk of adverse effect” to the “client’s objectives” or “other interests of the client.” Id. §60, cmt. c(i). The comment then states:

Adverse effects include all consequences that a lawyer of reasonable prudence would recognize as risking material frustration of the client’s objectives in the representation or material misfortune, disadvantage, or other prejudice to a client in other respects, either during the course of the present representation or in the future. It includes consequences such as financial or physical harm and personal embarrassment that could be caused to a person of normal susceptibility and a normal interest in privacy.

Id.
Protecting privacy and secrets is not the primary concern in privilege analysis. In litigation, many things that are confidential are not privileged. The primary concern in privilege analysis is encouraging communication, and it is the protection of sensitive information that then encourages the communication. Nonetheless, it is the communication that is protected by privilege, not the underlying information, no matter how sensitive it may be. Because such issues are squarely within the rationale for confidentiality, the interest survives, and the information remains confidential, even after information is revealed in a litigation context. Likewise, the interest in protecting information in litigation, based on evidentiary rationales, should survive revelation under a confidentiality exception.

The ability to grant immunity to get testimony is instructive. The relevant privilege in

115 This is either because they do not fit the definition of privilege in the first place, for example, because not dealing with an attorney client communication, or because immunity has been granted.

116 Cf. Swidler & Berlin, 524 U.S. at 407 (In deciding that attorney-client privilege survives the death of the client, the Court points out that “[k]nowing that communications will remain confidential even after death encourages the client to communicate fully and frankly with counsel” and that “[c]lients may be concerned about reputation, civil liability, or possible harm to friends and family.”).

117 RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 69 cmt. d (1998)(“The attorney-client privilege protects only the content of the communication between privileged persons, not the knowledge of privileged persons about the facts themselves.”).

118 See, supra, note 114.

119 See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §59, cmt. b (1998)(Confidentiality includes “information that becomes known by others, so long as the information does not become generally known. . . . The fact that information falls outside the attorney-client privilege . . . does not determine its confidentiality under this Section.”).
that case is of course the privilege against self-incrimination – a constitutional privilege.\textsuperscript{120} When immunity is granted, requiring one defendant to testify as to his own criminal acts to serve the greater societal goal of, for example, convicting a more dangerous criminal, no residual interest in the privacy of the information is sufficient to overcome the policies supporting the requirement that the defendant testify.\textsuperscript{121} While the information has literally been compelled, the protection for purposes of the defendant’s potential conviction remains. The policy of not requiring the defendant to testify against himself – not forcing a person to incriminate himself\textsuperscript{122} – has been served by the grant of immunity.

The revelation to prevent death, substantial bodily harm, or significant loss of liberty should work in a similar way. The information could be revealed (in this case by the attorney) as necessary to prevent the harm, and any interest the client has in the protection of his privacy would be insufficient to overcome the strong policies served by allowing the revelation. However, in this scenario, the policy can be served without necessarily giving up the privilege protection in the evidentiary sense, thus continuing to protect the client’s interest in not having his protected conversation with his attorney used against him in litigation. The continued protection of the evidentiary privilege then serves the interest of encouraging full disclosure to

\textsuperscript{120}\textit{U.S. Const. amend. V.}

\textsuperscript{121}\textit{See Kastigar v. United States, 406 U.S. 441 (1972).} While the Court does not specifically address “privacy interests” it indicates that the self-incrimination interest is the only interest protected in fifth amendment cases in stating that “We hold that such immunity from use and derivative use is coextensive with the scope of the privilege against self-incrimination, and therefore is sufficient to compel testimony over a claim of the privilege.” \textit{Id.} at 453.

\textsuperscript{122}\textit{Supra} note 120.
the attorney\textsuperscript{123} without sacrificing the ability to protect the public.\textsuperscript{124} As persuasively argued by one author, the failure to continue to protect privilege could significantly hamper the goal of protecting the public by making attorneys less willing to reveal confidential information under a confidentiality exception.\textsuperscript{125} The author’s conclusion is backed up not only by his cogent arguments, but also by empirical data.\textsuperscript{126}

One could of course argue that any revelation discourages client communications, but the argument has little force given (1) the premise that clients involved in litigation in many cases will be more concerned with culpability or liability than with reputation concerns, and, more importantly, (2) the fact that other confidentiality exceptions already exist that are in some cases beyond the control of the client,\textsuperscript{127} and that are well established in confidentiality rules.\textsuperscript{128} In

\textsuperscript{123}Fisher v. U.S., supra note 62, 425 U.S. at 403 (“The purpose of the privilege is to encourage clients to make full disclosure to their attorneys.”).

\textsuperscript{124}As the court points out in Purcell, a “[l]awyers will be reluctant to come forward if they know that the information that they disclose may lead to adverse consequences to their clients.” 676 N.E.2d at 440.

\textsuperscript{125}Simon, supra note 98 at 330 (“[M]y empirical research suggests that [compelling the attorney’s testimony] might actually decrease the number of lawyers willing to make voluntary disclosures. Since the prosecutor would not have the knowledge of the potential harm without the lawyer's disclosure, decreased disclosure would have a negative impact on public safety.”).

\textsuperscript{126}Id. at 336 (The author conducted a survey of the New Hampshire Bar for his article. He further refers to a limited study conducted by the Yale Law Journal in 1962, which was reviewed and expanded upon in 1989 by Professor Fred Zacharias.)

\textsuperscript{127}The fact that the “death or substantial bodily harm” no longer requires a client crime or fraud, MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(1)(2005), means that the exception could be triggered without the involvement of the client. For example, the imminent death from the aorta aneurism in Spaulding was not caused by a crime or fraud of the client. See discussion of the case supra Part II.A. Likewise, the “self-defense” exception, MODEL RULES OF
other words, the decision to allow certain revelations under confidentiality exceptions has already been made for other important policy reasons, apparently without dramatic impact on a client’s willingness to confide in his attorney. As long as such exceptions continue to be limited to the extreme situations, on a par with death or substantial bodily harm, there seems to be no reason to fear loss of willingness to consult with an attorney due to a carefully circumscribed expansion of the already numerous exceptions.

That having been said, there is a benefit to continuing to protect the information in the evidentiary context. Such protection can only increase client confidence that his revelations will be protected in the all-important litigation context. And, as indicated earlier, it makes no sense to bemoan loss of evidence because of the protection of privilege when that evidence would not have existed without the privilege. 129 Fostering an atmosphere of fuller communication facilitates the very real policy goal of providing more competent, complete, and ethical representation of clients.

IV. Suggestions for Change (or not) Based on Analysis of the Hard Cases

A. Introduction

Few questions have proven more difficult to resolve than those dealing with the extent to which an attorney should be allowed or required to reveal confidential information to prevent

PROFESSIONAL CONDUCT Rule 1.6(b)(5)(2005), can be triggered in response to a claimed “wrong alleged by a third person.” Id., cmt. 10.

128 For example, the self defense exception, which does not require a client action to trigger it, was part of the earlier Model Code. Model Code of Prof’l Responsibility DR 4-101(C)(4) (1983) (allowing a lawyer to reveal “[c]onfidences or secrets necessary to establish or collect his fee or to defend himself . . . against an accusation of wrongful conduct.”).

129 See supra note 92.
harm. Without a compelling reason to allow revelation of client information, the overarching fiduciary obligations of confidentiality, fidelity and loyalty prevail. The rub is in defining how compelling the reasons need to be to create an exception and how the line between the strong policies of obligations to clients and of protecting others (including the attorney himself) from harm is to be drawn. I will now discuss the hard cases, and suggest additional changes to deal with the issues highlighted by them. On the other hand, I will further discuss why, in some situations, change may not be in order.

B. The Wrongful Conviction

The rules already allow revelation to prevent death or substantial bodily harm. I suggest that revelation should also be allowed to prevent a significant loss of liberty. Such an exception would include wrongful incarceration for any significant time period and prevent the extreme

130 Cf. Paul T. Hayden, Ethical Lawyering – Legal and Professional Responsibilities in the Practice of Law 198 (2d ed. 2007) (Questions about when attorneys should be allowed to reveal confidential information “have proved to be matters about which some very good people have differed, either categorically or as applied to particular facts. These differences of opinion are reflected most notably in the variety of exceptions each state has recognized.”).

131 Akron Var Assn. v. Holder, 810 N.E.2d 426, 434 (Ohio 2004)(“A fundamental principle in the attorney-client relationship is that the attorney shall maintain the confidentiality of any information learned during the attorney-client relationship.”); Cont’l Res., Inc. V. Schmalenberger, 656 N.W.2d 730, 735 (N.D. 2003)(“Loyalty is an essential element in the lawyer’s relationship to a client.”); Lawyer Disciplinary Bd. V. Artinez, 540 S.E.2d 156, 168 (W. Va. 2000)(“[A]n attorney is a repository of the client’s confidences, and the trust a client places in his/her lawyer is so highly esteemed, and deemed so integral to a successful attorney-client relationship, that is has been afforded a status of privilege.”).

132 What is “significant,” like the rule itself, will be subject to a reasonableness analysis. It is likely that anything longer than the time necessarily involved in the attorney discovering and investigating the injustice would fit into this category.
miscarriages of justice in wrongful conviction cases in which the conviction involves incarceration of the defendant.\(^{133}\) Adding this exception is consistent with both the importance placed on liberty in this country,\(^{134}\) and with other current exceptions. For example, in the so-called “self defense” exception,\(^{135}\) an attorney is allowed to reveal confidential information to defend himself against claims even of third parties,\(^{136}\) and even if all that is at stake is civil liability.\(^{137}\) Surely allowing revelation to prevent loss of liberty to an innocent third party is consistent with that exception. Likewise, the Model Rules recently added limited exceptions for the prevention of substantial financial harm.\(^{138}\) It appears that the then prevalent culture of

\(^{133}\)The suggested exception is not without precedent. The Massachusetts Rules currently allow revelation “to prevent the wrongful execution or incarceration of another.” Massachusetts Rules of Professional Conduct, Rule 1.6(b)(1)(2009).

\(^{134}\)While Patrick Henry’s “Give me liberty, or give me death” statement may seem dramatic to some, it does underscore the historical importance of liberty in this country. Further, it is worth noting that in the Declaration of Independence, liberty is listed right after life as one of the “unalienable Rights” belonging to all. Declaration of Independence para. 2 (U.S. 1776).

\(^{135}\)Model Rules of Professional Conduct Rule 1.6(b)(5)(2005)(allowing disclosure “to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer’s representation of the client . . .”).

\(^{136}\)Id., cmt. 10 (“Such a charge . . . can be based . . . on a wrong alleged by a third person . . .”).

\(^{137}\)Id. (“Such a charge can arise in a civil, criminal, disciplinary or other proceeding . . .”).

\(^{138}\)A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary: . . . (2) to prevent the client from committing a
corporate misdeeds and the resulting widespread financial harm, such as in the Enron situation, had a lot to do with the exception.\textsuperscript{139} As dramatic as the consequences of such cases may have been, they pale in comparison to the plight of a wrongfully incarcerated innocent person. Thus, if the financial harm exceptions are justifiable, and do not (apparently) undermine in any significant way the willingness of clients to confide in their attorneys,\textsuperscript{140} certainly a loss of

\textbf{MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(2) & (3)(2001).}

\textsuperscript{139}Discussing the recent change to the Model Rules allowing disclosure for certain crimes or fraud resulting in substantial injury to financial interests in which the lawyer’s services were used, Model Rule 1.6(b)(2) and (3), one author states: “The final chapter of this story [regarding the rules revisions] . . . occurred after the wave of corporate scandals shook the public’s confidence in the legal and financial systems, as corporate giants such as Enron, Worldcom, Tyco and Adelphia crumbled. . . . Unlike past efforts, this time the House of Delegates agreed to expand the voluntary exceptions.” Simon, supra note 98 at 311.

The change in this instance is not as dramatic as one would expect. The Rules have for some time sanctioned the “noisy withdrawal” – a practice of, for example, disaffirming statements previously made. Only the dimmest of recipients of such a statement would not recognize it as a red flag that there is something questionable about the statements at issue. Thus, the “noisy withdrawal” in fact represents a degree of revelation (albeit obliquely revealed) of confidential client information. The exception as currently worded simply recognizes the revelation for what it is, and allows it forthrightly under a policy-driven exception.

\textsuperscript{140}Snyder, supra note 11 at 484 (“[W]hile there may be a value to promoting full client disclosure to counsel, this is not the only value that should be considered in making policy about attorney disclosure of client information. This suggests . . . that it is not necessary to provide absolute secrecy to clients in order to promote open discussion between clients and their attorneys.”).
liberty exception would also be justified.

The approach of the Model Rules and some of the case law in the case of a criminal defendant who plans to testify falsely further offers support for the loss of liberty exception. In the false testimony situations, candor to the tribunal is paramount, allowing an attorney to reveal confidential, and privileged, information to alert the court about a defendant’s intended or completed false testimony.141 In such situations, the great importance placed on preserving the integrity of the process allows information that is damaging to the client to be revealed in his own trial.142 Surely, if allowing the attorney to reveal evidence to the detriment of his client in his own trial is appropriate, it is more than appropriate to allow a limited revelation to prevent a miscarriage of justice in the trial of another, especially if the client’s interests can be protected.

A loss of liberty exception could further provide relief in another potentially difficult area – kidnapping cases. While kidnapping could result in death or substantial bodily harm in some cases, that result will not always be as clear as the current rule would seem to demand and thus may not fit within that exception. However, it can fit within my loss of liberty exception: One who has been kidnapped is not free to return to his original location, and thus has significantly

141 The Rules provide that “If a lawyer, the lawyer’s client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.” MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(a)(3)(2008)(emphasis added), and, “A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.” Id. Rule 3.3(b)(2008)(emphasis added). The comments emphasize that the “person” described in the rule includes that attorney’s own client. Id. cmt. 12.

142 See id., Rule 3.3, cmt. 2 (“This Rule sets forth the special duties of lawyers as officer
lost his liberty. This reasoning, along with the facts that kidnapping often entails some risk of death or bodily harm and involves other demonstrable harms, and with the urgency of the situation, justifies an exception for kidnapping cases. Because the loss of liberty is the clearest result of a kidnapping, I would include it within my suggested loss of liberty exception.

As important as the loss of liberty exception would be, however, careful implementation would be required for this exception just as it is for all exceptions to confidentiality. Some of the specifics of how the exception should be crafted will be addressed in subsequent sections.

C. The Criminal Act Requirement

In an earlier version of the Model Rules, an attorney was allowed (but not required) to reveal information “to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm.”\textsuperscript{143} There was no exception to prevent financial harm or to prevent physical harm that was not caused by a client crime. Rules in various jurisdictions differed in many relevant respects. Some allowed revelation to prevent all crimes, not just those causing physical harm,\textsuperscript{144} some allowed prevention of financial harms,\textsuperscript{145} others made some disclosures mandatory.\textsuperscript{146} The Model Rules, and many states’ rules, of the court to avoid conduct that undermines the integrity of the adjudicative process.”).

\textsuperscript{143} \textbf{Model Rules of Professional Conduct} Rule 1.6(b)(1)(2001).

\textsuperscript{144} See, \textit{e.g.}, Florida Rules of Professional Conduct, Rule 4-1.6(b)(1) (“A lawyer shall reveal [confidential] information to the extent the lawyer reasonably believes necessary to prevent a client from committing a crime.”)

\textsuperscript{145} See, \textit{e.g.}, Massachusetts Rules 1.6(b)(1)(2009)(“A lawyer may reveal . . . [confidential] information to prevent the commission of a criminal or fraudulent act that the lawyer reasonably believes is likely to result in . . . substantial injury to the financial interests or property of another. . .”)}
currently allow revelation to prevent death or substantial bodily harm not caused by a crime or fraud of the client.147

The unfortunate results in cases such as the Spaulding case or the suicide cases may have contributed to the deletion of the client crime requirement in death or substantial bodily harm cases. The deletion is significant in comparing the reasons for the exceptions for privilege and confidentiality. The crime-fraud exception in evidence law seems very much tied to the client’s wrongdoing, which justifies limiting the protection of his information.148 Because the privilege protects the client’s ability to communicate with his attorney to get adequate representation,149 forfeiting that protection when the client seeks to obtain an attorney’s help in committing a crime seems only fair.150 The balance is between the search for truth and the protection of advice-seeking communications. The balance easily tips against protection and in favor of truth-seeking

146 See, e.g., Arizona Ethics Rule 1.6(b)( “A lawyer shall reveal [confidential] information to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal act that the lawyer believes is likely to result in death or substantial bodily harm.”). See also supra note 144 and Illinois Rules of Professional Conduct, Rule 1.6(c)(2010).

147 MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(1)(2008).

148 Fisher v. U.S., 425 U.S. at 403 (“It is the purpose of the crime-fraud exception to the attorney-client privilege to assure that the ‘seal of secrecy’ between lawyer and client does not extend to communications ‘made for the purpose of getting advice for the commission of a fraud.’”).

149 See, e.g., People v. Gionis, 892 P.2d 1199, 1205 (Cal. 1995)(“Without the ability to make a full disclosure of the facts to the attorney, the client risks inadequate representation . . . .”)

150 See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §82, cmt. b (1998)(“Denying protection of the privilege can be founded on the additional moral ground that the client’s wrongful intent forfeits the privilege.”).
in the privilege context based largely on the client’s choice to seek unprotected advice.

On the other hand, on the confidentiality side, taking away the client crime requirement underscores the protective nature of the exception, regardless of client wrongdoing. This is consistent with other confidentiality exceptions, such as the so-called self-defense exception.\footnote{ Cf. \textit{id.}, §64, cmt. b (1998)(In discussing why the exception allows disclosure, given that “the prohibition against adverse use or disclosure . . . is rigorous,” the note points out that “in the absence of the exception . . ., lawyers accused of wrongdoing would be left defenseless against false charges in a way unlike that confronting any other occupational group.”).} The balance that must be struck is one between the very strong interest in protecting client communications and that of protecting the public. Now the balance may well tip in favor of protection of innocent third parties, even without client complicity in the wrongdoing.

In crafting the exception, however, it cannot be emphasized enough that the confidentiality interest is vitally important, and that exceptions must be few and carefully circumscribed.\footnote{In re Bryan, 61 P.3d 641, 656 (Kan. 2003)(“The ethical requirement of confidentiality is . . . interpreted broadly, with the exceptions being few and narrowly limited.”),} The change to the death or substantial bodily harm exception passes the test, and deals with some of the “hard cases” that have confounded lawyers and lay persons alike.

Because of the strong policies that pull in opposite directions – the policy requiring protection of client information versus that of protecting the public from harm\footnote{\textit{Cf. Gionis}, 892 P.2d at 1205 (“Although the attorney-client privilege is essential to our system of justice, it can and does result in the withholding of relevant information from the} – attorneys must be given reasonable latitude to make a judgment call in difficult situations. Therefore, with a possible exception for cases in which the attorney knows to a virtual certainty that, without
revelation, death, substantial bodily harm, or significant loss of liberty will occur, I would maintain the discretionary nature of the death or substantial bodily harm exception, and extend it to my suggested loss of liberty exception. Without that degree of certainty, and arguably even with it, a mandatory requirement likely creates more problems than it solves.

Any time a rule is couched in terms of likelihood, reasonable beliefs, reasonable certainty, or similar descriptions, a mandatory rule is fraught with peril for the attorney making the determination about its application. No lawyer wants to expose himself to discipline. Making the rule mandatory could well tip the scale in favor of disclosure and the policies supporting disclosure, and against the very real policies requiring confidentiality, creating pressure on attorneys to too easily reveal confidential information. An undue relaxing of the standard for maintaining confidentiality could undermine attorney-client relationships, resulting in a greater reluctance of clients to confide in their attorneys. This in turn would actually result in less protection for the public due to the fact that the attorney often would not get the relevant information in the first place.

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154 Rules differ on this issue, and I take no position on it in this article.


156 As pointed out in the Restatement, when a lawyer has made even the limited revelations allowed under current rules “in all but extraordinary cases the relationship between lawyer and client would have so far deteriorated as to make the lawyer’s effective representation of the client impossible.” *Restatement (Third) of the Law Governing Lawyers* §66, cmt. f (1998).
Further, pressuring attorneys to too quickly reveal a client’s information will often stifle creative solutions to difficult situations in ways that provide some protection to both clients and the public. For example, an attorney whose client seeks help in hiding a public hazard created by one of his products may be able to convince the client that it is not only right to warn the public about the problem, but that such a course will likely ultimately result in less liability for the client than trying to hide the problem.\textsuperscript{158} He can thus protect both his client and the public. A “doing good while doing well” approach can often be best for clients and the public alike, and allow the attorney to faithfully represent his client within the bounds of both loyalty and concern for the greater good. The rule should be crafted to encourage such solutions.

D. The Dead Bodies

As heartbreaking as the situation in \textit{Belge} clearly was, the case does not appear to this author to suggest that a change in rules is in order. Before creating exceptions, one must always consider the possibility that the information could be revealed with client consent, just as it

\begin{quote}
\textsuperscript{157}See supra note 79.
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\textsuperscript{158} Cf. Model Rule 1.6, cmt. 1, pointing the representational and preventive advantages of encouraging full disclosure:

[The protection of confidential information] contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and if necessary, to advise the client or refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is . . . deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the
\end{quote}
ultimately was in that case.\textsuperscript{159} Realizing that consent will not always be given, however, an exception nonetheless seems unwarranted. This conclusion is borne out of two main considerations: (1) the balance of policies seems to tip in favor of protecting the information, and (2) it is very difficult to craft a rule that would work for that case that would not necessarily do great damage to established and important principles. The two considerations are intertwined.

Regarding the first, the protection of client information and maintenance of client trust is paramount,\textsuperscript{160} both for the inherent merit of such protection and for the practical reason that less protection ultimately means less information,\textsuperscript{161} thus making the exception self-defeating. Therefore, any exceptions must be carefully circumscribed and limited to the most extreme cases. Human life and liberty and serious bodily injury are that extreme. Beyond that, the confidentiality requirement must be jealously guarded.

In situations such as the one in Belge, no lives will be saved, nor physical well-being protected, by the attorney’s revelation.\textsuperscript{162} It is true that the emotional pain involved is

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\textsuperscript{159}372 N.Y.S.2d at 801. It was in fact the client who ultimately revealed the information in his testimony given after consultation with his attorney. \textit{Id.}

\textsuperscript{160}\textit{See Theodore I. Koskoff, The American Lawyer’s Code of Conduct} preface (1982)(“Our first principle remains that a client must be able to confide absolutely in a lawyer, or there may be little point in anyone’s having a lawyer.”).

\textsuperscript{161}\textit{See supra} note 79.

\textsuperscript{162}In People v. Fentress, \textit{supra} note 24, a New York County Court, in approving revelation of a client’s intent to commit suicide even though no exception to confidentiality actually applied, distinguished the Belge case, stating that “[a]t least there it could be said that in hiding bodies behind a privilege, no life was endangered, although the anguish of the victims’
extreme, but revealing the information is not a panacea. Further, one must consider what could happen if the communication were revealed. It would naturally lead to the discovery of the body. If that discovery provided evidence to convict the client, then the purpose of attorney-client privilege and confidentiality is destroyed. On the other hand, if the evidence is protected by privilege due to the fact that it was revealed based on an exception to confidentiality, it may then ultimately be more difficult to convict the wrongdoer, thus adding to the suffering of the families and potentially endangering others.

As to the second consideration, it is difficult to see how to craft a rule that would allow revelation under the Belge facts yet still protect information that must be protected. Somehow the actual viewing of the dead body seems to have been an important factor in the outrage felt by the community in that case. Would the outrage have been so great had the public discovered simply that the location of the body had been communicated to the attorney? If not, what actually is the principled distinction between the cases? Would we not more readily agree that the latter communication is protected? In fact, the same concerns of decency could be raised in the case of the client who tells his attorney that he committed a murder, in which no body has yet

See id.

The prosecutor in the case gave this as an important reason he agreed that the attorneys were right to keep the information confidential.

See, e.g., Wade v. Ridley, 32 A. 975, 976 (Me. 1895)(“The person consulting a lawyer should be encouraged to communicate all such facts without fear that his statements may be possibly used against him.”)
been found, without revealing the location of the bodies at all. Protection of the revelation in this last scenario is probably more widely accepted than is the protection in Belge, but the effect is virtually identical. Of course, there are those who dislike a system that protects even that communication, but effectively addressing that concern would require a more general rethinking of the basic principles involved, rather than a refinement of rules based on those principles.

E. Information that is Privileged, but not Confidential

When defining what information will be protected by privilege, two steps are necessarily involved: (1) defining what kind of information is protected by privilege generally, and (2) defining the exceptions. Both involve policy determinations – determinations that should be, but are not always, made consistently. For example, in Purcell, the court protected the information that the client planned to set a fire in the apartment building by deciding that the crime-fraud exception did not apply.\textsuperscript{167} The reasoning was that the client was not seeking legal advice in regard to burning down the building,\textsuperscript{168} and that a strong public policy favors encouraging clients to give such information to their attorneys so that attorneys can exercise their powers of persuasion in stopping the conduct.\textsuperscript{169} The court then addressed the question whether the

\textsuperscript{166}See discussion of the fruits of the revelation \textit{infra} Part IV.F.

\textsuperscript{167}Purcell v. District Attorney, 676 N.E.2d at 440 (“The evidence in this case was not sufficient to warrant the judge’s finding that Tyree consulted Purcell for the purpose of obtaining advice in furtherance of a crime. Therefore, the order denying the motion to quash because the crime-fraud applied cannot be upheld.”).

\textsuperscript{168}Id.

\textsuperscript{169}Id at 440, 441. For another opinion discussing the benefits of using client information
information should have been protected in the first instance under the definition of privilege, finding a “strict construction” of privilege to be unwarranted.\textsuperscript{170} It would seem, however, that if the justification for privilege is to allow clients to seek legal advice, privilege would by definition not apply to mere statements that a client is going to commit a crime, unaccompanied by a request for advice.\textsuperscript{171} And if there is such a request, one is back to the conclusion that the crime-fraud exception would apply.\textsuperscript{172} It seems then that the proper place to address questions about whether a statement that a client will commit a crime is protected is at the level of the definition of privilege, not at the exception stage.

The issue is more than academic. Under an approach focusing on the exception, it appears that it is conceded that the statement is protected in the first instance. Yet that interpretation creates the anomalous result that a client who tells his attorney “I’m going to burn to protect the public, see The Florida Bar v. Calvo, 630 So.2d 548, 550 (Fla. 1993)(“Far too much criminal activity in today’s society goes uncharged, and this fact alone does not excuse attorneys from failing to honor their obligations to the public at large. It is especially incumbent upon attorneys to use their legal expertise to discourage rather than further the type of flagrant fraud on the public involved in this case.”)

\textsuperscript{170}676 N.E.2d at 441.

\textsuperscript{171}See Henderson v. State, 962 S.W.2d at 555.

A client who informs his attorney that he or she intends to commit a future crime – but does not convey the information for the purpose of securing the attorney’s services in furtherance of his plan – has arguably made a communication that is not for the purpose of facilitating the rendition of professional legal services. Hence, while such communications would fall outside the crime-fraud exception, they would also fall outside the definition of privilege itself so that the privilege would present no bar to disclosure.
down the building” may receive the protection of privilege while the client who asks his attorney “Will you advise me how best to burn down the building?” is not protected. Such a result is hard to justify. The question then becomes, if the result in each case should be the same, what should it be? Should the statement be protected or not?

Neither client just described deserves much sympathy. But privilege is not designed for the protection of only sympathetic or righteous clients. In deciding what rules should apply, one must look to the policies behind the privilege, not to the character of the client. Solid legal arguments can be made for either result. If neither statement is to be protected by privilege, the result is justified in the former case by the argument that the client is not seeking legal advice at all, and in the latter case on the basis of the crime-fraud exception. The result is compelling, not only based on a policy against providing protection to those who intend harm, but on logical, doctrinal reasoning. Such a conclusion, however, fails to address the legitimate concerns raised by the Purcell court. Perhaps a rule can be crafted that at least initially protects both statements, while ultimately leaving the crime-fraud exception intact, albeit slightly modified.

What, then, could be the arguments in favor of protecting both such seemingly

\footnote{172 \textit{RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS} §82 (1998).}  

\footnote{173 \textit{Cf. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS} §60, cmt. b (1998) (suggesting that the duty to protect a client’s confidential information (which, as discussed earlier, usually includes his privileged information) may come at a cost to “persons whose personal plight and character are much more sympathetic than those of the lawyer’s client or who could accomplish great public good or avoid great public detriment if the information were disclosed . . . [but that] despite those costs, the confidentiality rule reflects a considered judgment that high net social value justifies it.”).}
indefensible statements? One argument is the one favored by the Purcell court – that public policy favors attorneys having more information from their clients so that they have an opportunity to dissuade certain reprehensible behaviors.\textsuperscript{175} Another is that the line between what is a statement of intent and what is a request for legal advice can often be unclear, making it difficult for an attorney to determine which rule applies.\textsuperscript{176} A related reason is that if the line is unclear to attorneys, it will be especially unclear to clients. When an attorney tells his client that their conversations will be protected, it would seem he should also explain to what extent they will not be protected. As it becomes harder for the client to tell what is protected and what is not, a sensible client will opt for providing less information for self-protection, thus undermining the protection of privilege.\textsuperscript{177} “An uncertain privilege . . . is little better than no privilege at all.”\textsuperscript{178} Each of these reasons will be discussed in more detail.

The more information an attorney has, the better he can advise his client. This advice

\textsuperscript{174}Henderson \textit{supra} note 42.

\textsuperscript{175}676 N.E.2d at 441 (“Unless the crime-fraud exception applies, the attorney-client privilege should apply to communications concerning possible future, as well as past, criminal conduct, because an informed lawyer may be able to dissuade the client from improper future conduct, and, if not, . . . make a limited disclosure of the client’s threatened conduct.”). \textit{Cf.} Fred C. Zacharias, \textit{Rethinking Confidentiality}, 74 \textit{Iowa L. Rev.} 351, 369 (1989)(“The most appealing secondary justification for attorney-client confidentiality is that helping lawyers obtain information enables them to advise clients against committing improper acts . . ..”).

\textsuperscript{176}The difficulty further justifies applying the same rule to both statements.

\textsuperscript{177}\textit{See} Upjohn Co. v. U.S., 449 U.S. at 393 (“[I]f the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected.”).
includes advice not to commit a crime in the future. A rule that protects all client statements makes the attorney privy to more information. In a situation like *Purcell*, one would hope that when a client states that he is going to burn down a building, the attorney would be able to persuade him that such an action would not be in his best interest. Barring that, at least the fact that the attorney knows of the proposed action allows him to potentially prevent it. This ability is of course supported by the sound public policy of preventing potential loss of human life, but may also be the best course for the client. The issue in *Purcell* was admissibility of evidence in an attempted arson trial. Had the client proceeded with the action, the case may well have been about felony murder. Thus, the attorney having the information not only prevented harm to others but also potentially provided a better outcome for the client.

As indicated previously, it makes little sense to protect the statement, “I am going to burn down that building,” and not the question, “How can I burn down that building?” Each represents the same nefarious intent, and neither indicates the seeking of legal advice – the

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178 *Id.*

179 *Purcell* v. District Attorney, 676 N.E.2d at 438.

180 *Black’s Law Dictionary* 1114 (9th ed. 2009) (“Murder that occurs during the commission of a dangerous felony (often limited to rape, kidnapping, robbery, burglary, and arson).”).

181 Of course, the best outcome from the client’s perspective would have been to have not been discovered at all. The “better outcome” analysis presumes that the client would at some point become a suspect. Were that not the case, the revelation admittedly did not produce the best outcome for the client.

182 See *supra* notes 172-74 and accompanying text.
former because it does not seek advice at all and the latter because it does not seek legal (as opposed to illegal) advice. Further, the line between the two statements is often unclear. What if the client says, “I am planning to burn down that building. Would that be illegal?” Are we now dealing with a statement of illegal intent, or a seeking of legal advice? Could we somehow parse the statement so that the first is protected, but not the second? If so, would we not still need to refer to the first to explain the second? It is tempting to answer the question by acknowledging that even the dimmest of clients has to know that it is illegal to burn down a building. Yet what if the client states, “I am planning to make a securities offering as outlined in this document. Is this legal?” If it turns out that the offering cannot legally be made as outlined, I suspect most attorneys would say the communication is protected unless it is clear the client knew it was illegal and was trying to get help with his illegal purpose.

It is not difficult to distinguish the two situations just posited. Securities law is hard – questions about what is required and what is not are difficult questions about which legal advice is often sought. Whether it is legal to burn down a building is not a difficult legal question, and is not a question about which one would expect clients to ask for advice. It could, after all, be answered correctly by almost any lay person. The client who asks for advice to burn down a building knows he is pursuing an illegal purpose. Yet our securities client may also intend to get help to carry out an illegal purpose, and that intent may be more difficult to discover. And in between the securities example and the arson example are numerous potential scenarios in which the client’s intent may not be entirely clear to the attorney. Perhaps trying to get into the head of the client at the advice stage of representation is not after all the best way to decide these questions.
A better rule would be to protect both statements (if either statement is to be protected) under the umbrella of attorney-client privilege. “I’m going to burn down that building” may not sound like a request for legal advice, but one wonders why a client would make such a statement to his attorney. Almost certainly he expects the statement to be kept confidential. It further seems likely that he expects he will be told he should not do it. Perhaps he is just letting off steam, rather than stating an actual intention. Regardless of the client’s intent, unless the statement is obviously not serious, it would be incumbent upon any attorney to advise him that the course of action suggested is not appropriate. Thus, whether the communication is a statement or a question, the appropriate response for the attorney is to advise the client that the proposed course of action is against the law and that he should not pursue it. As long as the client refrains from committing the act, evidence about the conversation would not be admissible. The result should be the same if the client said, “How can I burn down that building?” In both instances, the client has made a statement or asked a question in the overall context of seeking legal advice. One can engage in a presumption that “legal” advice is what the

183 Cf. Deborah L. Rhode & Geoffrey C. Hazard, Jr., Professional Responsibility and Regulation 62 (2002)(“Where lawyers manage to discover such misconduct, they should to dissuade the client or otherwise to abort the transaction . . . .”).

184 Cf. Restatement (Third) of the Law Governing Lawyers §66(2) (1998) (“Before using or disclosing information [to prevent death or substantial bodily harm] . . ., the lawyer must, if feasible, make a good-faith effort to persuade the client not to act.”).

185 This approach, although not universally accepted (add authority), is consistent with the approach taken by the Restatement. Restatement (Third) of the Law Governing Lawyers §82(a) (1998) (stating that the crime-fraud exception applies when a client “consults a lawyer for the purpose, later accomplished, of obtaining assistance to engage in a crime or fraud
client wants. Even if the presumption defies common sense, as long as the client adheres to the advice not to commit the crime, little would be gained, and much lost, if the statement is admissible.\footnote{Id. cmt. c (“A client could intend criminal or fraudulent conduct but not carry through the intended act. The exception should not apply in such circumstances for it would penalize a client for doing what the privilege is designed to encourage—consulting a lawyer for the purpose of achieving law compliance.”).}

The approach suggested avoids the thorny problem of trying to determine what the client intended in asking for the advice. What the client intended may be difficult to discover, and what we mean by the client’s intent may be difficult to define. Does the client intent mean intent to do an act that \textit{in fact} is illegal or to do an act that the client \textit{knows} is illegal? The latter is the only defensible position,\footnote{Compare \textsc{Restatement (Third) of the Law Governing Lawyers} § 82 cmt. c (1998), which states that the “client need not specifically understand that the contemplated act is a crime or fraud.” While that statement would seem to be at odds with the view just expressed, consideration of the context shows that the two are in reasonable harmony. Under the Restatement view, the evidence will not be admissible if the client does not proceed with the crime. Presumably the attorney will advise him that the act is criminal. He now knows it is illegal, and whether the communication will depend on whether he proceeds or desists, as...”) (emphasis added).} but how do we know what the client knows about illegality? If the statement/question is made in an overall context of seeking legal advice, a presumption that he is seeking advice is preferable. Clients would then not be expected to be lawyers or appreciate legal nuances in their communications with their attorneys, and no examination of the client’s subjective intent would be required. All such communications would be treated as confidential and privileged. All such communications should also result in appropriate legal advice from the...
attorney. The client who follows the advice to act within the law would be viewed as having consulted the attorney regarding how to act within the law, not how to break the law.\^{188} His subsequent legal conduct would bear out such a presumption. As long as the advice given is that the client must act within the law, and the client does, the conversation should be protected.

Further, it is the overall context of seeking legal advice that gives the assurance of confidentiality and thus creates privilege.\^{189} Undoubtedly, if the conversation clearly strays to a non-legal discussion, or for other reasons privilege will not apply, a line will be crossed such that the discussion is no longer privileged.\^{190} An attorney advising a client should be cognizant of that fact and, when necessary to prevent misunderstanding about whether the information is privileged, alert the client if it appears that such a line is about to be crossed.\^{191} But an attempt discussed later in this paragraph.

\^{188}This approach is consistent with the view that the client can protect the communication seeking legal advice about committing a crime or fraud by refraining from the contemplated activity. See id. § 82, cmt. b (“The client can choose whether or not to commit or aid the act after consulting the lawyer and thus is able to avoid exposing secret communications.”).

\^{189}See id. § 68, cmt.c (“The rationale for the privilege is that confidentiality enhances the value of client-lawyer communications and hence the efficacy of legal services.”).

\^{190}In People v. Gionis, supra note 153, the California Supreme Court upheld the trial court’s finding that a conversation between a criminal defendant and an attorney was not protected by attorney-client privilege, pointing out that the attorney, who was a personal friend of the defendant “specifically stated he would not represent defendant” and “in no way wanted to be involved in the dispute.” Thus, no attorney-client relationship existed and privilege did not obtain. Id. at 1206.

\^{191}See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.4, cmt. 5 (2005) (“The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client’s best interests, and the client’s overall requirements . . . .”)
to parse each isolated statement in a context of seeking legal advice creates too much potential for confusion, thus devaluing the privilege.\(^{192}\)

On the other hand, if the client proceeds to burn down the building (or attempt to do so), the evidence would be admissible, again regardless of the form of the question or statement. The client’s illegal activity after advice by his attorney that the activity is illegal belies the notion that the client was seeking legal advice. Thus, it now appears that if the client were in fact seeking advice at all, he was seeking advice about how to commit a crime and the crime-fraud exception would apply. If, on the other hand, the client was simply making a statement of criminal intent, the information would be discoverable because it does not fit the definition of privilege as pertaining to seeking legal advice. Either way, the subsequent action bears out a determination that the information should not be protected. While the \textit{Purcell} court’s interest in greater disclosure\(^{193}\) is compelling, it is hard to justify a disparate treatment of the two communications when the contemplated criminal act has been pursued.\(^{194}\)

Further justifying treating the two statements the same is the fact that it is hard to imagine the conversation an attorney would have with his client prior to any disclosures that would make the distinction clear to the client.\(^{195}\) And if it is not clear to the client, an attorney’s attempt to

\(^{192}\textit{See supra} \text{ note 178.}\)

\(^{193}\textit{See supra} \text{ notes 169 and 175 and accompanying text.}\)

\(^{194}\text{It is not clear in} \textit{Purcell} \text{ whether the client began “attempting” to commit arson after the communication to his attorney or before.} \textit{See infra} \text{ note 200 and accompanying text.}\)

\(^{195}\textit{See generally} \textit{Zacharias supra} \text{ note 60 at 75-76 (discussing the need for, but lack of, adequate counseling about privilege and confidentiality).}\)
distinguish the two will not assure the client that his statements will be protected, resulting in less attorney-client communication.  If the intent is to encourage the fullest disclosure to the attorney, a more all-encompassing privilege serves that goal. The result is further justified by the aforementioned reasoning that but for the privilege, the “evidence” would not have existed at all, and by the policy favoring putting attorneys in a position to dissuade the client (in other words, to more fully advise the client) to prevent the act.

The important determination for purposes of this article is that the statement/question falls within an exception to confidentiality and that the determination that the exception applies is separate from the question whether the crime-fraud exception to privilege applies. As in Purcell, the information could then be disclosed for public safety purposes, but still be protected for litigation purposes.

One important fact does not appear from a reading of Purcell. It is unclear whether Tyree’s “attempt” to commit arson occurred after he talked to his lawyer or before. In other words, were the incendiary devices found by the authorities placed there, and other related

196 See supra note 178.

197 See supra note 92.

198 See supra notes 169 and 175.

199 Purcell v. District Attorney, 676 N.E.2d at 441.

200 Although the court does at one point make the statement that “the judge would have evidence tending to show that Tyree discussed a future crime with Purcell and that thereafter Tyree actively prepared to commit that crime,” Id. at 439 (emphasis added), the statement does not seem to represent a fact finding, nor does the sequence appear to figure prominently in the
actions taken, before or after the conversation with the attorney? If before, the protection of the information in the opinion is consistent with the rule I propose herein. To be sure, in such a situation, the discussion in part goes to the heart of privilege as it concerns past actions taken by the client, for which he is now being tried (while in part also dealing with intended future actions). However, if the client continued to take action designed to burn down the building after being strongly advised by his attorney that he should not do so, and that doing so would be against the law, I would suggest that the result should have been different. At that point, for the reasons previously discussed, the information should not be privileged.

F. The Fruits of the Communication

If the conversation in which the attorney successfully dissuades the client from committing a crime is to be protected in an evidentiary context, an important question remains. Are the “fruits” of the revelation also to be protected? I submit that they should be, but with a very carefully circumscribed view of what one considers fruits of the revelation. The crucial point of privilege is to encourage the client to fully confide in his attorney, and the assumption is that he will not do so if he would be hurt by his communications. Thus, if the initial revelation

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201 At this point it appears that the client had simply told the attorney what he was going to do, and was in no way seeking advice, or, if seeking advice, it was advice as to how to proceed with the commission of the crime. Neither possibility should result in protection of the information. See supra note 194 and accompanying text.

202 Swidler and Berlin, 524 U.S. at 407. See also, Restatement (Third) of the Law Governing Lawyers § 68 cmt. c (1998)(“[I]t is assumed that lawyers would not feel free in probing client’s stories and giving advice unless assured that they would not thereby expose the client to adverse evidentiary risk.”).
is protected by privilege, any evidence found only because of the revelation should likewise be privileged. On the other hand, if the information is, or would have been, discovered independently, it should be admissible.

The protection of the information is not designed to discourage conduct by authorities, as it would be for, say, the exclusionary rule. On the contrary, the evidence comes to the authorities without any involvement by them – voluntarily reported by an attorney to prevent harm. Therefore, there is no reason to hamstring the prosecution for any prophylactic purpose related to state action. On the other hand, using the attorney’s revelation to get at related evidence to use against the client involves all the communication-chilling concerns that support protecting the initial communication. The approach taken should protect privilege as much as possible, while still allowing revelations that protect important public interests. As long as the evidence could have, and likely would have, been discovered without the revelation, it should be admissible. Otherwise, it should not.

The approach described by the Supreme Court in a 1972 case dealing with a challenge to a “use immunity” statute would satisfy the test I propose. The statute in that case provided that neither the compelled testimony nor “any information directly or indirectly derived from

\textsuperscript{203}Elkins v. United States, 364 U.S. 206, 217 (1960)(“The [exclusionary] rule is calculated to prevent, not to repair. Its purpose is to deter – to compel respect for the constitutional guaranty in the only effectively available way – by removing the incentive to disregard it.”).

\textsuperscript{204}Kastigar v. United States, 406 U.S. 441 (1972).

\textsuperscript{205}Id. at 442.
such testimony” could be used against the witness testifying under a grant of immunity. In finding this grant of immunity sufficient and “coextensive with the privilege,” the Court held that the burden of proof on the prosecution should “impose on the prosecution the affirmative duty to prove that [any] evidence it proposes to use [in a subsequent prosecution for an act about which the defendant testified] is derived from a legitimate source wholly independent of the compelled testimony.” I would apply the same test, including the same burden of proof in the case of revelations by attorneys pursuant to an exception to confidentiality.

Admittedly, the court in Henderson stated a different view, allowing the evidence of the discovery of the body, which was considered the “fruits” of the revelation, to be admitted. It may well be that the information about the location of the body would not have been discovered without the turnover of the map. No facts are available to say with any degree of certainty that the body would have been discovered without the map. Given that the court found that the revelation of the maps was proper, it became a matter of statutory interpretation

206 Id. at 460, citing 18 U.S.C. § 6002.
207 Id. at 459.
208 Id. at 460.
209 Supra, note 42.
210 962 S.W.2d at 551.
211 See id. at 557.
212 Id.
for the court to decide that the “fruits” of the communication were admissible. The statute involved was one providing that illegally obtained evidence was inadmissible in a criminal trial. The court, in the view of this author, engaged in two mis-steps in holding that the statute did not prevent admissibility.

The first questionable step the court took was in treating the revelation of the information under compulsion the same as if the attorney had chosen to reveal the information under the confidentiality exception. After making that leap, the court compounded the problem in deciding that the third party (the state here) did not have to have the same degree of certainty that the attorney would need for revelation under the rules. The Texas rule, a mandatory rule where death or substantial bodily harm is the issue, requires a reasonable degree of certainty before an attorney is required to reveal information to prevent the client’s crime or fraud.

\[\text{Id. at 551-57.}\]

\[\text{Id. at 556.}\]

\[\text{Id.}\]

\[\text{Id. at 553.}\]

The rule provides:

When a lawyer has confidential information clearly establishing that a client is likely to commit a criminal or fraudulent act that is likely to result in death or substantial bodily harm to a person, the lawyer shall reveal confidential information to the extent revelation reasonably appears necessary to prevent the client from committing the criminal or fraudulent act.
the case, there was some uncertainty about whether the kidnapped baby was dead or alive. 218
Thus, from the attorney’s perspective, if she had real concern that the baby was still alive, but his
life in danger, she may have been required to reveal if she believed it was necessary to prevent
the client from committing a crime (felony murder). However, the facts lend considerable
support for the suggestion that there was in fact little uncertainty in the minds of the authorities
about the likelihood that the baby was dead. 219 It seems likely that there was even less
uncertainty in the mind of the attorney, given that the maps led to the location of the body. 220
Yet somehow the court extended the public policy reasons for requiring revelation by the
attorney and used the policies to compel disclosure of privileged information, without requiring
certainty that breaking privilege would protect a life. In doing so, the court held “that a third
party need show only a reasonable possibility of the occurrence of a continuing or future crime
likely to result in serious bodily injury or death to compel disclosure of the privileged
information.” 221

The second problem with the court’s approach was that it did not keep its own counsel
regarding the need to encourage communication between attorney and client. While the court

\text{TEX. DISCIPLINARY R. PROF’L CONDUCT 1.05(e), reprinted in TEX. GOV’T CODE ANN., tit. 2,

\begin{enumerate}
\item 218 962 S.W.2d at 557.
\item 219 \textit{Id.} at 549, 557.
\item 220 \textit{Id.} at 551.
\item 221 \textit{Id.} at 557.
\end{enumerate}
initially seems to interpret privilege expansively (by interpreting the crime-fraud exception narrowly), and to limit the extent to which the privilege yields to protect policy interests, it then allows the fruits of the evidence to be admitted. Surely knowing that the fruits of the communication made to one’s attorney would be admissible against a client is as communication-chilling as knowing that the communication itself would be. Thus, a rule protecting fruits of the communication that would not have been discovered but for the communication is preferable.

G. Eternal Privilege

While the Supreme Court seems to have, in its decision in Swidler & Berlin v. U.S., put to rest any suggestion that an exception to attorney-client privilege be created for certain federal cases following the death of the client, that decision does not answer the question about confidentiality. The opinion further seems to go too far in justifying the result based on client’s desire for confidentiality. As indicated, the desire for confidentiality is in aid of the encouraging open communications with one’s attorney, but other interests may intervene that allow for the revelation of information as long as its evidentiary protection is not undermined. Privilege does not prevent revelation of the information, it prevents its admission into evidence.

222 *Id.* at 553 (“[A]ppellant’s creation of the maps and her attorney’s refusal to release those maps did not further any crime.”)

223 *Id.* at 556 (“The privilege need only yield in a limited fashion – to the extent necessary to satisfy the policy interest in question.”) (*citing Purcell*).

224 *Supra* note 54.

225 *Supra* note 202 and accompanying text.
It is in fact tempting to suggest that the solution is to simply craft the rules about attorney-client privilege to protect the information against revelation in trials in which the client is a party, but not in trials involving others. But such an exception opens too wide a door – perhaps the real concern of the Swidler majority. Because courts have a unique ability to compel discovery of information, in a head-to-head contest privilege trumps confidentiality.\footnote{See Model Rules of Professional Conduct Rule 1.6(b)(6) (2005) (“A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary . . . to comply with other law or a court order.”)} For all other purposes, the information remains confidential, and that confidentiality must be protected to the extent possible.\footnote{See id., cmt. 14 (“If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it . . .”).}

Justice O’Connor, in the Swidler dissent, expresses concern for clients for whom the information may be needed to prove their innocence\footnote{524 U.S. at 413.} and other important criminal law concerns.\footnote{Id. at 412-14.} However, the requirement that testimony be given that is not privileged occurs in a broad spectrum of cases, not just such compelling ones, and the potential for revelation could be of great concern to clients in those cases.\footnote{For example, assume a client reveals to his divorce attorney that he had an affair with a married woman – clearly a confidential and privileged communication. However, if the information could be compelled in the woman’s divorce trial, the confidentiality expectations of the client would be deeply disappointed.} Because the ability to compel the revelation of

\begin{itemize}
\item[227] See id., cmt. 14 (“If the disclosure will be made in connection with a judicial proceeding, the disclosure should be made in a manner that limits access to the information to the tribunal or other persons having a need to know it . . .”).
\item[228] 524 U.S. at 413.
\item[229] Id. at 412-14.
\item[230] For example, assume a client reveals to his divorce attorney that he had an affair with a married woman – clearly a confidential and privileged communication. However, if the information could be compelled in the woman’s divorce trial, the confidentiality expectations of the client would be deeply disappointed.
\end{itemize}
confidential and privileged information could undermine the trust relationship\textsuperscript{231} and, again, chill client communications, there is good reason to continue to protect the information, even in trials that do not directly involve the defendant.

Yet the Court’s decision to preserve the privilege beyond the client’s lifetime,\textsuperscript{232} and corresponding decisions in state courts, do not necessarily preclude confidentiality exceptions that would allow revelation of otherwise confidential information. Application of the exceptions could address some of the concerns expressed in the dissent. In other words, while it may be the case that the information is just as protected after death as it was during the client’s lifetime, there is no reason to provide more protection after the death of the client. Surely the client who would be dissuaded from confiding in his attorney because of the fear of revelation after his death would be at least as dissuaded by fear of revelation during life. Thus, no greater protection is needed.

Considering the protection in that light, it seems that revelation after death would be permissible under the current rules to the same extent it would have been allowed during the life of the client. To illustrate, let us return to the facts in the case of the innocent man, but make two important changes. First, we will assume that the client does not consent to revelation, even after his death. Next, we will assume that the innocent man is given the death penalty. Under these facts, revelation should be allowed to prevent the death of the innocent man. In fact, as indicated

\begin{itemize}
\item \textsuperscript{231}524 U.S. at 410, fn 4 (citing articles that “conclude that a substantial number of clients and attorneys think the privilege enhances open communication . . . and that the absence of a privilege would be detrimental to such communication . . . .”).
\item \textsuperscript{232}524 U.S. at 410-11.
\end{itemize}
earlier, it seems the rules would have allowed revelation even before the client’s death to prevent the death of the innocent man.\textsuperscript{233} If the substantial loss of liberty exception is added, it would then operate to allow revelation both before and after the client’s death.

The suggestion raises a further question. How will the revelation help the innocent man unless it is allowed to be introduced into evidence?\textsuperscript{234} Yes, the revelation would be permissible under the Rules, but how, as a practical matter, does it help the innocent man if it is still privileged? It would be possible to design the rules of evidence to allow introduction of evidence properly revealed under a confidentiality exception,\textsuperscript{235} but such a result would give up much in terms of protection of client communications, and is inconsistent with the approach suggested earlier in this article.\textsuperscript{236} Yet the innocent man could still be protected when one considers the ethical obligations of the prosecutor involved. Surely when presented with credible evidence from a disinterested attorney that the accused in fact did not commit the crime, and assuming the evidence was borne out by any further investigation warranted, a prosecutor would

\textsuperscript{233}See supra note 2 and accompanying text.

\textsuperscript{234}This is one of the concerns driving the attorneys’ decision not to reveal in the first scenario presented. Supra notes 5-8 and accompanying text.

\textsuperscript{235}The Swidler decision does not address such a possibility, although the reasoning of the majority decision would seem to disapprove such a result. However, there is no reason that a jurisdiction could not craft its own rules in this way. Such a rule would provide relief in the extreme cases, but still protect the information without a strong showing of dire necessity.

\textsuperscript{236}See supra, Part IV. E.
be required by the ethics rules to seek to right the wrong. Further, under this scenario, the information can be protected from any general revelation to the public, thus preserving the client’s interest in confidentiality.

Thus the balancing the Swidler court decried for purposes of privilege is avoided for that question, but remains as part of the confidentiality question. As attorneys already must determine “ex post the importance of the information” relative to “client interests” no measurable uncertainty is introduced. Further, the suggested approach does not imply “that the privilege applies differently in criminal and civil cases,” at least at the conceptual level. It is of course likely that the death and suggested loss of liberty exceptions to confidentiality will apply most often in criminal cases, but that is because of the facts, not because of a rule definition. Further, the result is fitting, because it is in the criminal arena that the prosecutor is ethically bound to refrain from prosecuting without probable cause, making a revelation to the prosecutor effective while providing a way to protect the information from greater dissemination.

237 See MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.8(h) (2005) Of course, the obligations of the prosecutor will depend on how credible the evidence is, and on the results of additional inquiry.

238 It is always the obligation of the attorney to reveal no more confidentiality than necessary to protect the purpose of the exception. Model Rule 1.6

239 524 U.S. at 409-10.

240 Id. at 409.

241 Id. at 408-09.

242 See MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.8(a) (2005).
V. CONCLUSION

A careful study of some of the situations that test the limits of confidentiality and privilege, and of duty to one’s client and obligations to society, reveals why in some cases there must always be unsettling results from honoring professional obligations. However, such study reveals how the rules can be interpreted, and in some cases changed, to provide avenues for serving the greater good without undue interference with those obligations. As illustrated, it is of utmost importance to understand and respect the differences between confidentiality and privilege, and to recognize how those differences can lead to better results. Such understanding would include recognition of the reality that it is possible for information to remain privileged, while being properly subject to revelation under a confidentiality exception. Further, adding another exception to confidentiality obligations for revelation to prevent substantial loss of liberty (including a loss of liberty due to kidnapping) serves a very important public interest without sacrificing basic protection of client communications. Such a change in the rules, coupled with an analysis of the existing rules discussed in this article, should provide avenues for attorneys to continue to follow their professional obligations, and yet follow their consciences regarding the public good in some of the more compelling “hard cases” they must face.