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Garth A. Molander, JD, LLM [a1]

DO ELDER LAW PRACTITIONERS AND THE AMERICAN LEGAL PROFESSION NEED AN ETHICAL CONFIDENTIALITY RULE OR CAN BOTH DO WITHOUT ABA MODEL RULE 1.6?

***60** Plato's Allegory of the Cave explores the tension between the imagined reality that we think is "real" (shadows) versus the reality that is the "truth" (outside the cave).

--Mayo Oshin, from *Plato's Allegory of the Cave: Life Lessons on How to Think for Yourself*

I. Introduction

The ethical rule of confidentiality is expressed in Model Rule 1.6, Confidentiality of Information, in the American Bar Association (ABA) Model Rules of Professional Conduct. Rule 1.6 covers a broad expanse of communications between client

and attorney that cannot be disclosed by the attorney unless such disclosure falls under one of seven limited exceptions provided in the rule. [1] These exceptions were introduced to rectify troubling circumstances in which strident compliance with the rule of confidentiality prevented the avoidance of harm to others or even to the clients themselves. [2]

Model Rule 1.6 itself provides the basis for most state confidentiality rules, [3] particularly ***61** the common law developed over the years concerning the evidentiary attorney-client privilege. [4] However, commentators have remarked that Model Rule 1.6 also creates tension [5] between the policy concerns underlying confidentiality and the policy concerns underlying the public good in optimizing the court's truth-seeking function to ensure that fundamental justice can be maximized in resolving legal disputes. [6]

This tension has led some commentators to question whether the "bar should defer to the courts in establishing disclosure standards for client information on a case by case basis under the evidentiary attorney-client privilege." [7] Some commentators would simply eliminate Model Rule 1.6 entirely because "confidentiality rules for lawyers are destructive; the societal cost for these rules outweigh the purported benefits, which are largely illusory." [8] Even our country's highest Court has noted the societal costs imposed by confidentiality rules for lawyers. [9] Because of this obvious ***62** societal harm, courts have applied the dictum that the attorney-client privilege should be construed strictly and narrowly to achieve its purpose. [10]

The New York Court of Appeals has noted the general tension created by these competing policy considerations. [11] Importantly, although neither the New York attorney-client privilege statute, Civil Practice Law and Rules (CPLR) § 4503, [12] nor the New York bar's confidentiality rule mirror Model Rule 1.6, [13] the courts in New York, by applying a fact-specific analysis, balance the need for disclosure against the importance of confidentiality on a case-by-case basis. [14] Similarly, Florida has given the evidentiary attorney-client privilege a strict and narrow application. [15] ***63** However, as opposed to New York, Florida is one of 12 states that goes further than the ABA's current permissive stance on disclosure for the purpose of preventing death, serious bodily injury, or the commission of a crime and actually requires disclosure in these circumstances; it also is one of five states that mandates disclosure in cases in which the ABA Model Rule would merely permit it in order to prevent noncriminal fraud. [16]

Given the broad societal costs imposed by confidentiality rules [17] and the common-law recognition of the adverse effect of the evidentiary attorney-client privilege on the court's truth-seeking function, [18] some scholars have questioned the policy concerns underlying both and have concluded that confidentiality rules are nothing more than a vestige of medieval class preservation, [19] which should be abolished because the behavioral assumptions and risks that ground ABA Model Rule 1.6 are more appropriately dealt with in Model Rules 1.7, 1.8, 1.9, 1.10, and 1.11. [20] Moreover, the evidentiary rules of attorney-client privilege and work product doctrines, hearsay rules, regulatory restraints, and other procedural and evidentiary safeguards already make confidentiality rules superfluous. [21] Finally, it has been further suggested that the evidentiary attorney-client privilege, being a product of confidentiality rules, also should be more narrowly construed so that the primary function of the court (i.e., truth-seeking and fact-finding) can rid itself of information asymmetry that the confidentiality rules create. [22]

***64** The purpose of this article is to briefly review the policy concerns of both confidentiality and the evidentiary attorney-client privilege to determine whether Model Rule 1.6 and the evidentiary attorney-client privilege can exist without each other. The article explores (a) whether the societal harm inflicted by confidentiality rules exacts mistrust in our legal institutions, thus actually undermining the observance of the law and the administration of justice, and (b) whether the evidentiary attorney-client privilege should be further narrowed in scope to facilitate the court's truth-seeking function, thus arguably optimizing compliance with the rule of law and the administration of justice. This article presumes that the societal costs of a strict rule of confidentiality or an expanded application of the attorney-client privilege outweigh each's social, political, and economic benefits and that broad application of the evidentiary attorney-client privilege not only obstructs fundamental fairness in the administration of justice but also enables malfeasance in government. [23]

In recognition that the attorney-client privilege should have a more narrow scope for government clients, *Restatement (Third) of the Law Governing Lawyers* § 74 qualifies the government lawyer's privilege to the extent required by "applicable law." It further notes that "a legislative determination of a need for less confidentiality, for example in a statute that limits attorney client confidentiality in areas outside of litigation, would prevail over the common-law rule stated in this Section." [24] Not surprisingly, "most legislation, explicitly or through interpretation by the courts and agencies, recognizes an exception to the disclosure principle where government lawyers are involved," [25] thus illustrating the deteriorating effect the rule of confidentiality has on open government and accountability for government officials' misconduct. [26]

II. Historical Development of ABA Model Rule 1.6-- Confidentiality of Information

A. Medieval Confidentiality Duties and the Attorney-Client Privilege

Confidentiality duties and the attorney-client privilege [27] are not new to the bar; they can be traced back to medieval times. [28] Although both doctrines have their genesis in the medieval era, confidentiality, as a rule of professional ethics, has only recently gained prominence as an ethical duty. [29] In fact, the evidentiary attorney-client privilege, as a common-law doctrine, sufficiently provided the primary protection for client confidences and secrets for more than 400 years until the ABA Model Code of Professional Responsibility (1969) [30] and ABA Model ***65** Rules of Professional Conduct (1983) [31] promulgated the present ethical confidentiality rule. [32]

As previously noted, the historical beginnings of confidentiality, as an attorney obligation to a client, can be traced back to medieval times, specifically to the English bar. [33] Interestingly, a medieval ethical canon (oath) required by all medieval pleaders [34] --who were the equivalent of contemporary attorneys--is uncannily similar to Model Rule 1.16. [35] Under Model Rule 1.16, [36] an attorney has the right to ***66** withdraw from a representation if the attorney knows that the client is involved in criminal or fraudulent conduct. [37]

An early medieval attorney (pleader or serjeant) had to swear under oath that he "will not knowingly maintain or defend wrong or falsehood, but will abandon his client immediately that he perceives his wrongdoing." [38] Today's Model Rules 1.6 and 1.16, acting in tandem, impose a similar ethical obligation that has not changed since the medieval oath was introduced in *Mirrors of Justices* [39] in 1285. In short, as with the medieval ethical oath, the contemporary ethical rule permits the attorney to withdraw as counsel but does not allow disclosure of client secrets. [40] Hence, the modern ethical rule that prohibits an attorney from revealing a client's secrets had its genesis in early medieval English law's professional duty of confidentiality. [41]

B. ABA Model Code Canon 4--"A Lawyer Should Preserve the Confidences and Secrets of a Client"

Until 1937, [42] the evidentiary privilege basically served as the only unequivocal rule restricting attorneys from disclosing client confidences. [43] Before 1937, the American legal bar essentially practiced without an ethical confidentiality rule because for more than 400 years, privilege law that had been developed by the courts served the purpose of protecting client confidences. [44] However, by 1969, the ABA expanded the ethical duty of confidentiality to include not only client confidences but also client secrets. [45] ***67** Notably, by including secrets in Model Code Disciplinary Rule (DR) 4-101, [46] the ABA was echoing Lord Whitlocke's three "general" duties of a serjeant [47] --secrecy, diligence, and fidelity. [48] Not surprisingly, the reason for the expansion of the confidentiality rule is entirely consistent not only with medieval secrecy rules [49] but also with John Henry Wigmore's behavioral assumption [50] postulating that confidentiality encourages client candor, thus assisting the attorney in ensuring compliance with the law. [51]

C. Model Rule 1.6--The Expanded Rule of Confidentiality

In 1983, the ABA promulgated Model Rule 1.6 and further expanded the confidentiality rule by protecting not only client confidences and secrets but also "information relating to the representation of a client." [52] Although the 1983 Model Rules have been amended numerous times, [53] it still remains a fundamental principle in the attorney-client relationship that the confidential nature of the relationship serves the policy function of promoting full and frank communications between attorneys and their clients, thus encouraging observance of the law and the administration of justice. [54] Moreover, this policy ***68** consideration has remained consistent with John Henry Wigmore's behavioral assumption, which explains the motivating force that drives clients to seek early legal assistance and encourages clients to speak openly with their lawyers. [55] This behavioral assumption is expressly noted in both ABA Model Code Ethical Consideration (EC) 4-1 and ABA Model Rule 1.6 Comment 2. [56]

Yet despite the ABA's complete devotion to John Henry Wigmore's behavioral assumption to justify the emergence of a broad confidentiality rule, there is no empirical evidence to support this assumption [57] or the necessity of a confidentiality rule to protect client secrets [58] because, as one ethics scholar observed, "[T]he traditional evidentiary rule of attorney-client privilege would continue to [en]sure the integrity of the judicial process in the absence of an ethical rule of confidentiality." [59] In fact, many commentators have questioned this behavioral assumption as being based on a false premise [60] and have further questioned whether the social cost of the confidentiality rule outweighs its illusory benefit. [61]

Indeed, the pervasiveness of Model Rule 1.6 throughout the Model Rules regime evidences the fact that current confidentiality rules enjoy a sacrosanct place in the ethical codes for lawyers. [62] Stated ***69** differently, this pervasiveness evidences the importance of confidentiality to contemporary organized bar members as a means to enhance their importance in the legal system while receiving an economic benefit. [63] Just as important, this pervasiveness evidences an explicit bias in the ABA Model Rules for preserving confidences at the expense of the rules of candor, fairness, integrity, and truthfulness. [64] Essentially, the ABA Model Rules encourage secrecy at the expense of transparency in the administration of justice. [65] Furthermore, the prominence of confidentiality in the legal profession and common law has also encouraged the development of secrecy law in government ***70** [66] and corporate malfeasance in the private sector. [67]

III. Why Does Model Rule 1.6 Exist?

A. The Need for Model Rule 1.6 Is Unsupported by Empirical Evidence

Presently, the generally accepted rationale for the confidentiality rule is that it encourages clients to provide complete, accurate information to their lawyers to ensure that the lawyers can represent their clients competently. [68] This behavioral assumption, which was introduced by John Henry Wigmore, [69] is still cited today as ***71** the essential basis for the attorney-client privilege [70] as well as justification for an ethical rule of confidentiality. [71] However, many scholars have noted that the ABA's 1969 construct of an ethical rule of confidentiality, which is based on John Henry Wigmore's instrumental theory, is not supported by empirical data. [72]

Because the confidentiality rule is rooted in early medieval bar oaths, some scholars question whether the rule is outdated because, with the rule, the modern bar functions more as a medieval craft guild whose purpose is to protect its members rather than to serve the public interest in administering justice. [73] Moreover, the rule itself can be seen as serving the purpose of fostering a guild mentality that ensures the legal guild's preservation through the development of a social relationship between client and lawyer--a relationship that defines the mode of production and delivery of legal services that is more concerned with protecting guild member interests than the interests of those receiving their services. [74]

Due to current academic skepticism, it is still questionable whether the recent ABA expansion of the rule of confidentiality ***72** serves the public interest because the need for the rule has not been substantiated by any empirical data supporting the behavioral assumption that grounds it. [75] Furthermore, because development of the common-law evidentiary privilege is driven by the ethical rule of confidentiality, [76] court-established norms of secrecy in the context of the attorney-client privilege have also seen recent expansion aligned with the ABA confidentiality rule. [77] More specifically, the behavioral rationale for the rule, and the expansion of it, has produced a distorted expansion of evidentiary privileges beyond reasonable limits. [78] This distortion has created externalities that have increased the societal costs to our judicial system of justice. [79] In short, the expansion of the rule of confidentiality in 1969 has created a legal norm postulating that secrecy is more important than the courts' truth-seeking function--a function that is necessary for administering justice. [80]

Ironically, the justification for a strict confidentiality rule conveniently ignores the fact that when a judge applies any evidentiary privilege, the judge is excluding relevant evidence that could assist the trier of fact, thus limiting the probability that fundamental justice will be administered. [81] As a matter of convenience, proponents for the expansion of strict confidentiality discount this observation by simply noting that without the existence ***73** of the privilege, there is no communication withheld because the existence of the privilege induces client confidences. [82] Similarly, based on the prevailing behavioral assumption, without the privilege, clients would be reluctant to exercise candor with counsel, thus diminishing counsel's role in guiding them in the observance of the law, which ostensibly defeats the administration of justice. [83] As previously argued, this logical syllogism is not grounded in empirical proof and is admittedly an assumption and nothing more. [84]

B. The Societal Costs of Model Rule 1.6 Actually Outweigh Its Benefits

The “costs of confidentiality--egregious instances of unfairness or injustice, undermining of the public trust in the legal system, and declining transparency in society overall”-- do not justify Model Rule 1.6's existence. [85] In sum, the rule's social costs outweigh its benefits. As previously argued, the supposed primary benefit of Rule 1.6 is that confidentiality rules create trust and transparency between clients and their counsel, but this seems to rest on a false premise. [86] Moreover, broader benefits supposedly resulting from the rule, such as inducing client disclosures, preventing client misconduct, and enhancing client autonomy, are not supported by empirical evidence. [87] Furthermore, since the rule of confidentiality impedes transparency, it generally undermines public confidence in our legal system. [88] Finally, government and corporate malfeasance is causally connected to the lack of transparency that the rule of confidentiality creates. [89]

Recent scholarship has undoubtedly argued that the rule of confidentiality has deleterious social effects, such as fostering public harms (e.g., the social cost exacted ***74** by confidential settlement agreements); [90] producing international transactional costs that impede effective global policy initiatives on public international law (e.g., initiatives in public finance, human rights, investment, and environmental regulation); [91] and raising constitutional implications by applying an expansive rule of confidentiality in court-mandated alternative dispute resolution (ADR) methods of settlement (e.g., arbitration, mediation). [92] Hence, a movement to moderate these pernicious social effects has justified the notion that the rule of confidentiality itself must be modified accordingly. [93]

C. Rights-Based Theory of Model Rule 1.6 Not Relied On By the ABA or Any Other Bar Association

The still-dominant instrumental theory espoused by John Henry Wigmore, [94] as reflected in the ABA Model Rules, has become so entrenched in the organized contemporary bar regulatory rules and our common-law dictum that the underlying behavioral assumption for both the instrumental theory of privileges and the rule of confidentiality has become accepted, although unwittingly, by the legal profession as a neoliberal tenet of autonomy. ***75** [95] This tenet should be afforded constitutional protections within a zone of privacy necessary for fostering a meaningful attorney-client relationship. [96]

Not surprisingly, in elevating the importance of confidentiality in attorney-client relationships, the organized contemporary bar is forced to adopt the premise that the liberty interest of every individual in the other person's evidence [97] must be subordinate to the neoliberal right of decision-making autonomy as a necessary and natural result of the importance an ordered society places on client confidences and secrets in fostering the attorney-client relationship. [98]

***76** Although a rights-based theory for Model Rule 1.6 has strong constitutional appeal, [99] this rationale has never been advanced by either the ABA or any other organized bar association as the justification for a strict rule of confidentiality. [100] To this day, the justification for the contemporary bar's ethical rule of confidentiality relies primarily on the behavioral assumption of John Henry Wigmore's instrumental theory that client confidences and secrets are privileged information. [101]

IV. Social Externalities Outweigh the Need for Model Rule 1.6

A. Model Rule 1.6 Duplicates the Attorney-Client Privilege

Unquestionably, Model Rule 1.6 duplicates attorney-client privilege law that has effectively protected client confidences and secrets for more than 400 years. [102] This historical fact demonstrates that the recent prominence of the contemporary rule of confidentiality serves another purpose that the contemporary bar refuses to acknowledge. [103] Commentators have observed that client confidences are fully protected by the conflict of interest Model Rules, [104] work product doctrine, hearsay rules, and evidentiary rules, thus exposing the rule of confidentiality for what it truly is: a rule designed to protect the American legal guild from outside regulatory pressures. [105]

As stated previously, the American legal guild has been delivering legal services without the rule of confidentiality for more than 400 years. [106] However, because the contemporary bar acts with a guild or cartel mentality, it will not willingly ***77** modify the present regime of regulatory rules and continues to promote the mode through which it produces legal services--a social relationship defined by the attorney-client confidentiality rule. [107]

Even a cursory review of the contemporary conflict of interest rules reveals that they more than adequately provide protection against a lawyer compromising client secrets or confidences. [108] In short, the rule of confidentiality simply duplicates the same protections afforded by the conflict of interest rules. [109] This is evident when comparing the dangers to be avoided in both categories of rules. [110] For instance, although the conflict of interest rules comprise Model Rules 1.7, 1.8, 1.9, 1.10, 1.11, 1.12, and 1.13, most of the heavy lifting is accomplished by Rules 1.7 through 1.11 “in protecting clients from predatory practitioners, not the confidentiality rules.” [111]

Rule 1.7 protects against information being shared among various clients; [112] Rule 1.8 protects against client transactional information being used by a lawyer to a client's disadvantage; [113] Rule 1.9 protects against a lawyer using a former client's secrets or confidences in a matter substantially related and materially adverse to the former client; [114] Rule 1.10 protects against revealing client secrets and confidences in a law firm setting; [115] and finally, Rule 1.11 protects against a former government or public lawyer revealing government secrets or confidences in representing clients he or she dealt with while employed by the government or public agency. [116]

In sum, the conflict of interest rules provide protection in most circumstances that arise under the rule of confidentiality. [117] Notwithstanding the conflict of interest rules, the fact is that privilege law, evidentiary rules (i.e., hearsay rules), and other civil procedural safeguards, such as the attorney work product doctrine, make the rule of confidentiality superfluous. [118] Combined, these rules seek to prevent lawyer abuses similar, if not identical, to those the rule of confidentiality is purported to prevent. [119]

Moreover, the rule of confidentiality and the attorney-client privilege are so interrelated that the terms *privileged* and *confidential* are commonly used interchangeably. [120] Understandably, it should come ***78** as no surprise that the policy concerns grounding the rule of confidentiality are shared by the attorney-client privilege. [121] Simply stated, similar to the justification underpinning the rule of confidentiality, the attorney-client privilege serves the policy function of promoting full and frank communications between attorneys and their clients so as to encourage observance of the law and the administration of justice. [122]

The symbiotic development of the concept of confidentiality of client information and the evidentiary attorney-client privilege can be traced back to the 16th century. [123] Indeed, "[T]he attorney-client privilege is the oldest of the privileges for confidential communications known to the common law." [124] And, up until recently, it served as the primary protection from client confidences and secrets being disclosed. [125] Therefore, much scholarship has challenged the notion that the confidentiality rule is necessary in light of the historical effectiveness of the attorney-client privilege protecting client confidences and secrets. [126] In fact, recent scholarship has argued for further narrowing the privilege to facilitate the court's truth-seeking function [127] and, more broadly, to instill confidence in the legal system as well as confidence in government and financial institutions, [128] which has declined precipitously since the 1970s. [129] The idea that the privilege's application should be further limited has support in our common law [130] and is consistent with its conceptual beginnings. [131]

**79 B. Model Rule 1.6 Undermines Government Accountability and Trust in Government and Our Legal System*

In 1908, the Preamble to the ABA Canons of Professional Ethics underlined a lawyer's civil obligation to promote confidence in the integrity and impartiality of the administration of justice, which the future of the republic depended on. [132] Consistent with these canons, in 1969, the Preamble to the ABA Model Code of Professional Responsibility functionally introduced the ABA's regulatory regime as a sociopolitical mechanism to ensure "the continued existence of a free and democratic society, [which] depends upon recognition of the concept that justice is based upon the rule of law grounded in respect for the dignity of the individual and his capacity through reason for enlightened self-government." [133] The ABA Model Code further postulated that "[l]aw so grounded makes justice possible .... Without it, individual rights become subject to unrestrained power, respect for law is destroyed, and rational self-government is impossible." [134]

Similarly, in 1983, the ABA Model Rules of Professional Conduct Preamble also provided that "a lawyer should further the public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority." [135] Clearly, in 1908, 1969, and 1983, the ABA promoted itself as being instrumental in protecting democratic values and ensuring confidence in our democratic institutions. [136] However, this laudable civic goal is presently at odds with polling data measuring the current level of mistrust in government and our representatives. [137]

A recent Pew Research Center study of government trust noted, "Public trust in the government remains near historic lows. Only 17% of Americans today say they can trust the government in Washington to do what is right 'just about always' (3%) or 'most of the time' (14%)." [138] Another Pew Research Center survey found that 81 percent of those surveyed feel that members of Congress act unethically "some" or "all or most of the time." [139] Given the high percentage of lawyers in government, [140] who serve both a public interest and institutional interest, the rule of confidentiality allows secrecy to flourish at the expense of transparency in social policy affecting millions of Americans. [141]

Not surprisingly, the democratic values historically promoted by the ABA's regulatory ***80** rules [142] are not promoted by the rule of confidentiality. [143] In fact, another study by the Pew Research Center revealed that Americans believe more transparency

in government will lead to better government, [144] thus confirming the causal link between transparency and accountability in our government. [145]

Whether the current high level of public mistrust in our legal/political environment can be directly correlated with the organized bar's expansion of the confidentiality rule or whether such correlation has had an indirect causal effect is a matter for debate, but it is irrefutable that the expansion of confidentiality as an ethical duty and the rise of mistrust in our legal/political institutions have occurred simultaneously. [146] This observation does not bode well for "a functioning democracy, [which] depends heavily on the rule of law, and the public's confidence that the legal system [will uphold] the rule of law," [147] which only a legal/political culture of transparency rather than a culture of secrecy can deliver. [148]

***81** In sum, because confidentiality rules are essentially rules of secrecy, they undermine the public's confidence in our government and legal system and produce unjust or erroneous outcomes in cases and transactions. [149] Generally speaking, since lawyer confidentiality interferes with transparency in our society, secrecy, as a practical principle applied by our government officials and members of financial institutions and other corporate power structures in their interactions, undermines transparency and therefore public trust in these organizations. [150] Although many of the ABA Model Rules mandate candor, [151] integrity, [152] truthfulness, [153] and fairness, [154] Model Rule 1.6 "sets the outer bounds for the truthfulness rules or trumps the disclosure rules." [155] In essence, Model Rule 1.6 not only creates a destructive tension in the Model Rules themselves but also external societal costs that have a detrimental effect on our daily lives. [156]

C. Model Rule 1.6 Benefits Lawyers Rather Than Clients

The ABA Model Rules Preamble generally claims, "The profession has a responsibility to [en]sure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar." [157] However, as argued herein, ABA Model Rule 1.6 [158] is designed to benefit attorneys rather than clients. [159] In addition, the fact that Model Rule 1.6 is repeatedly cross-referenced in many of the other Model Rules [160] is testament to the importance the rule plays ***82** in diluting and eroding an attorney's duty of candor, fairness, and integrity. [161] Furthermore, this repeated cross-referencing is conclusive proof that the conventional wisdom that strict confidentiality rules are necessary for fostering attorney-client communications is still the dominant behavioral assumption [162] grounding Model Rule 1.6 as well as the evidentiary attorney-client privilege, even though there is absolutely no empirical evidence supporting that assumption. [163] Therefore, the tension between the court's truth-finding function and an absolute confidentiality rule has resulted in a synergetic relationship based on a false premise. [164] This synergetic relationship has produced unreasonable expansion of privilege law aligned with ABA constructs for confidential relationships. [165]

Undeniably, this tension has medieval beginnings. [166] The medieval bar espoused an attorney duty to reveal to the court all truthful information while demanding that client secrets be held in confidence. [167] Ironically, notwithstanding the fact that this tension still exists today, the contemporary bar still insists that the conventional rationale for the present evidentiary attorney-client privilege would not exist but for the rule of confidentiality. [168] However, this tautological reasoning is not supported by empirical research on the subject. [169]

If one were to analyze the need for the confidentiality rule through the prism of class identification, one could not escape the conclusion that the contemporary bar is the functional equivalent of a cartel, acting much like a medieval craft guild. [170] The assertion that the contemporary bar ***83** is there to protect its constituency [171] has led one commentator to conclude, "By analogy, letting bar associations prescribe the rules for [ethical] opinions is equivalent to allowing the American Medical Association to specify the tort law principles applicable to medical malpractice actions." [172] Similarly stated, "just as the medieval guild screened out the worst performers of its profession, but suppressed competition among its remaining members,

so too does the contemporary bar association seek to protect its members from both liability and competition" [173] through its ethical opinions. [174]

The idea that the ABA should institutionalize opinions as a mechanism to control its membership had its genesis in 1919, as noted in the ABA Model Rules Preface. [175]

However, to this day, the primary purpose of lawyer discipline is not to punish the lawyer but rather "to protect the public, the bar, and legal institutions against lawyers who have demonstrated an unwillingness to comply with minimal legal standards" [176] -- behavior that would jeopardize the contemporary legal guild's cohesiveness and self-governing status. [177]

***84** For example, the 1969 ABA Model Code postulated, "[T]he Code is designed to be adopted by appropriate agencies both as an inspirational guide to the members of the profession and as a basis for disciplinary action when the conduct of a lawyer falls below the required minimum standards stated in the Disciplinary Rules." [178] Thus, the ABA regulatory axiom in 1969 was based on preserving minimum uniformity in the quality of the legal services provided by the contemporary legal guild, [179] similar to the medieval craft guild's regulatory scheme that forced its members to deliver craft services within the guild's guidelines and according to its standard of production. [180] Presently, the contemporary legal guild's standard of production in delivering legal services is dominated by a social relationship between client and attorney defined by the ethical rule of confidentiality. [181] Although the current ABA Model Rules espouse that "[t]he profession has a responsibility to [en]sure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar," [182] much scholarship on ethics has concluded otherwise. [183]

D. Model Rule 1.6 Undermines Truth-Seeking Function of the Courts

Undoubtedly, given the historical public interest underpinnings of the rule of confidentiality and the contemporary bar's overzealous attachment to secrecy as a core requirement of an attorney-client relationship [184] --which is not grounded in logic or empirical reasoning but inspired by blind devotion to a medieval legal concept or, at best, to an unfounded behavioral assumption--the confidentiality rule will continue to erode public trust and confidence in our legal system of justice. [185] This is so because presently our courts continue to endorse this behavioral assumption based on the contemporary bar's blind devotion to confidentiality as an ethical duty. [186]

***85** Additionally, adherence by courts to this outdated norm of secrecy in our legal profession continues [187] despite the fact that it distorts the appropriate balance between attorney-client secrecy and the courts' need to obtain relevant evidence, [188] thereby further diminishing the administration of justice rather than enhancing it. [189] In sum, by suppressing relevant and material facts from disclosure, the symbiotic relationship between the confidentiality rule and the attorney-client privilege has a powerful causal effect in eliminating fundamental fairness in the administration of justice rather than in fostering it. [190]

E. Model Rule 1.6 Stunts Innovative Delivery of Legal Services

Given the aforementioned disruptive effects the rule of confidentiality has on an ordered society's legal and governing institutions, commentators have recommended eliminating the rule as an ethical duty and have asserted that the present evidentiary attorney-client privilege can achieve the same results without the confidentiality rule. [191] This further suggests that the synergy between the rule of confidentiality and the attorney-client privilege is an illusion and is not based in empirical fact but in an alternative reality that is perpetuated by the contemporary organized bar members' conclusory assumption that client confidentiality is a fundamental requirement for ensuring candor and competency within the attorney-client relationship. [192]

Ironically, one commentator has observed that given recent technological developments in how confidential information is disseminated and the globalization of the legal practice, recent amendments to the Model Rules "reflect the relatively limited potential of the 'law of lawyering' [193] to change how legal services ***86** are delivered." [194] Moreover, recent scholarship has further observed that confidentiality as an ethical duty will expand into other law-related services as a natural progression of the present legal practice evolving into an integrated law practice. [195] This will require the legal profession to provide services well beyond those that are traditionally and routinely offered in law offices. [196]

Hence, the dominant role the rule of confidentiality holds in the ABA's ethical regime will require revision due to the ***87** globalization of the legal practice and the technological advancements in communication and information dissemination--advancements that are producing revolutionary changes in the delivery of legal and law-related services that will require less secrecy and more transparency. [197] Similar to the manner in which the industrial revolution exposed the inability of the medieval craft guilds' organizational form to compete efficiently within an industrialized form of market production, which elevated mass production over artisanry, [198] globalization of the legal profession and revolutionary advancements in information technology have exposed the inability of the contemporary organized bars' outmoded and inflexible business structures, which rely heavily on a rule of confidentiality defining the attorney-client relationship, to efficiently and competitively deliver legal and law-related services. [199]

The confidentiality rule operates to protect secrets made within the context of a professional relationship (e.g., the attorney-client relationship), which stands in the way of the ABA transforming its present professional model to a business model that requires more transparency and less secrecy. Thus, if current trends continue, the ABA will be pressured to redefine core principles of the attorney-client relationship (i.e., the rule of confidentiality) because a global market system driven by information technology requires a greater ***88** degree of information transparency or less information asymmetry in order to be competitive and efficient in meeting the rising demand for traditional legal services and law-related services. [200]

Just as the regulatory rules of the medieval craft guild business structure shackled the potential to innovate and adapt to new relations of production, which led to the guild's demise, [201] the regulatory rules of the contemporary organized bar and its rationale based on protecting confidential professional relations of production/delivery of legal services, are proving to be an obstacle that are preventing the contemporary legal bar from adapting to the new globalized legal economy. This new economy requires more transformative business structures with the capacity and potential to deliver cost-efficient legal and law-related services to those otherwise unable to access the legal system, [202] which the present mode of delivering legal services, dominated by confidential relations of production, cannot achieve. In sum, a cost-effective delivery system of legal services requires the reduction of information asymmetry that the rule of confidentiality creates.

V. Model Rules 1.14 and 1.6 and NAELA Aspirational Standards E and G: Cartel Rules, Craft Guild Membership Rules, Bar Regulatory Rules, and/or Aspirational Standards?

In 1983, the ABA introduced Model Rule 1.14, Client With Diminished Capacity, in reference to the representation of clients "under a disability." However, in 2002, the ABA broadened this category to include clients with "diminished capacity," in recognition of the continuum of client capacity. [203] In addition, language was added to clarify the lawyer's confidentiality obligations under Model Rule 1.6. [204]

In sum, presently, Model Rule 1.14 addresses a lawyer's ethical obligations when a client's diminished capacity interferes with the client's cognitive ability to make adequately considered decisions. Paragraph (a) directs the lawyer to maintain a "normal client-lawyer relationship" to the extent possible. If the lawyer believes that the client is at risk of harm and cannot act in his or her own interest, paragraph (b) permits the lawyer to "take reasonably necessary protective action" under specified conditions. Although paragraph (c) explicitly provides that disclosure of client information is "impliedly authorized" by Model Rule 1.6, Confidentiality of Information, that authority is narrowed by the following caveat: "but only to the extent ***89** reasonably necessary to protect the client's interests." This statement was provided to offer guidance in evaluating a client's diminished capacity and in determining whether protective action should be taken. [205]

Similarly, the National Academy of Elder Law Attorneys promulgated its Aspirational Standards to help elder law attorneys meet their ethical obligations expressed in ABA Model Rules 1.14 and 1.6. [206] Given the unique client circumstances elder law attorneys confront on a daily basis, NAELA sought to set additional practice guidelines to assist these attorneys in implementing the principles set forth in Model Rules 1.14 and 1.6 in their elder law practices. [207] To illustrate, Aspirational Standard E § 4 mandates strict preservation of client confidences, [208] while Aspirational Standard E § 6 tempers Aspirational Standard E § 4's strict mandate to the extent possible while meeting laws, regulations, or court orders imposing a duty to disclose. [209] Further, Aspirational Standard G § 1 counsels the elder law attorney to continue to respect confidences of a client with diminished capacity, [210] while Aspirational Standard G § 6 cautions the attorney not to disclose more than is reasonably necessary to protect such a client from physical, financial, or other harm. [211]

Interestingly, ABA Model Rule 1.14(c) and NAELA Aspirational Standard G cmt. 5 include similar exceptions to ***90** Model Rule 1.6 for clients who obviously need protective action, but then limits the attorney's assistance "to the extent reasonably necessary to protect the client's interests" or, "the attorney should do no more than is necessary to protect the client," respectively. [212] Thus, just as the ABA Model Rules fail to provide an empirically supported justification for the necessity of a strict rule of confidentiality to induce client candor, the NAELA Aspirational Standards also fail to provide an empirically sufficient rationale for preserving confidences when an elder law attorney is faced with circumstances that require protective action for clients with diminished capacity who cannot help themselves or who, because of their diminished capacity, cannot appreciate the consequences of not acting. Furthermore, similar to the Model Rules, the Aspirational Standards assert rationales in a conclusory manner in support of a strict rule of confidentiality as necessary to maintain a client's decision-making autonomy. In short, the ABA's and NAELA's respective rationales are identical because both rely on the behavioral assumption espoused by John Henry Wigmore to justify the need for a strict confidentiality rule.

To illustrate, NAELA Aspirational Standard E § 1 Comment states: "Confidentiality of client information is a core fundamental principle of the attorney-client relationship, and the attorney must guard against the disclosure of the client's protected confidential information." [213] This language comports with John Henry Wigmore's instrumental theory because recognition of an evidentiary privilege is an essential instrument or means of promoting social relationships, "which in the opinion of the community ought to be sedulously fostered." [214] In fact, NAELA's Aspirational Standard on confidentiality seems to appeal to the authority of John Henry Wigmore's instrumental theory for recognizing interpersonal communication privileges because, in order to be a member of NAELA, [215] one has to shield client confidences from disclosure, presumably by invoking ABA Model Rule 1.6 or the attorney-client privilege, to protect NAELA's organizational precept that "[c]onfidentiality of client information is a core fundamental principle of the attorney-client relationship ...." [216]

NAELA's precept concerning confidentiality, itself being based on a behavioral assumption (i.e., that a typical layperson such as an elderly client would neither consult with nor divulge to a confidant, such as an attorney, but for the assurance of confidentiality furnished by a formal evidentiary privilege) [217] is testament to NAELA's devotion to John Henry Wigmore's instrumental theory's behavioral assumption. Therefore, as with the ABA Model Rules, the NAELA Aspirational Standards implicitly adopt Wigmore's behavioral ***91** assumption as its rationale or justification for a strict confidentiality rule.

Arguably, NAELA itself can be viewed as the functional equivalent of an organization operating similar to a medieval craft guild or cartel because NAELA sets standards for membership and rules to regulate (guide) its members in providing competent services to elderly clients while preserving strict adherence to confidentiality. [218] The confidentiality relationship between lawyer and client established by these standards defines the mode of production in delivering legal and law-related services to elderly clients. If ABA Model Rule 1.6 is designed to benefit attorneys rather than clients, as some commentators have observed, [219] it would logically follow that the NAELA Aspirational Standards are also implemented to protect the interests of elder law attorneys because both ethical (aspirational) regimes mirror each other. [220] More specifically, NAELA Aspirational Standard E, Confidentiality, implicitly adopts the rationales, justifications, and policy reasons identical to those that ground John

Henry Wigmore's instrumental theory for an evidentiary attorney-client privilege, whose validity has been refuted by recent scholarship due to the absence of empirical data justifying it. [221]

VI. Ethical Dilemmas for Elder Law Attorneys Created by Model Rule 1.6 Juxtaposed With Model Rule 1.14 and NAELA Aspirational Standards E and G

As stated in ABA Model Rule 1.6 Comment 2, "A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation .... This 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." [222] NAELA Aspirational Standard E § 1 Comment echoes this ethical precept in stating, "Confidentiality of client information is a core fundamental principle of the attorney-client relationship, and the attorney must guard against the disclosure of the client's protected confidential information." [223] In fact, as previously argued, the principle of confidentiality dominates both the ABA Model Rules and the NAELA Aspirational Standards. [224]

***92** Interestingly, although NAELA promotes Model Rule 1.6 as a governing principle in its holistic approach, [225] NAELA intuitively recognizes that the behavioral assumptions of the instrumental theory grounding the rule of confidentiality are misplaced because NAELA implemented Aspirational Standard H. [226] This illustrates that, in NAELA's legal guild structure, the rule of confidentiality plays a different role other than soliciting a meaningful level of client candor necessary to achieve the following goals of the holistic approach: elder "independence and autonomy" and timely "protection from exploitation, abuse, and neglect." [227]

In practice, the tension between Aspirational Standards E and G creates an ethical conflict within the Aspirational Standards. This tension results from the rule of confidentiality's dominant role in how an elder law practitioner determines which elder preferences are selected in maintaining the elder's "autonomy and self-determination." [228] This determination process, which is generally at the expense of not instituting timely protection from exploitation, abuse, and neglect, [229] thus creates further tension with the elder law attorney's duty of diligence and competency in handling elder client matters in a timely manner. [230] In sum, the rule of confidentiality, as with the ABA Model Rules, creates tension within NAELA's Aspirational Standards, thus leaving confusion regarding what an elder law practitioner should do when he or she becomes aware of elder abuse. [231]

A. Elder Abuse and Model Rule 1.6

According to the Department of Health and Human Services Administration on Aging, between 2007 and 2017, the population age 60 and older increased 35 percent from 52.5 million to 70.8 million. [232] The population age 65 and older ***93** increased from 37.8 million in 2007 to 50.9 million in 2017 (a 34 percent increase) and is projected to reach 94.7 million in 2060. [233] By 2040, there will be about 80.8 million older Americans, more than twice their number in 2000. [234] People age 65 and older represented 15.6 percent of the population in 2017 but are expected to increase to 21.6 percent of the population by 2040. [235] The 85 and older population is projected to more than double from 6.5 million in 2017 to 14.4 million in 2040 (a 123 percent increase). [236] In short, our population is graying fast. [237]

The five states with the highest percentage of persons age 65 and older in 2017 were Florida (20.1 percent), Maine (19.9 percent), West Virginia (19.4 percent), Vermont (18.7 percent), and Montana (18.1 percent). [238] Moreover, the National Adult Maltreatment Reporting System (NAMRS) *Adult Maltreatment Report 2018* for adult protective services' clients and victims of abuse reported that 70 percent of abused adults were age 60 or older. [239] Hence, given that the elder population is growing at an accelerated pace, elder abuse will continue to be a growing and pervasive social harm [240] that elder law ***94** attorneys will be forced to address in delivering protective legal services to elder clients under NAELA's holistic approach. [241]

Interestingly, recent scholarship has revealed that the duty of confidentiality imposed on attorneys greatly hinders their ability to disclose abuse. [242] The duty of confidentiality most likely forbids a lawyer from disclosing abuse unless the client gives informed consent. [243] Even if the lawyer is in a jurisdiction that requires lawyers to report abuse, [244] the ABA Model Rules impose a presumption against supersession that makes it unclear whether mandatory reporting laws abrogate a lawyer's duty of confidentiality. [245] For example, although Florida imposes a statutory duty for all persons to report elder abuse, [246] attorneys are not expressly listed in the statute as professionals who are required to report such abuse. [247] Moreover, even if Florida's mandatory reporting statute implicitly applies to attorneys, Florida Bar Rule 4-1.6 imposes a presumption against supersession that leaves the issues of compliance subject to interpretation. [248]

This tension creates a practical as well as ethical dilemma for attorneys in Florida because if an attorney reasonably believes abuse is occurring, Florida's confidentiality rule creates a presumption against supersession, thus placing the attorney in an ethical dilemma. [249] In practice, an attorney would be required to comply with his or her ethical duty of confidentiality until forced by court order to report abuses that ***95** his or her client has not given informed consent to report [250] and even then, under Model Rule 1.6(b)(6), reporting client confidences or secrets is permitted, not mandatory. [251]

Given the exponential growth of the elderly population and mental illnesses associated with this population, providing timely protective action to stem elder abuse raises ethical issues for elder law practitioners. [252] In acknowledging this ethical tension, NAELA directs elder law practitioners to presume capacity until facts and circumstances override that presumption. [253] However, even when not confronted with a client suffering from apparent diminished capacity, the subjective circularity imposed by ABA Model Rule 1.14 and NAELA Aspirational Standard G requires elder law practitioners to assess capacity continually when dealing with elder clients. [254] Not surprisingly, capacity assessments are a daily exercise for elder law practitioners, particularly when there is a reasonable suspicion of elder abuse. [255] Therefore, in the context of elder abuse, ABA Model Rules 1.6 and 1.14, and NAELA's counterparts, Aspirational Standards E and G, create ethical dilemmas for elder law attorneys. [256]

***96** In addition, because attorneys are ethically mandated to strictly preserve client confidences and secrets [257] in applying the NAELA holistic approach, [258] ABA Model Rule 1.14 and NAELA Aspirational Standard G further hinder abuse reporting because both require the elder law practitioner to use the least restrictive means to address abuse. When a reasonable suspicion of elder abuse arises, the attorney must first assess the elderly client's capacity to engage in a normal attorney-client relationship before the attorney can determine whether the client has the capacity to exercise self-determination in selecting preferences that are consistent with his or her known wishes and best interests, thus ensuring the elderly client's autonomy. [259] As previously alluded to, the social relationship between client and attorney, which is dominated by the rule of confidentiality, makes it increasingly difficult for the attorney to deliver timely and appropriate services to abused elderly clients that are in accord with their known wishes and best interests and consistent with their values. [260]

B. Capacity Determinations and Ethical Dilemmas

The process of making capacity determinations has been characterized as the "black hole of legal ethics." [261] Although ***97** the ABA Model Rules and NAELA Aspirational Standards provide guidelines for assessing whether an elderly client is suffering from diminished capacity, [262] in the end the attorney has wide discretion in making determinations about capacity. [263] However, in order to determine whether any protective action is necessary to address an elderly client's abuse, the lawyer must first assess the client's capacity. [264] This is problematic because a client may experience a steady decline in capacity. [265] Also, a client's competency may vary depending on the day or even the time of day. [266] Therefore, because capacity assessments can vary with the same individual for a variety of reasons, [267] elder law attorneys must depend on independent professional services for assessing a client's capacity but always in the shadow of the rule of confidentiality. [268]

In appropriate circumstances the "lawyer may seek guidance from an appropriate diagnostician" [269] to determine an elderly client's capacity to select preferences. [270] But even with the client's informed consent, [271] a breach of confidentiality can still occur because most states have mandatory reporting for diagnosticians. [272] In this scenario, an ethical dilemma arises ***98** because if a diagnostician finds that the elderly client does not have the capacity to formulate informed consent, lacks the faculties to understand the fact that he or she is being abused, or cannot understand the consequences of the abuse, any informed consent the client gave to reveal abuse prior to the capacity assessment is invalidated by such incapacity determination. [273] This dilemma deters attorneys from using independent professional services to assess capacity [274] because such ethical breach is not authorized by ABA Model Rule 1.14 or NAELA Aspirational Standard E. [275]

In sum, although obtaining informed consent waivers is a good practice for elder law attorneys under these circumstances, [276] it is not an absolute safeguard against an ethical breach. [277] Eliminating or further restricting the rule of confidentiality is the only fail-safe way to avoid this dilemma while encouraging elder abuse reporting, [278] which is more consistent with the elder law practitioner's ethical duty to act in a timely and competent manner. [279] Additionally, by facilitating reporting, the costs associated with capacity assessments are shifted to society in general for both the elderly client [280] and ***99** the attorney, [281] thus making protective action and capacity assessments more easily accessible and cost-effective.

C. Model Rule 1.6 Inhibition of Achievement of the Goals of the NAELA Holistic Approach

"Since the holistic approach may go beyond traditional legal services," [282] Model Rule 1.6 presents an obstacle to delivering law-related services [283] to elderly clients who are attempting to meet their "life needs"--needs the holistic approach is designed to deliver. [284] In specific terms, the holistic approach encourages the use of law-related services, such as the services of diagnosticians, in making capacity assessments. [285] However, the rule of confidentiality hinders the use of diagnosticians because presently there is no privilege exception to protect the attorney when using a diagnostician [286] or disclosure exception to protect the attorney during the assessment of a client's capacity. [287] In other words, when using diagnosticians to assess an elderly client's capacity, there is no privilege law or ethical exception to shield the elder law practitioner from the ethical dilemmas created by a strict rule of confidentiality. In general terms, the rule of confidentiality restricts the application of collaborative interdisciplinary business models that would better achieve the goals of the holistic approach outlined in NAELA Aspirational Standard A. [288]

Although much scholarship has argued that multidisciplinary practice models (MDPs) and medical-legal partnerships (MLPs) make legal services more accessible and cost-effective for the elderly, [289] ***100** the ABA still adamantly refuses to permit alternative business models to facilitate the delivery of law-related services. [290] The ethical debate to allow collaborative interdisciplinary business models has been ongoing for several decades, [291] but the ABA still opposes the general use of these alternative business models principally because of the rule of confidentiality. [292] However, one commentator has correctly noted that the ABA's strident opposition is counterintuitive to *Restatement (Third) of the Law Governing Lawyers*. [293]

Notably, *Restatement (Third)* explicates the general principle that a third party in attendance at attorney-client meetings does not break the privilege if the third party is in a profession with a similar confidentiality privilege. [294] Hence, because social workers and medical professionals have a duty to preserve client confidences and secrets, the principles set forth in *Restatement (Third)* would extend the attorney-client privilege to communications with these professionals. [295] Furthermore, *Restatement (Third)* explicitly provides that, under certain circumstances, the attorney-client privilege attaches when the client has a reasonable expectation that the matter will be kept confidential. [296] ***101** Arguably, and as provided by *Restatement (Third)*, if an interdisciplinary party is present during an attorney-client meeting, the client's expectation interest is met and the attorney-client privilege attaches to the matter discussed, [297] thus protecting the client's confidential information. Notwithstanding this analytic perspective, the ABA refuses to adopt the *Restatement (Third)* rationale and adheres to John Henry Wigmore's instrumental

behavioral assumption to justify its adamant refusal to accept the use of collaborative interdisciplinary business models to facilitate efficient, cost-effective, and timely delivery of legal and law-related services to the elderly consistent with the NAELA holistic approach. [298]

VII. Conclusion

Recent scholarship has attacked the necessity of a rule of confidentiality on the following grounds. First, it impedes access to the truth and consequently creates information asymmetry that hinders the truth-finding function of the courts. [299] Second, it has led to the distorted expansion of privilege law beyond reasonable bounds. [300] Third, it creates public mistrust in government and in corporate governance. [301] Fourth, it stunts innovative change in the delivery of legal services for the bar generally [302] and for NAELA's holistic approach specifically. [303] These social externalities increase society's transactional costs associated with these institutions; [304] therefore, they compellingly support the conclusion that Model Rule 1.6, Confidentiality of Information, primarily serves the functional purpose of maintaining the internal cohesiveness of the contemporary legal guild, which benefits guild members' economic interests [305] while ensuring members' independence from external regulation. [306]

As a consequence of the rule of confidentiality, bar members are forced to rely on an outdated mode of production in ***102** delivering legal services, which places the American legal guild at a disadvantage in competing in a global economy characterized by transformative technological and informational changes that require transparency in transactions. [307] The destructive consequences of the rule of confidentiality further obstructs the ability of older adults to benefit from a more effective and cost-efficient business model that would enhance the NAELA holistic approach [308] "especially when the capacity of the person being served in the legal representation is diminished." [309]

To clarify, because the contemporary rule of confidentiality dominates the ABA ethical regime, it imposes a social relationship between client and lawyer that defines the mode of production in delivering legal services that not only hinders access to the legal system but also stunts innovative change necessary to meet the increasing demand for legal services. [310] Significantly, since the ABA ethics regime is rooted in medieval ethical concepts, the present legal guild structure faces extinction unless it sheds its cartel or guild mentality by ridding itself of the rule of confidentiality, thus enabling it to adapt to the challenges brought on by a revolutionary global informational and technological economy. [311] This challenge will require American contemporary bar organizations to reform their social relations of production in the way legal services are delivered because an expanding global economy is creating a greater demand for those services. Confidential relations of production in the present legal guild business structure are no longer viable because the structure relies on an outdated confidential attorney-client relationship, or social relations of production dominated by rules of secrecy, that obstructs efficiency and competitiveness in the delivery of legal services. [312]

Footnotes

a1 Garth A. Molander, JD, LLM, a solo practitioner whose principle office is in Bohemia, New York, earned his JD from Touro Law School, Long Island, New York, and graduated from the Elder Law LLM program at Stetson University College of Law in December 2019. He has been admitted to the bar associations in New York, New Jersey, Florida, and the District of Columbia. He is a proud NAELA member.

1 *Annotated Model Rules, infra* n. 3, at 103, Model R. 1.6, which states: **|** *Client-Lawyer Relationship*

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;

(6) to comply with other law or a court order; or

(7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

2 Snyder, *infra* n. 7, at 507-516; Stevenson, *infra* n. 8, at 349-353.

3 *Annotated Model Rules of Professional Conduct* 109-110 (Ellen J. Bennett & Helen W. Gunnarsson, eds), 9th ed. 2019) (hereinafter *Annotated Model Rules*) (“The attorney-client evidentiary privilege is so closely related to the ethical duty of confidentiality that the terms ‘privileged’ and ‘confidential’ are often used interchangeably. But the two are entirely separate concepts, applicable under different sets of circumstances and using different standards. The ethical duty is extremely broad: it protects from disclosure all ‘information relating to the representation,’ and always applies. The attorney-client privilege, however, is more limited: it protects from compelled disclosure the substance of a lawyer-client communication made for the purpose of obtaining or imparting legal advice or assistance and applies only in the context of a legal proceeding governed by the rules of evidence. *See* Model Rule 1.6, cmt. [3]; Restatement (Third) of the Law Governing Lawyers §§68-86 (2000).”).

4 *See Restatement (Third) of the Law Governing Lawyers* §§ 68-86 (2000) (hereinafter *Restatement (Third)*).

5 Andrews, *infra* n. 19.

6 *See* David L. Ferstendig, 9 *N.Y. Civil Practice* ¶ 4503.19 (2020) (“Unless this relationship between truth-finding and privilege is recognized, the privilege may be permitted to expand beyond reason and need.”); *McCormick on Evidence* § 72, 466 (Kenneth S. Broun, 3rd ed. 2013) (“the rules of privilege ... those shielding confidentiality of communications between ... attorney and client ... are not designed or intended to facilitate or to safeguard its integrity. Their effect instead is clearly inhibitive; rather than facilitating the illumination of truth, they shut out the light.”); *Restatement (Third)* § 68

cmt. c ("The privilege implies an impairment of the search for truth ... [S]ome judicial fact findings undoubtedly have been erroneous because the privilege excluded relevant evidence .... To that extent the privilege may facilitate serious social harm."); *see also Law of Lawyering, infra* n. 193, at § 9.3 ("It is the confidentiality principle that most often creates tension between the law of lawyering and 'other' law, for it exacts significant sacrifice of the truth-finding and justice-seeking aims of the law generally ....").

7 Lloyd B. Snyder, *Is Attorney-Client Confidentiality Necessary?* 15 Geo. J. Leg. Ethics 477, 479 (Spring 2002); *see also* Paul R. Rice, *Attorney-Client Privilege: The Eroding Concept of Confidentiality Should Be Abolished*, 47 Duke L.J. 853 (Mar. 1998).

8 Snyder, *supra* n. 7 (citing Rice, *supra* n. 7, at 888-895) (arguing to abolish Model Rule 1.6 because "the privilege's protection of the use of a client's statements to counsel is what encourages openness and candor in such communications." Rice, *supra* n. 7, at 888.); see Dru Stevenson, *Against Confidentiality*, 48 U.C. Davis L. Rev. 337, 343 (November 2014) (positing the thesis that confidentiality rules undermine public confidence in the legal system and, more generally, interfere with transparency in society, leading to distrust in our government officials, financial institutions, and other power structures that affect our daily lives, and advocating for the abolition or repeal of Model Rule 1.6. *Id.* at 399-401.); *see also* Fred C. Zacharias, *Rethinking Confidentiality*, 74 Iowa L. Rev. 351, 370-376 (Jan. 1989) (generally discussing the negative effects the strict confidentiality rule has on the public perception of the bar and further noting that the exceptions to the ABA Model Rule of strict confidentiality were a response by the profession to protect its personal and economic interests).

9 *See e.g. Trammel v. U.S.*, 445 U.S. 40, 50-51 (1980) (qualifying the witness-spouse privilege to further the important public interest in marital harmony and stating that all privileges should be construed strictly because they contravene the fundamental principle that the public has a right to every person's evidence, thus echoing John Henry Wigmore's "every man's evidence" principle. 8 J. Wigmore, *Evidence* § 2192 (McNaughton rev. ed. 1961)); *Fisher v. U.S.*, 425 U.S. 391, 403 (1976) (accountant's documents at issue were not privileged; production of the documents would involve no incriminating testimony within the protection of the Fifth Amendment, arguing that "the privilege has the effect of withholding relevant information from the factfinder"); *see also U.S. v. Bryan*, 339 U.S. 323 (1950) (the "every man's evidence" principle trumped the privilege but it should be noted that the decision was made at the height of the second Red Scare in the 1950s).

10 *E.g. U.S. v. Zolin*, 491 U.S. 554, 562 (1989) (quoting *Fisher*, 425 U.S. at 403 (The Supreme Court said, "[S]ince the privilege has the effect of withholding relevant facts from the fact finder, it applies only where necessary to achieve its purpose.").

11 *Priest v. Hennessy*, 51 N.Y.2d 62, 68, 409 N.E.2d 983, 431 N.Y.S.2d 511 (1980) (The court noted, "It has long been recognized that 'the attorney-client privilege constitutes an 'obstacle' to the truth-finding process, the invocation of which should be cautiously observed to ensure that its application is consistent with its purpose.'") (citations omitted); *see also Spectrum Sys. Intl. Corp. v. Chem. Bank*, 78 N.Y.2d 371, 377, 581 N.E.2d 1055, 575 N.Y.S.2d 809 (1991) (noting, "Obvious tension exists between the policy favoring full disclosure and the policy permitting parties to withhold relevant evidence.").

12 N.Y. Consol. Laws: Civil Practice Law and Rules (CPLR) § 4503 (2020). "Attorney (a) 1. Confidential communication privileged. Unless the client waives the privilege, an attorney or his or her employee, or any person who obtains without the knowledge of the client evidence of a confidential communication made between the attorney or his or her employee and the client in the course of professional employment, shall not disclose, or be allowed to disclose such communication, nor shall the client be compelled to disclose such communication, in any action, disciplinary trial or hearing, or administrative action, proceeding or hearing conducted by or on behalf of any state, municipal or local governmental agency or by the legislature or any committee or body thereof. Evidence of any such communication

obtained by any such person, and evidence resulting therefrom, shall not be disclosed by any state, municipal or local governmental agency or by the legislature or any committee or body thereof. The relationship of an attorney and client shall exist between a professional service corporation organized under article fifteen of the business corporation law to practice as an attorney and counselor-at-law and the clients to whom it renders legal services."

13 *See ABA, Jurisdictional Rules Comparison Charts*, https://ambar.org/MRPCStateCharts (accessed June 2, 2020) (showing how each jurisdiction has modified each of the ABA Model Rules of Professional Conduct).

14 *See generally* 1 Weinstein, Korn & Miller, CPLR Manual § 20.02, ¶ (c), for a detailed discussion of New York case law concerning CPLR § 4503 (New York attorney-client privilege statute) and CPLR § 3101(b) (New York disclosure statute/privileged matter); *see also* Ferstendig, *supra* n. 6, at ¶ 4503.02 ("The privilege created by CPLR 4503(a) is not absolute .... The privilege should be strictly limited and whether it applies will depend on the circumstances of each case.").

15 *See* Fla. Stat. § 90.501 (current through 2019 session of the Fla. Legis.) ("Except as otherwise provided by this chapter [which includes an attorney-client privilege provision], any other statute, or the Constitution of the United States or of the State of Florida, no person in a legal proceeding has a privilege to: (1) Refuse to be a witness. (2) Refuse to disclose any matter. (3) Refuse to produce any object or writing. (4) Prevent another from being a witness, from disclosing any matter, or from producing any object or writing."); *see also Hoyas v. St.,* 456 So. 2d 1225, 1228 (Fla. 3d Dist. App. 1984) (the privilege, being an "exception to the general duty to disclose" and an "obstacle to the investigation of the truth," "ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle.") (citing *Anderson v. St.*, 297 So. 2d 871, 872 (Fla. 2d Dist. App. 1974), quoting J. Wigmore, *supra* n. 9, at § 2291, 554).

16 ABA, *supra* n. 13; *but see* Fla. R. Prof. Conduct 4-1.6 cmt. 21 (2019) ("Whether another provision of law supersedes rule 4-1.6 is a matter of interpretation beyond the scope of these rules, but a presumption should exist against a supersession."); *see also Annotated Model Rules, supra* n. 3, at 107, Model R. 1.6 cmt. 15 (repeating the presumption against supersession).

17 Stevenson, *supra* n. 8, at 382-388 (generally discussing Model Rule 1.6 redundancy).

18 *See supra* nn. 9, 10, 11.

19 Carol Rice Andrews, *Standards of Conduct for Lawyers: An 800 Year Evolution*, 57 SMU L. Rev. 1385, 1404 (Fall 2004) (In reviewing the medieval underpinnings of the confidentiality rule, Professor Andrews reveals the tension between the rule itself and the truth-finding function of the court. This tension is evidenced in the oaths medieval lawyers had to take, which obligated them to keep client secrets while demanding that "[a]n advocate owes to the court a just and true information. The zeal of his client's cause, as it must not transport him to irreverence, so it must not mislead him to untruths in his information of the court." Because advocates were the aristocracy, the duties an advocate owed to both the court and the client preserved the class distinction between both.); *see also* Posner, *infra* n. 73, at 7 (arguing that the contemporary bar is the functional equivalent to the medieval craft guild); Coffee, *infra* n. 73.

20 Stevenson, *supra* n. 8, at 346.

21 *Id.* at 343.

22 *Id.* at 359 (asymmetry of information is further found in the exceptions to Model Rule 1.6).

23 *Id.* at 370-375.

24 *See e.g. Restatement (Third)* § 74.

25 *See Law of Lawyering, infra* n. 193, at § 9.8, 9-36.

26 Stevenson, *supra* n. 8; *see also infra* n. 65.

27 *Annotated Model Rules, supra* n. 3, at 109-110, ann. cmt. Relationship of Rule 1.6 to Attorney-Client Privilege.

28 Andrews, *supra* n. 19 (positing that the 1275 First Statute of Westminster imposed on attorneys a duty of loyalty and confidentiality, which the English courts enforced, and further noted that John Henry Wigmore traced the history of the attorney-client privilege to the reign of Elizabeth I (1558-1603)).

29 Snyder, *supra* n. 7, at 485-493 (discussing the history of the rule of confidentiality).

30 The ABA Model Code of Professional Responsibility was adopted by the ABA House of Delegates on August 12, 1969, and was amended by the House of Delegates in February 1970, February 1974, February 1975, August 1976, August 1977, August 1978, February 1979, February 1980, and August 1980.

31 The ABA Model Rules of Professional Conduct were adopted by the ABA House of Delegates in 1983. They serve as models for the ethical rules of most jurisdictions. Before the adoption of the Model Rules, the ABA used the 1969 Model Code of Professional Responsibility. Preceding this were the 1908 Canons of Professional Ethics (last amended in 1963).

32 *See e.g.* Fred C. Zacharias, *Integrity Ethic*s, 23 Geo. J. Leg. Ethics 541, 550 (Spring 2009) (noting that although the 1908 Canons of Professional Ethics referred to "[t]he obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences (Canon 6)," the duty of attorney-client confidentiality, which the Canons recognized, had to be read in light of early understandings of privilege and confidentiality as a "gentleman's" obligation to keep secrets--an aspect of ordinary citizens' integrity--rather than as a strict, role-based concept"; therefore concluding that the original ABA ethical regime--the 1908 Canons of Professional Ethics-- for regulating lawyers took the form of a code resting primarily on integrity ethics.); see also Snyder, supra n. 7 (noting that the attorney obligation to withhold client information obtained from a client first appeared in the ABA Canons of Professional Ethics in either 1927 or 1937, but further noting that prior to 1969, the ABA ethical rule of confidentiality was no broader than the evidentiary privilege. Id. at 505.); *but see Law of Lawyering, infra* n. 193, at § 1.11, 1-19 (positing that the "core duty to preserve a client's confidences was not mentioned until a Canon 37 was added in 1928.").

33 Andrews, *supra* n. 19, at 1403 (positing that the duty of confidentiality can be traced back to 1275).

34 *Id.* at 1391 (The early medieval legal profession was composed of pleaders and attorneys. "The pleaders tended to be better educated than attorneys (agents of the client) and were the 'aristocrats' of the early profession. An elite class of pleaders became known as 'serjeants,' and in early times, serjeants often (but not exclusively) represented the King. The serjeants formed the order of the coif and were the 'cream of the profession."').

35 *Annotated Model Rules, supra* n. 3, Model R. 1.6 cmt. 7 (Paragraph (b)(2) is a limited exception to the rule of confidentiality that permits the lawyer to reveal information to the extent necessary to enable affected persons or

appropriate authorities to prevent the client from committing a crime or fraud, as defined in Rule 1.0(d), that is reasonably certain to result in substantial injury to the financial or property interests of another and in furtherance of which the client has used or is using the lawyer's services. Such a serious abuse of the lawyer-client relationship by the client forfeits the protection of this rule. The client can, of course, prevent such disclosure by refraining from the wrongful conduct. Although paragraph (b)(2) does not require the lawyer to reveal the client's misconduct, the lawyer may not counsel or assist the client in conduct the lawyer knows is criminal or fraudulent. See Model R. 1.2(d).); *see also* Model R. 1.16 (with respect to the lawyer's obligation or right to withdraw from the representation of the client in such circumstances); Model R. 1.13 (c) (which permits the lawyer, when the client is an organization, to reveal information relating to the representation in limited circumstances).

36 *Annotated Model Rules, supra* n. 3, at 281-282, Model R. 1.16, Declining or Terminating Representation (stating, "(a) Except as stated in paragraph (c), a lawyer shall not represent a client or, where representation has commenced, shall withdraw from the representation of a client," after which citing seven circumstances under which withdrawal may be exercised. The first instance is when "the representation will result in violation of the Rules of Professional Conduct or other law." *Id.* at 281.).

37 *Id.* at 105, Model R. 1.16 cmt. 7 (stating that withdrawal is not mandatory).

38 Andrews, *supra* n. 19, at 1398.

39 *Id.* at 1401 (Professor Andrews notes that scholars believe that *The Mirror of Justices* (Selden Society 1893) was written in the late 13th century. The author and date are unknown, but scholars have dated the publication 1285-1290).

40 *See Annotated Model Rules, supra* n. 3, at 296 ("A lawyer must protect client confidences when moving to withdraw and thereafter. Rule 1.6 (Confidentiality of Information); Rule 1.9 (Duties to Former Clients).").

41 Andrews, *supra* n. 19, at 1405 (noting that "[John Henry] Wigmore's historical account and purported justification for the privilege are subject to question, but the uncertainty does not extend to the early existence of the underlying professional duty of confidentiality.").

42 Snyder, *supra* n. 7, at 486 (noting in 1908 that the ABA promulgated Canon 6, which dealt with the issue of conflicts of interest, thus obligating attorneys "not to divulge [client's] secrets or confidences"; however, because Canon 6 was a canon on the subject of conflicts of interest, arguably it was not intended as an independent rule of confidentiality).

43 *Id.* at 488 (Canon 37 in 1937 stated: "It is the duty of a lawyer to preserve his client's confidences. This duty outlasts the lawyer's employment and extends as well to his employees ..." and further noted, "For the first time, the ABA unequivocally expressed the obligation of a lawyer to preserve a client's confidences.").

44 Andrews, *supra* n. 33; *see also* Snyder, *supra* n. 7, at 487 ("the subsequent history of the ABA's treatment of Canon 6 confirms that it was drafted to deal exclusively with conflict cases. After the promulgation of the *1908 Canons*, the Professional Ethics and Grievances Committee of the ABA issued advisory opinions applying the 1908 Canons to various fact patterns. Every advisory opinion relating to Canon 6 involved a conflict of interest. Not one opinion discussed disclosure of confidential information apart from a conflict matter.").

45 Snyder, *supra* n. 7, at 490-491; *see also* Model Code Ethical Consideration (EC) 4-1 (ABA 1969): "The observance of the ethical obligation of a lawyer to hold inviolate the confidences and secrets of his client not only facilitates the

full development of facts essential to proper representation of the client but also encourages laymen to seek early legal assistance."

46 Model Code 4-101 (A) states: "'Confidence' refers to information protected by the attorney-client privilege under applicable law, and 'secret' refers to 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."

47 Andrews, *supra* n. 19, at 1391 (serjeants were considered the "aristocrats of medieval lawyers").

48 *Id.* at 1400 (In 1648, Commissioner Lord Whitlocke presented a comprehensive statement of serjeants' duties while conferring the degree upon new serjeants, which stressed secret-keeping as one of the three "general" duties).

49 *Id.* at 1404 (Professor Andrews noted Lord Whitlocke's speech before the serjeants bar in 1648, where he stated: "For secrecy: advocates are a king of confessors, and ought to be such, to whom the client may with confidence lay open his evidences, and the naked truth of his case, *sub Sigillo*, and he ought not to discover them to his client's prejudice; nor will the law compel him to it.").

50 Snyder, *supra* n. 7, at 491 (Professor Snyder observed that the ABA adopted the 400-year-old rationale for the evidentiary rule of privilege as its reason for expanding the confidentiality rule in 1969).

51 *See e.g.* Model Code EC 4-1 (reiterating the instrumental behavioral assumption of John Henry Wigmore).

52 Snyder, *supra* n. 7, at 492; *see e.g. Annotated Model Rules, supra* n. 3, at 103; *see also id.* at 104, Model R. 1.6 cmt. 1 ("This Rule governs the disclosure by a lawyer of information relating to the representation of a client during the lawyer's representation of the client. See Rule 1.18 for the lawyer's duties with respect to information provided to the lawyer by a prospective client, Rule 1.9(c)(2) for the lawyer's duty not to reveal information relating to the lawyer's prior representation of a former client and Rules 1.8(b) and 1.9(c)(1) for the lawyer's duties with respect to the use of such information to the disadvantage of clients and former clients.").

53 *Annotated Model Rules, supra* n. 3, at ii ("The ABA Model Rules of Professional Conduct, including Preamble, Scope, and Comment, were adopted by the ABA House of Delegates on August 2, 1983, and amended in 1987, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1997, 1998, 2000, 2002, 2003, 2007, 2008, 2009, 2012, 2013, 2016, and 2018.").

54 *Id.* at 104, Model R. 1.6 cmt. 2 ("A fundamental principle in the client-lawyer relationship is--the lawyer must not reveal information relating to the representation .... This 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.").

55 Edward J. Imwinkelried, *The New Wigmore: An Essay on Rethinking the Foundation of Evidentiary Privileges*, 83 B.U. L. Rev. 315 (Apr. 2003); *see e.g. supra* n. 54.

56 *Supra* nn. 51 and 54, respectively.

57 Imwinkelried, *supra* n. 55, at 321-322 (arguing that empirical studies do not bear out John Henry Wigmore's behavioral assumption).

58 Snyder, *supra* n. 7, at 521 (concluding that since 1969, when the ABA started expanding the rule of confidentiality, the rule has had "a corrosive effect on the judicial analysis of the evidentiary privilege, pushing decisions about the privilege beyond what would be required by the traditional reasons for the privilege.").

59 *Id.*

60 *Id.* at 497 ("The traditional rationale for the attorney-client privilege is highly speculative and lacking in empirical support."); *see also* Rice, *supra* n. 7, at 859-860 (arguing that [John Henry] Wigmore's secrecy requirement is not supported by Anglo-American history because "not a single reported decision can be found in which a court has either explicated this reasoning or questioned its logic."); Stevenson, supra n. 8, at 392-398 (positing that the ABA rationale for Model Rule 1.6 is based on a speculative behavioral assumption unsupported by empirical data).

61 *Id.; see also* J. Wigmore, *supra* n. 9, at § 2291, 554 (noting the illusory nature of the benefits attaching to the privilege in observing that "Its benefits are all indirect and speculative; its obstruction is plain and concrete ....").

62 *See e.g. Annotated Model Rules, supra* n. 3, at 162, Model R. 1.8(f)(3) (strictly applying Rule 1.6 to third-party payers, such as insurers); *id.* at 232, Model R. 1.13 cmt. 2 ("The lawyer may not disclose to such constituent's information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by Rule 1.6."); *id.* at 253, Model R. 1.14(c) cmt. 8 (requiring lawyers representing clients who have diminished capacity to yield to Rule 1.6 in defining the scope of disclosure and only disclose the confidential information that is reasonably necessary to protect the client); *id.* at 328, Model R. 2.3(c) cmt. 5 ("Information relating to an evaluation is protected by Rule 1.6."); *id.* at 365, Model R. 3.3 cmt. 15 ("In connection with a request for permission to withdraw that is premised on a client's misconduct, a lawyer may reveal information relating to the representation only to the extent reasonably necessary to comply with this Rule or as otherwise permitted by Rule 1.6."); *id.* at 444, Model R. 4.1(b) cmt. 3 ("If the lawyer can avoid assisting a client's crime or fraud only by disclosing this information, then under paragraph (b) the lawyer is required to do so, unless the disclosure is prohibited by Rule 1.6."); *id.* at 509-510 (Model Rule 5.3's title and comments were amended to emphasize that lawyers should make reasonable efforts to ensure that outsourced work is performed in a manner compatible with the lawyer's own professional obligations, including the lawyer's obligation to protect client information.); *id.* at 575, Model R. 5.7 cmt. 10 (requiring a lawyer to take special care "to scrupulously adhere to the requirements of Rule 1.6 relating to disclosure of confidential information"); *id.* at 673, Model R. 8.1(b) cmt. 3 ("A lawyer representing an applicant for admission to the bar, or representing a lawyer who is the subject of a disciplinary inquiry or proceeding, is governed by the Rules applicable to the client-lawyer relationship, including Rule 1.6." The rule itself states, "Except that this rule does not require disclosure of information otherwise protected by Rule 1.6."); *id.* at 695, Model R. 8.3(c) cmt. 2 ("A report about misconduct is not required where it would involve violation of Rule 1.6." The rule itself states, "This Rule does not require disclosure of information otherwise protected by Rule 1.6.").

63 Snyder, *supra* n. 7, at 505-506.

64 *Annotated Model Rules, supra* n. 3, at 701, ann. cmt. Model R. 8.3, Reporting Professional Misconduct ("Rule 8.3(c) makes the duty to report misconduct subordinate to the duty of confidentiality set forth in Rule 1.6. *See e.g.* In re Ethics Advisory Panel Op. No. 92-1, 627 A.2d 317 (R.I. 1993) (if lawyer learns of another lawyer's misconduct while representing client, duty of confidentiality prohibits reporting it without client's consent, even if lawyer learned of it from other lawyer's admission rather than from client"); *id.* at 366, ann. cmt. Model R. 3.3, Candor Toward the Tribunal ("If the tribunal's judgment will not be binding, Rule 3.3 does not apply. This means the lawyer need abide only by Rule

4.1's requirement of truthfulness, rather than by Rule 3.3's more rigorous requirement of candor. The major differences are that Rule 3.3 applies to all statements regardless of materiality and can even require a lawyer to disclose information protected by Rule 1.6 (Confidentiality of Information).”); *id.* at 383, ann. cmt. Model R. 3.4, Fairness to Opposing Party and Counsel (“Rule 3.4(a) prohibits a lawyer from ‘unlawfully’ concealing material having potential evidentiary value. This does not impose a duty to volunteer all relevant information that a lawyer has but prohibits concealing potential evidence a lawyer has a legal duty to disclose. *Sherman v. State,* 905 P.2d 355 (Wash. 1995) (“RPC 3.4 does not itself create a duty of disclosure.”); *id.* at 451 (ann. cmt. Model R. 4.1, Truthfulness in Statements to Others (“Rule 4.1(b) requires disclosure of a material fact to avoid assisting in a client's crime or fraud ‘unless disclosure is prohibited by Rule 1.6.’ Rule 1.6 generally bars lawyers from disclosing any ‘information relating to the representation of a client,’ but an exception in Rule 1.6(b) permits disclosure when a client is using the lawyer's services to further certain crimes or frauds. Although the language used in Rule 4.1(b) is not perfectly congruent with that used in Rule 1.6(b)(2) and (3), Rule 4.1(b) requires the disclosure if the conditions of both rules are met.”).

65 Stevenson, *supra* n. 8, at 345 (noting that transparency brings accountability, resulting in trust in legal institutions and governing institutions); *see also* Tal Z. Zarsky, *Transparent Predictions*, 2013 U. Ill. L. Rev. 1503, 1533 (2013) (“Transparency renders government actors accountable for their actions and their outcome. Transparency is, at times, considered synonymous to accountability.”).

66 *Infra* n. 144; *see also* Jennifer E. Manning, *Membership of the 116th Congress: A Profile* (Cong. Research Serv., updated June 1, 2020), https://crsreports.congress.gov/product/pdf/R/R45583 (accessed June 3, 2020) (observing that 161 members of the House (36.6 percent) and 53 senators (53 percent) hold law degrees).

67 *See e.g.* Julie R. O'Sullivan, *Does DOJ's Privilege Waiver Policy Threaten the Rationales Underlying the Attorney-Client Privilege and Work Product Doctrine? A Preliminary “No,”* 45 Am. Crim. L. Rev. 1237 (Fall 2008) (concluding that the Court's decision in *Upjohn* functionally expanded the corporate attorney-client privilege to a Fifth Amendment right against self-incrimination that now enables corporations to resist governmental investigations. Further, noting that “practitioners writings on the conduct of internal corporate investigations make one point crystal clear: the true function the attorney-client privilege and the work product doctrine serve is to give the corporation a fighting chance of resisting a government investigation or at least to buy it breathing space to make a decision regarding its best interests, not to encourage self-investigation or employee candor or any of the other rationales traditionally said to underpin the attorney-client privilege and work product doctrine.” *Id.* at 1294.); *see also* Robert B. Robbins, *Ethics and Professional Responsibility for Attorneys in Securities Transactions* (Am. L. Inst. CLE May 2013) (discussing the dominant role the rule of confidentiality plays in the securities sector in hindering compliance with the Securities and Exchange Commission and other regulatory agencies, thus severely compromising investor confidence in the quality and integrity of public company corporate governance).

68 Snyder, *supra* n. 7, at 482 (referring to J. Wigmore, *supra* n. 9, at § 2291, which introduces the reader to a behavioral assumption that confidentiality encourages full and open disclosure by clients to their attorney); *see also* Imwinkelried, *supra* n. 55, at 317 (noting that the John Henry Wigmore behavioral assumption posits that a typical layperson/client would neither consult with nor divulge personal information to an attorney but for the assurances of confidentiality furnished by a formal evidentiary privilege); *see also McCormick on Evidence, supra* n. 6, at § 72, 467 (noting that the utilitarian justification for privilege was based on the traditional rationale advanced by John Henry Wigmore that “public policy requires the encouragement of the communications without which the [attorney-client relationship] cannot be effective.”); *see also Annotated Model Rules, supra* n. 3, at 104, Model R. 1.6 cmt. 2 (“A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. *See* Rule 1.0(e) for the definition of informed consent. This 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 to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws

and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.").

69 John Henry Wigmore (1863-1943) ranks as one of the most important legal scholars in U.S. history. Dean Wigmore, a law professor and later dean of Northwestern University Law School from 1901 to 1929, was a prolific writer in many areas of the law. He is renowned for his 10-volume *Treatise on the Anglo-American System of Evidence in Trials at Common Law*--usually referred to as *Wigmore on Evidence*--originally released in four volumes (1904-1905) but expanded to 10 volumes by the third edition (1940). Legal scholars consider this treatise one of the greatest treatises on law ever written.

70 *See e.g. Upjohn v. U.S.,* 449 U.S. 383, 389 (1981); *see also Fisher*, 425 U.S. at 403.

71 *See supra* n. 54 (Model Rule 1.6 Comment 2 expressly asserts the instrumental theory as justification for the rule of confidentiality. The comment stresses the instrumental theory's misplaced syllogism of confidentiality contributing to the trust that is the hallmark of the attorney-client relationship, which further encourages the client to seek legal assistance and to communicate fully and frankly with the attorney even about embarrassing or legally damaging subject matter, which in turn facilitates facilitating effective representation in advising the client to refrain from wrongful conduct; thus, the law is upheld.).

72 Snyder, *supra* n. 7, at 497; Stevenson, *supra* n. 8, at 392-398; Imwinkelried, *supra* n. 55, at 321-322; Subin, *infra* n. 96, at 1160-1172; Zacharias, *supra* n. 8, at 376-396; *see also* Fred C. Zacharias, *Confidentiality II: Is Confidentiality Constitutional?* 75 Iowa L. Rev. 601 (Mar. 1990) (analyzing confidentiality in the context of attorneys' First Amendment right to free speech, or where the line should be drawn when the confidentiality rule is "no longer a regulation of a profession, but a regulation of speech." *Id.* at 625.).

73 Richard A. Posner, *The Material Basis of Jurisprudence,* 69 Ind. L.J. 1 (Winter 1993) (Professor Posner postulated that until the 1960s, the U.S. legal profession was functioning as a cartel, isolated from political and economic market controls due to government regulations designed to protect against competition from without and within, similar to medieval craft guilds.); *see also* John C. Coffee Jr., *Comment: Can Lawyers Wear Blinders? Gatekeepers and Third-Party Opinions*, 84 Tex. L. Rev. 59, 62 (Nov. 2005) (Functionally, bar associations operate much like cartels. Stated differently, "[J]ust as the medieval guild screened out the worst performers of its profession, but suppressed competition among its remaining members, so too does the contemporary bar association seek to protect its members from both liability and competition ....").

74 Snyder, *supra* n. 7, at 505 ("A more likely reason for the expansion of confidentiality rules is that members of the organized bar find such rules beneficial."); Zacharias, *supra* n. 8, at 370 ("One of the ramifications of the model codes' adoption of strict confidentiality rules was that the profession moved to protect its own interests."); Posner, *supra* n. 73, at 6 ("The legal profession in its traditional form is a cartel of providers of services related to society's laws."); Coffee, *supra* n. 73 ("[B]ar associations operate much like cartels" in protecting their constituents, who are attorneys.).

75 *See supra* n. 72.

76 *See e.g. Upjohn*, 449 U.S. at 391 (acknowledging ABA Model Code of Professional Responsibility, EC 4-1, in beginning its legal analysis in expanding the attorney-client privilege beyond the "control group" within a corporate context, which previously included only corporate directors or officers); *see also* O'Sullivan, *supra* n. 67, at 1295 (accusing the *Upjohn* Court of "using the attorney-client privilege and the work product doctrine as a stand-in for the Fifth Amendment right to resist governmental investigations," even though corporations lack a Fifth Amendment right against self-incrimination).

77 *See Mohawk Indus., Inc. v. Carpente*, 558 U.S. 100, 105 n. 1, 109, 130 S. Ct. 599, 175 L. Ed. 2d 458 (2009) (agreeing with the majority decisions of circuit appeals courts holding that attorney-client privilege rulings are "non-appealable" because "post judgment appeals generally suffice to protect the rights of litigants and ensure the vitality of the attorney-client privilege.").

78 Snyder, *supra* n. 7, at 521 (concluding that the confidentiality rules "have a corrosive effect on the judicial analysis of the evidentiary privilege, pushing decisions about the privilege beyond what would be required by the traditional reasons for the privilege" and giving examples of this phenomenon in the Supreme Court decisions of *Upjohn* (extending the privilege beyond corporate directors and officers) and *Swidler & Berlin, infra* n. 82 (extending the privilege beyond the client's death); *see also* O'Sullivan, *supra* n. 67, at 1295 (*Upjohn* essentially created a constitutional privilege for corporations.).

79 Stevenson, *supra* n. 8 (Professor Stevenson analyzed the external costs associated with the confidentiality rule by applying the Coase Theorum--a legal and economic theory arguing that when the parties know the rule of law when they make their bargaining decisions, the final allocation of resources will be the same no matter how the legal rules would have resolved the issue.).

80 Snyder, *supra* n. 7, at 490 (noting that in 1969 "The ABA promulgated confidentiality provisions such as Disciplinary Rule 4-101 in the *Model Code* to cover information beyond that which would have been inadmissible in court under the attorney-client privilege.").

81 Imwinkelried, *supra* n. 55, at 318 (In advocating revisiting the merit of the Wigmore behavioral assumption, Professor Imwinkelried noted that proponents for the expansion of the rule of confidentiality argue that "the excluded evidence would not have come into existence without the privilege"; therefore, the "unspoken evidence will serve no greater truth-seeking function than if it had been spoken and privileged.").

82 *Swidler & Berlin v. U.S.*, 524 U.S. 399, 408 (1998) (upholding the attorney-client privilege, noting that "without the privilege, the client may not have made such communication in the first place ... so the loss of evidence is more apparent than real."); *see also Restatement (Third)* § 68 cmt. c ("If the behavioral assumptions supporting the privilege are well-founded, perhaps the evidence excluded by the privilege would not have come into existence save for the privilege.").

83 Imwinkelried, *supra* n. 55, at 317.

84 *See Restatement (Third)* § 68 cmt. c ("It is assumed that, in the absence of such frank and full discussion between client and lawyer, adequate legal assistance cannot be realized.").

85 Stevenson, *supra* n. 8, at 375.

86 *Id.* at 376; *see also* Subin, *infra* n. 96.

87 *See supra* n. 72.

88 Stevenson, *supra* n. 8, at 363-369 (based on a Coasian analysis, generally discussing how Rule 1.6 undermines public confidence in our legal system); *see also* Justin Hansford, *Cause Judging,* 27 Geo. J. Leg. Ethics 1, 53 (2014) (discussing the relationship between transparency and public confidence in the judiciary, arguing that more judicial transparency would increase public confidence); *see generally* Charles Gardner Geyh, *Roscoe Pound and the Future of*

the Good Government Movement, 48 S. Tex. L. Rev. 871, 875-876 (2007) (discussing the "concern [that] flagging public confidence in the courts dominates contemporary discourse on the administration of justice"); Raymond J. McKoski, *Judicial Discipline and the Appearance of Impropriety: What the Public Sees Is What the Judge Get*s, 94 Minn. L. Rev. 1914, 1952-1954 (2010) (discussing the importance of public confidence in the judiciary); Leita Walker, *Protecting Judges From White's Aftermath: How the Public-Employee Speech Doctrine Might Help Judges and the Courts in Which They Work,* 20 Geo. J. Leg. Ethics 371, 381-382 (2005) ("Without public confidence in an independent Judiciary, court orders and judgments would be rendered meaningless, legislative intent would be undermined, chaos would reign, and our system of government would surely deteriorate.").

89 *Supra* nn. 65, 67.

90 Saul Levmore & Frank Fagan, *Semi-Confidential Settlements in Civil, Criminal, and Sexual Assault Cases*, 103 Cornell L. Rev. 311 (Jan. 2018) (generally discussing the social costs of confidential settlement agreements); *see also* Dustin B. Benham, *Tangled Incentives: Proportionality and the Market for Reputational Harm*, 90 Temp. L. Rev. 427 (Spring 2018) (arguing that confidentiality litigation agreements undermine state sunshine statutes, which require disclosure of information affecting the public interest).

91 Emilie M. Hafner-Burton, Sergio Puig & David G. Victor, *Against Secrecy: The Social Cost of International Dispute Settlement*, 42 Yale J. Intl. L. 279 (Summer 2017) ("For scholars, transparency has been treated as a vital ingredient in enforcing treaties between nations--because it helps to stabilize expectations, develop a notion of international 'rule of law' and lower transaction costs.").

92 Maureen A. Weston, *Confidentiality's Constitutionality: The Incursion on Judicial Powers to Regulate Party Conduct in Court-Connected Mediation*, 8 Harv. Negot. L. Rev. 29 (Spring 2003) (concluding that separation of powers principles implicitly restrict enforcement of broad confidentiality statutes to the extent these provisions materially impair judicial power to sanction participant conduct in court-connected dispute resolution proceedings).

93 William H. Simon, *Attorney-Client Confidentiality: A Critical Analysis*, 30 Geo. J. Leg. Ethics 447 (Summer 2017) (arguing that moderating the rule of confidentiality "would give coherence to confidentiality exceptions by unifying them around a single, compelling concept--justice. [In addition], moderate confidentiality would be responsive to cases that fall in the cracks between the current discrete exceptions."); *see also* Keith Kendall, *The Economics of the Attorney-Client Privilege: A Comprehensive Review and a New Justification*, 36 Ohio N. U. L. Rev. 481 (2010) (arguing for using a modified attorney-client privilege based on a model balancing the incentives for a privilege against self-incrimination as a guide on how the attorney-client privilege should be developed or modified).

94 J. Wigmore, *supra* n. 9, at § 2285, 527 (Traditionally, the common law has applied the maxim that "the public ... has a right to every man's evidence." Where privileges have been recognized by the courts, they have generally had to meet four criteria specified by John Henry Wigmore: (1) The communications must originate in a confidence that they will not be disclosed. (2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relationship between the parties. (3) The relationship must be one that in the opinion of the community ought to be sedulously fostered. (4) The injury that would inure to the relationship by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.).

95 *See* Pozen, *infra* n. 146; *see also* Martha Albertson Fineman, *Vulnerability and Social Justice,* 53 Val. U. L. Rev. 341, 353 (Winter 2019) (positing that the ideologies of neoliberalism and the current progressive individualism perspective on social justice reach the same perverted conclusion--that the laws necessary to effect the social order advanced by these particular visions of justice are those that guarantee individual dignity, autonomy, and self-responsibility that "emphasizes individual choice and renders social justice a matter of individual definition. This maneuver also locates the

ultimate responsibility with the individual, who must choose what is best for him, as well as determining how to achieve it; and appeals to economic efficiency and cost-benefit analysis as the ultimate standard for defining public policies.").

96 *See* Imwinkelried, *supra* n. 55, at 327-330 (articulating that the right to autonomy or decisional privacy-- the right to independent decision making--is the most promising basis for privilege law); *see also* Edward J. Imwinkelried, *The New Wigmore: A Treatise on Evidence* § 5.1.2, 293 (2d ed. 2009) ("Like Dean Wigmore's instrumental rationale, the humanistic rationale conceives of evidentiary privileges as a means to an end. However, ... the humanistic rationale does not rest on the factual assumption of a causal connection between the existence of a privilege and certain out-of-court behavior. Rather, the rationale is that it is desirable to create certain privileges out of respect for personal rights such as autonomy or privacy."); *see e.g. Restatement (Third)* § 68 cmt. c ("The privilege provides a zone of privacy within which a client may more effectively exercise the full autonomy that the law and legal institutions allow."). *But see e.g.* Harry I. Subin, *The Lawyer as Superego: Disclosure of Client Confidences to Prevent Harm*, 70 Iowa L. Rev. 1091, 1160-1172 (1985) (arguing that there is no empirical data to support a strict rule of confidentiality (a) under a rights-based defense that confidentiality preserves individual autonomy or (b) under an instrumental defense that confidentiality will induce client candor and thus assist the attorney in persuading the client to observe the law.).

97 *See e.g. Trammel, supra* n. 9, at 50. The U.S. Supreme Court has summarized the principle as follows: "Dean Wigmore stated the proposition thus: 'For more than three centuries it has now been recognized as a fundamental maxim that the public (in the words sanctioned by Lord Hardwicke) has a right to every man's evidence. When we come to examine the various claims of exemption, we start with the primary assumption that there is a general duty to give what testimony one is capable of giving, and that any exemptions which may exist are distinctly exceptional, being so many derogations from a positive general rule.'" *U.S. v. Bryan*, 339 U.S. 323, 331 (1950).

98 Fineman, *supra* n. 95, at 347-354 (discussing the reliance of neoliberalism and progressive individualism on market forces defining the social ordering of society); *see also* Aspirational Stand. G § 6 cmt. ("The core principles of the attorney-client relationship are the duties of loyalty and confidentiality." Yet NAELA's core principle of loyalty is cross-referenced 10 times, whereas its core principle of confidentiality is cross-referenced 44 times, thus underscoring the dominant importance confidentiality holds in the client-attorney relationship. Moreover, the core principle of confidentiality overshadows NAELA's core principle of decision-making autonomy by a ratio of 7 to 1 (decision-making autonomy cited 6 times, confidentiality cited 44 times), thus further illustrating the dominant position the rule of confidentiality takes in delivering services to the elderly with diminished capacity. Similarly, *Annotated Model Rules, supra* n. 3 (cross-referencing the principle of confidentiality 180 times compared with the core principle of autonomy, which is cited 7 times; loyalty, 36 times; and trust, 27 times. This also illustrates the dominant role the principle of confidentiality holds above other core principles of the attorney-client relationship.).

99 Imwinkelried, *supra* n. 55, at 327-333 (discussing the right to autonomy and decisional privacy--the right to freedom from control and right to independent decision-making--as the most promising basis for privilege law); *but see* Subin, *supra* n. 96 (arguing that there is no empirical evidence to support the instrumental theory or humanistic theory for a strict rule of confidentiality).

100 *See e.g. Annotated Model Rules, supra* n. 3, at 25, Preamble [8] ("[A] lawyer can be sure that preserving client confidences ordinarily serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private."); *see also* NAELA Aspirational Stands. Preamble ("These Standards are designed to assist attorneys to provide high-quality counsel, advocacy, and guidance to clients in this unique and specialized area." This statement echoes the behavioral assumption that justifies ABA Model Rule 1.6, Confidentiality of Information.).

101 Snyder, *supra* n. 7, at 482 ("primary modern justification for the privilege"); *see* Imwinkelried, *supra* n. 55, at 316-320 (discussing John Henry Wigmore's instrumental rationale as the basis for the attorney-client privilege); *see also* Subin,

supra n. 96 (no empirical evidence that the instrumental theory promotes a rights-based defense that confidentiality preserves individual autonomy).

102 Snyder, *supra* n. 7, at 491.

103 *See* Zacharias, *supra* n. 8, at 370 (Exceptions to Model Rule 1.6 were a response to protect the personal and economic interests of attorneys.); *see* Coffee, *supra* n. 73, at 73 ("[B]ar associations sometimes (and maybe often) behave as cartels seeking to protect their members' interests.").

104 Stevenson, *supra* n. 8, at 346.

105 Posner, *supra* n. 73, at 1 ("The organization of the profession as a cartel produced ... a certain view of 'law' ... constraining the behavior of lawyers and judges and thereby justifying the autonomy of the profession from political or market controls."); *see also* Zacharias, *infra* n. 171 (the bar's self-regulation serves to fend off external oversight of the profession).

106 Snyder, *supra* n. 7, at 491.

107 *Annotated Model Rules, supra* n. 3, at 136 (ann. cmt. under *Disclosure Strictly Limited to Essential Information* ("Any disclosure permitted under Rule 1.6 must be strictly limited to that which 'the lawyer reasonably believes ... is necessary to accomplish one of the purposes specified in paragraph (b). Cmt. 16.'").

108 Stevenson, *supra* n. 8, at 383-388 (generally discussing the overlap of the confidentiality rule and the conflict of interest rules, making the rule of confidentiality redundant and of no value to the legal system).

109 *Id.*

110 *Id.* at 383 ("Model Rules 1.7, 1.8, 1.9, and 1.10 carry the water in protecting clients from predatory practitioners, not the confidentiality rules.").

111 *Id.*

112 *Annotated Model Rules, supra* n. 3, at 139.

113 *Id.* at 161-162.

114 *Id.* at 181.

115 *Id.* at 195-196.

116 *Id.* at 205-206.

117 Stevenson, *supra* n. 8, at 382-388 (generally discussing Rule 1.6 redundancy).

118 *Id.* at 375-398 (arguing that the rule of confidentiality is superfluous: "[E]videntiary rules--not only privilege and work product doctrines, but also the inadmissibility of past crimes, irrelevant material, hearsay rules, and the Fifth Amendment-- already prevent unduly prejudicial disclosures from influencing a judge or jury, making confidentiality rules superfluous.").

119 *Id.*

120 *Annotated Model Rules, supra* n. 3, at 109-110, ann. cmt. Model R. 1.6, Relationship of Rule 1.6 to Attorney-Client Privilege ("Although a determination of whether a lawyer must reveal client information in an adversarial proceeding will turn on rules of evidence rather than rules of ethics, the lawyer's ethical duty of confidentiality governs important aspects of the lawyer's response to a demand for information.").

121 Snyder, *supra* n. 7, at 491 ("Justification for the expanded rule of confidentiality in the Model Code turns out to be the same as the reason postulated for the initial evidentiary rule of privilege, the inducement to clients to be forthcoming."); *see also Law of Lawyering, infra* n. 193, at § 9.7 ("Professional-ethical rules of confidentiality (like Model Rule 1.6) are closely related to the evidentiary rule of attorney-client privilege and are animated by similar policy concerns. Both are based on the instrumental idea that clients will more likely confide fully in lawyers if they can do so behind a veil of secrecy ....").

122 *See supra* n. 70 (in both *Upjohn* and *Fischer*, the U.S. Supreme Court cited this policy concern in upholding the privilege asserted).

123 Andrews, *supra* n. 19, at 1405 (referencing John Henry Wigmore's *Treatise on Evidence*, which cites cases dating back to 1577-1693 that recognize the attorney-client privilege); *but see* Geoffrey C. Hazard *Jr., An Historical Perspective on the Attorney-Client Privilege,* 66 Cal. L. Rev. 1061 (1978) (arguing that the historical foundations for the privilege only questionably trace back to the 16th century and positing that recognition of the privilege surfaced after 1800).

124 *Upjohn,* 449 U.S. at 389; *see also* J. Wigmore, *supra* n. 9, at § 2290.

125 Snyder, *supra* n. 7, at 491 (observing that for 400 years the evidentiary attorney-client privilege protected client secrets without the need for an expanded rule of confidentiality).

126 *Id.;* Rice, *supra* n. 7; Stevenson, *supra* n. 8.

127 81 Am. Jur. 2d *Witnesses* § 272 (2019) ("Although an evidentiary privilege must be applied so as to effectuate its purpose, it is to be applied cautiously and with circumspection because it impedes the truth-seeking function of the adjudicative process.").

128 Rice, *supra* n. 7; Stevenson, *supra* n. 8.

129 Pozen, *infra* n. 146.

130 81 Am. Jur. 2d *Witnesses* § 272 ("When the underlying justification for a rule of law or privilege is not furthered by its continued application, the rule or privilege should cease to apply; it is contrary to the spirit of the common law itself to apply a rule founded on a particular reason to a law when that reason utterly fails.").

131 Imwinkelried, *supra* n. 55, at 319-320 (noting that John Henry Wigmore's instrumental theory recognized that the absoluteness of the attorney-client privilege is subject to exceptions).

132 *ABA 1908 Canons of Prof. Ethics,* Preamble § I ("The future of the Republic, to a great extent, depends upon our maintenance of justice pure and unsullied.").

133 Model Code Prof. Resp. Preamble (ABA 1969).

134 *Id.*

135 *Annotated Model Rules, supra* n. 3, Preamble § 6, at 1.

136 *Supra* nn. 132, 133, 135.

137 *Infra* nn. 138, 139.

138 Pew Research Ctr., U.S. Politics & Policy, *Public Trust in Government: 1958-2019* (Apr. 11, 2019), https://www.people-press.org/2019/04/11/public-trust-in-government-1958-2019 (accessed June 6, 2020).

139 Pew Research Ctr., U.S. Politics & Policy, *Why Americans Don't Fully Trust Many Who Hold Positions of Power and Responsibility* (Sept. 19, 2019), https://people-press.org/2019/09/19/why-americans-dont-fully-trust-many-who-hold-positions-of-power-and-responsibility (accessed June 6, 2020).

140 Manning, *supra* n. 66.

141 *Infra* n. 148.

142 *Supra* n. 135, at 1 (Model Rules Preamble and Scope Comment 6 posit that "constitutional democracy depends on popular participation.").

143 Stevenson, *supra* n. 8.

144 Pew Research Ctr., Internet & Technology, *Americans' Views on Open Government Data* (Apr. 21, 2015), https://www.pewresearch.org/internet/2015/04/21/open-government-data (accessed June 6, 2020) (This study found the following: Seventy-six percent of those who generally trust the federal government say government data can help government officials be more accountable; 73 percent believe government data can help journalists cover government more thoroughly; 71 percent back the idea that government data results in better government decisions; 70 percent agree

with the notion that government data can enable people to have a greater impact on government affairs; and 69 percent say government data can improve the quality of government services.).

145 *Supra* n. 65.

146 Snyder, *supra* n. 7 (noting that confidentiality, as a rule of professional ethics, is of recent origin because the 1969 ABA Model Code of Professional Responsibility and 1983 ABA Model Rules of Professional Conduct exponentially expanded its importance); *see also* David E. Pozen, *Transparency's Ideological Drift*, 128 Yale L.J. 100, 151-152 (Oct. 2018) (noting that the level of public mistrust in government has declined precipitously since the 1970s but also explaining that this decline on progressive transparency laws are being altered by a neoliberal ideology that emphasizes autonomy and less state intervention in aggregating individual preferences).

147 Stevenson, *supra* n. 8, at 364 (further noting that citizens' perception that the courts have failed in applying the rule of law equally erodes confidence in the judicial branch, which further supports the perception that the executive and legislative branches are "veering towards tyranny").

148 Dakota S. Rudesill, *Coming to Terms With Secret Law*, 7 Harv. Natl. Sec. J. 241 (2016) (noting that the attorney-client privilege plays a part in the development of secrecy law in our federal government); *see also* Nancy Leong, *Attorney-Client Privilege in the Public Sector: A Survey of Government Attorneys*, 20 Geo. J. Leg. Ethics 163 (Winter 2007) (arguing that a very limited attorney-client privilege for government attorneys properly balances the preservation of government entity secrets while enhancing the important democratic values of transparency and openness in government, citing Model Rule 1.13 Comment 9 for support: "Thus, when the client is a governmental organization, a different balance may be appropriate between maintaining confidentiality and assuring that the wrongful act is prevented or rectified, for public business is involved."); W. Bradley Wendel, *Government Lawyers in the Trump Administration*, 69 Hastings L.J. 275 (Dec. 2017) (arguing the lack of a public service exception to the rule of confidentiality/attorney-client privilege for government lawyers can lead to an abuse of power by government officials).

149 Stevenson, *supra* n. 8.

150 *Confidentiality, Transparency, and the U.S. Civil Justice System* (Joseph W. Doherty, Robert T. Reville & Laura Zakaras eds., 2012); *see also supra* nn. 65, 146.

151 *Annotated Model Rules, supra* n. 3, at 461, Model R. 3.3 cmt. 15 (The duty of candor yields to Rule 1.6: "In connection with a request for permission to withdraw that is premised on a client's misconduct, a lawyer may reveal information relating to the representation only to the extent reasonably necessary to comply with this Rule or as otherwise permitted by Rule 1.6.").

152 *Id.* at 835 (Model Rule 8.1, the main ethical rule for lawyers pertaining to bar admission and disciplinary matters, has an exception that gives confidentiality supremacy over integrity.); *see also id.* at 861 (Model Rule 8.3, which explicitly states that Model Rule 1.6 trumps the duty of reporting misconduct).

153 *Id.* at 559 (Model Rule 4.1, Truthfulness in Statements to Others, concludes with a caveat that Rule 1.6 trumps the duty of truthfulness and fairness to others.).

154 *Id.*

155 Stevenson, *supra* n. 8, at 354.

156 *See e.g.* Snyder, *supra* n. 7; Stevenson, *supra* n. 8, at 354-363 (discussing tension that Rule 1.6 creates with other ABA Model Rules).

157 *Annotated Model Rules, supra* n. 3, at 2, Preamble cmt. 12.

158 *See id.* at 103.

159 Snyder, *supra* n. 7 (arguing that broad confidentiality rules with narrow, limited exceptions serve the interests of attorneys well while subjecting other parties to significant harm); *see also id.* at 505-506 (The most likely reason for confidentiality rules expansion is that bar members find such rules beneficial in that confidentiality is a useful device for securing clients, enhances an attorney's role in the legal system, and creates a legal culture based on secrecy, which benefits bar members economically because confidentiality increases the cost of litigation.); *see also* Stevenson, *supra* n. 8; *see e.g.* Daniel Fischel, *Lawyers and Confidentiality*, 65 U. Chi. L. Rev. 1, 33 (1998) (arguing that stringent lawyer confidentiality rules unfairly benefit lawyers in interprofessional competition with accountants, bankers, management consultants, and others offering similar services).

160 *See supra* nn. 62, 64 (illustrating the rule of confidentiality as a default rule in most Model Rules); *see also supra* n. 98 (citing the ratio differentials between confidentiality and other core principles explicated in *Annotated Model Rules* and NAELA Aspirational Standards).

161 Stevenson, *supra* n. 8, at 357, 363 (positing, "The confidentiality rules reduce the risk of discipline for violations of candor, fairness, or integrity rules, so that in theory lawyers have more incentive to take their chances and ignore those rules.").

162 Snyder, *supra* n. 7, at 491 (concluding, "[J]ustification for the expanded rule of confidentiality in the Model Code turns out to be the same as the reason postulated for the initial evidentiary rule of privilege, the inducement to clients to be forthcoming. For some 400 years, this rationale supported nothing more than an evidentiary privilege. In the middle of the 20th century, for some unstated reason, the same rationale required that attorneys withhold disclosure of an expanded inventory of information."); *see also id.* at 392 ("The commentary to Model Rule 1.6 provides the same explanation for the rule as prior ABA regulations. The purpose of the rule is to encourage clients to seek early legal assistance and encourage clients to speak openly with their lawyers.").

163 *Supra* n. 72.

164 Imwinkelried, *supra* n. 55, at 321-322; *see also* Stevenson, *supra* n. 8, at 392-398.

165 *Supra* n. 78.

166 Andrews, *supra* n. 19.

167 *Id.*

168 Imwinkelried, *supra* n. 55, at 318 (positing that the dictum in *Fisher v. U.S.,* 425 U.S. 391, 403 (1976) (attorney-client privilege); *Jaffee v. Redmond*, 518 U.S. 1, 11-12 (1996) (psychotherapist-patient privilege); and, *Swidler & Berlin v. U.S.*, 524 U.S. 399, 408 (1998) (attorney-client privilege) reflects the application of Wigmore's instrumental theory that the excluded evidence would not have come into existence without the privilege, hence the privileged "evidence" will serve no greater truth-seeking function than if it had been spoken and privileged. In short, "without the privilege, the client may not have made such communications in the first place." *Id.*).

169 *See supra* nn. 7, 8, 55, 72.

170 Snyder, *supra* n. 7, at 525 (arguing, "[T]he ABA acts more like a cartel protecting the interest of lawyers than an organization promoting ethical conduct or the public interest."); Posner, *supra* n. 73, at 6 (arguing, "[T]he legal profession in its traditional form is a cartel of providers of services related to society's laws."); Coffee, *supra* n. 73 (arguing that the modern bar functions as a cartel to protect its constituents, who are attorneys).

171 Snyder, *supra* n. 7 ("Broad confidentiality rules with narrow, limited exceptions serve well the interests of attorneys while subjecting other parties to significant harm."); Coffee, *supra* n. 73 ("The bar associations' efforts to insulate attorneys should not be surprising; after all, their constituency is attorneys, not clients.); *see also* Fred C. Zacharias, *The Myth of Self-Regulation*, 93 Minn. L. Rev. 1147, 1185 (Apr. 2009) (arguing that the Model Rules equate the codes to self-regulation and positing that self-regulation is a myth, a deliberately implemented narrative whose principal purpose is to fend off external oversight of the profession).

172 Coffee, *supra* n. 73, at 62; *compare* Gustafsson, *infra* n. 199.

173 Coffee, *supra* n. 73, at 62-63; *see also* Zacharias, *supra* n. 171, at 1180 ("Rather than attempting to mesh the professional rules and external law or attempting to build upon external law, the code drafters remain willing to adopt rules inconsistent with external law, which lawyers then attempt to use as a defense, immunity, or for other personal benefit."); *see also* Andrew M. Perlman, *Towards the Law of Legal Services*, 37(49) Cardozo L. Rev. 50 (Oct. 2015) (arguing that the ABA should authorize but appropriately regulate competing law-related services provided by alternative business structures (ABSs) and limited license legal technicians (LLLTs) to assimilate the delivery of more legal and law-related assistance by nonlawyers under the ABA regulatory umbrella, in recognition of the globalization of legal services and the impact the digital age has had on how those law-related services are provided.).

174 Joy, *infra* n. 187, at 316-317 (positing that one of the four important spheres of self-governance regulating the conduct of lawyers is "ethics opinions in which a bar association committee, bar association counsel, office of disciplinary counsel, or some other entity interprets the rules and provides guidance to lawyers seeking to comply with prevailing ethical rules ethics opinions in which a bar association committee, bar association counsel, office of disciplinary counsel, or some other entity interprets the rules and provides guidance to lawyers seeking to comply with prevailing ethical rules.").

175 *Annotated Model Rules, supra* n. 3, at vii ("In 1913, the Standing Committee on Professional Ethics of the American Bar Association was established to keep the Association informed about state and local bar activities concerning professional ethics. In 1919 the name of the Committee was changed to the Committee on Professional Ethics and Grievances; its role was expanded in 1922 to include issuing opinions "concerning professional conduct, and particularly concerning the application of the tenets of ethics thereto.").

176 *Id.* at 381 (quoting Charles W. Wolfram, *Modern Legal Ethics* § 31, 79 (1986)).

177 Gustafsson, *infra* n. 199, at 11-13 (observing that medieval craft guild craftsmen voluntarily and in their own interests organized to promote their economic interests; used regulatory rules to control membership, control quality, control "limitation of production and prohibition against competition [and established] a comprehensive sanctioning system for safeguarding the working of the rules.").

178 1969 Model Code Prof. Resp. Preliminary Statement ¶ 1.

179 Gustafsson, *infra* n. 199, at 15 (Professor Gustafsson notes the medieval "guild regulations about the quality of the products did not aim at producing goods of maximum quality but at prescribing a minimum level." Moreover, guilds achieved cohesiveness with "control of membership, control of quality, limitation of production and prohibition against competition along with a comprehensive sanctioning system for safeguarding the working of the rules." *Id.* at 13.).

180 *Id.*

181 *Supra* nn. 62, 64, 98.

182 *Annotated Model Rules, supra* n. 3, at 2, Preamble cmt. 12.

183 *Supra* nn. 159, 170, 171, 173.

184 *Annotated Model Rules, supra* n. 3, at 27 (The ABA places such importance on the confidentiality rule, Rule 1.6, that it is mentioned in Comment 17 of the Preamble and Scope of the *Annotated Model Rules* as a reminder that confidentiality under Rule 1.6 attaches when an attorney agrees to consider whether an attorney-client relationship will be established, not when he or she begins to render legal services. Therefore, the attorney is reminded that his or her duty of confidentiality attaches before any ethical duties of candor, fairness, or integrity. In a sense, a pecking order is established before the formal introduction of each Model Rule.).

185 Stevenson, *supra* n. 8, at 363-369.

186 Rice, *supra* n. 7, at 859 (noting that throughout both English and American legal history, not a single reported decision can be found in which a court has either explicated the behavioral assumption or questioned its logic); *see also e.g. Jaffee v. Redmond,* 518 U.S. 1 (1996) (upholding the physician-patient evidentiary privilege by rejecting the balancing component of the privilege and elevating privacy because such an approach would eviscerate the effectiveness of the privilege); *Swindler & Berlin v. U.S.,* 524 U.S. 399, 407 (1998) (referring to judicial decisions as "established law" in the attorney-client privilege context).

187 *See Mohawk Indust.*, 558 U.S. at 109 (agreeing with the federal circuit court majority decisions holding that attorney-client privilege rulings are "non-appealable" because "post judgment appeals generally suffice to protect the rights of litigants"); *see also* Peter A. Joy, *Making Ethics Opinions Meaningful: Toward More Effective Regulation of Lawyer's Conduct*, 15 Geo. J. Leg. Ethics 313 (Winter 2002) (noting the influential importance of organized bar associations' ethics opinions in courts establishing ethical norms for the legal profession).

188 *See e.g.* Snyder, *supra* n. 7, at 523 (positing that under a strict rule of confidentiality "attorneys are likely to overemphasize the value of confidentiality and minimize the value of disclosure," thus reducing fairness in outcomes).

189 Stevenson, *supra* n. 8, at 363-369.

190 *Restatement (Third)* § 68 cmt. c ("The privilege implies an impairment of the search for truth ... [S]ome judicial fact findings undoubtedly have been erroneous because the privilege excluded relevant evidence .... To that extent the privilege may facilitate serious social harm."); *see also* 4 Bender's N.Y. Evid. § 160.01 ¶ 1 (2019) ("Evidence that is relevant, material, and competent may nevertheless be excluded from admission due to the assertion of a privilege.").

191 Snyder, *supra* n. 7, at 491 (positing that until 1969, the evidentiary attorney-client privilege served as the only rule restricting attorneys from disclosing information provided by their clients); see Stevenson, *supra* n. 8, at 346 (positing that the conflict of interest rules already prevent exploitation of clients and opportunism, thus making the rule of confidentiality redundant, and positing that the evidentiary attorney-client privilege can effectively protect client confidences from disclosure in the adversarial process).

192 *Id.; see also* Imwinkelried, *supra* n. 55.

193 *See generally e.g. Restatement (Third)*; Geoffrey C. Hazard Jr. & W. William Hodes, *The Law of Lawyering* (3d ed. 2014).

194 Perlman, *supra* n. 173, at 63 (noting that the ABA Commission on Ethics 20/20 was not transformative and concluding that the ABA is incapable of adjusting to the increasing globalization of legal services and the digital age of information dissemination by setting conduct standards dominated by a "law of lawyering" regulatory regime, and advocating for the development of a "law of services" as a type of regulatory reform that falls outside the law of lawyering to expand access to justice); *but see* Dana A. Remus, *Restructuring Professionalism*, 51 Ga. L. Rev. 807, 831-832 (Spring 2017) (advocating for all segments of the profession--bench, bar, and education--not to abandon but strengthen the professional form and professional commitments by revising ethical rules and professional structures to constrain and harness neoliberal market forces in productive ways, acknowledging that globalized market forces can be beneficial if harnessed through ethical rules and professional structures); *see e.g. Annotated Model Rules, supra* n. 3, at 13 ("In 2009, the American Bar Association created the Commission on Ethics 20/20 to perform a thorough review of the ABA Model Rules of Professional Conduct and the U.S. system of lawyer regulation in the context of advances in technology and global legal practice developments. On August 6, 2012, and February 11, 2013, the House of Delegates adopted a series of amendments to the Rules and Comments as a result of the Commission's work and recommendations." The ABA, through its Center for Professional Responsibility, makes available several online resources, including a chronological list of jurisdictions that have taken action to adopt all or parts of the Commission on Ethics 20/20 revisions. ABA Ctr. for Prof. Resp. Policy Implementation Comm., *Chronological List of States Adopting Amendments to Their Rules of Professional Conduct Based Upon the August 2012 Policies of the ABA Commission on Ethics 20/20* (Apr. 3, 2017), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/chron_adoption_e_20_20_amendments.authcheckdam.pdf (accessed June 8, 2020)).

195 Perlman, *supra* n. 173 (arguing for regulatory rules within the traditional "law of lawyering" regulatory rules to regulate untraditional legal services arising out of law-related services provided by nonattorneys).

196 Gregory C. Sisk & Pamela J. Abbate, *The Dynamic Attorney-Client Privilege*, 23 Geo. J. Leg. Ethics 201 (Winter 2010) (arguing that Model Rule 5.7 provides a conduit to expand the confidentiality duty/attorney-client privilege to "law-related services" exemplified in Comment 9 of Rule 5.7 because "Rule 5.7 bolsters the client's 'reasonable expectations' that communications about law-related services, when they are substantively related to and performed in conjunction with the provision of legal services, will be guarded by the attorney-client privilege"); *see* Model R. 5.7 cmt. 10 (*"When a lawyer is obliged to accord the recipients of such services the protections of those Rules that apply to the client-lawyer relationship, the lawyer must take special care* to heed the proscriptions of the Rules addressing conflict of interest (Rules

1.7 through 1.11, especially Rules 1.7(a)(2) and 1.8(a), (b) and (f)), and *to scrupulously adhere to the requirements of Rule 1.6 relating to disclosure of confidential information.* The promotion of the law-related services must also in all respects comply with Rules 7.1 through 7.3, dealing with advertising and solicitation. In that regard, lawyers should take special care to identify the obligations that may be imposed as a result of a jurisdiction's decisional law." (emphasis added); *see also e.g.* Roberta K. Flowers, *Can I/Should I Sell Law-Related Financial Services to Clients?* 13 NAELA J. 15 (2017) (noting that case law and rules in most states already permit attorneys to sell financial products).

197 *See* Adams, *infra* n. 199 (arguing that if the ABA does not become more innovative in capitalization of law firms to increase efficiency and client access to competent legal services, the present self-regulatory regime may be replaced by an increase in government regulation of the legal profession that will allow competitive business structures that bring with them more transparency in delivering legal services and law-related services).

198 Posner, *supra* n. 73 (arguing that the American legal profession is a legal cartel and its decline is occurring today because of the competitive expansion of the market for legal services, "law's industrial revolution," whose decline is comparable to the decline of medieval craft guilds stemming from the evolution from guild production to mass production brought on by the industrial revolution); *see also* Jack A. Guttenberg, *Practicing Law in the Twenty-First Century in a Twentieth (Nineteenth) Century Straight-Jacket: Something Has to Give"* 2012 Mich. St. L. Rev. 415, 417 (2012) (The ABA "rules reinforce a cartel mentality that impedes change, stifles competition, and does not promote innovation" necessary for the legal profession in the United States to reform its "outmoded business practices and rules that do not promote the best interests of the profession or clients.").

199 *See e.g.* Edward S. Adams, *Rethinking the Law Firm Organizational Form and Capitalization Structure*, 78 Mo. L. Rev. 777 (Summer 2013) (arguing that globalization is placing pressure on ABA regulatory rules concerning ABSs and multidisciplinary practice models (MDPs) because if U.S. firms want to remain competitive in the market for global legal services, they must have access to more flexible business structures); Perlman, *supra* n. 173 (arguing for the ABA to bring law-related services provided by people who lack a traditional law license under its regulatory umbrella as an innovative way to control its competition in providing legal and law-related services (i.e., the LLLT program)); *see also* Bo Gustafsson, *The Rise and Economic Behaviour of Medieval Craft Guilds: An Economic-Theoretical Interpretation*, Scandinavian Econ. History Rev. 35:1, 1, 32 (1987) https://doi.org/10.1080/03585522.1987.10408080, (arguing that the fall of craft guilds was attributed to the inflexible form of organization the guilds adopted, resulting in a rigid business structure that became an obstacle in the new economic world that emerged after 1500. Thus, "the craft guilds perished not owing to the fact that they represented an irrational form of production but owing to the fact that their rationality, based on different relations of production, gave lower results and so was far more inefficient than the capitalist form of production.").

200 *See* Imwinkelried, *supra* n. 96, at §§ 12.1-12.3.4 (arguing that legal globalization will influence U.S. privilege law by prompting courts to treat most privileges as qualified or conditional rather than absolute, as most Western democracies have already done, particularly if U.S. legal organizations and courts place greater emphasis on the autonomy- and privacy-based humanistic rationale, which foreign jurisdictions have increasingly adopted in redefining their privilege laws).

201 Gustafsson, *supra* n. 199 (positing that the guild relations of production could not compete in the new economy brought on by the industrial revolution and therefore perished).

202 Perlman, *supra* n. 173, at 58 (noting that the "law of lawyering" is an obstacle to transforming legal services delivery to increase access to legal and law-related services); Adams, *supra* n. 199, at 790-792 (discussing that the corporate business structure will allow more transparency and accountability in addition to cost-effective access to legal services).

203 *Annotated Model Rules, supra* n. 3, at 329.

204 *Id.* (citing ABA, *A Legislative History: The Development of the ABA Model Rules of Professional Conduct*, 1982-2013, 344-349 (2013)).

205 *Id.*

206 *Aspirational Standards for the Practice of Elder and Special Needs Law With Commentarie*s (2nd ed., NAELA 2017) (As stated in the Preamble: "The National Academy of Elder Law Attorneys (NAELA) was founded in 1987 to support attorneys in meeting the complex legal needs of elderly individuals and individuals with disabilities. These Aspirational Standards for the Practice of Elder and Special Needs Law are core to NAELA's mission. NAELA requires all members to support these Standards. This condition of membership distinguishes NAELA from all other legal associations.

Given the dynamic and evolving nature of elder and special needs law, attorneys should and often must represent their clients "holistically," adapting and applying information and insight obtained from a wide range of legal and social disciplines. When assisting clients with planning or the implementation of plans, elder and special needs law attorneys often will represent clients who have diminished or lack of capacity. Family members and other persons with fiduciary responsibilities also may be involved. The attorney-client relationship in elder and special needs law is not always as clear-cut and unambiguous as in other areas of law. Questions relating to end-of-life planning, self-determination, exploitation, abuse, long-term care planning, best interests, substituted judgment, and, fundamentally, "Who is the client?" present issues not regularly faced by attorneys in other fields. These Standards are designed to assist attorneys to provide high-quality counsel, advocacy, and guidance to clients in this unique and specialized area.")

207 *Id.* at 5.

208 Aspirational Stand. E § 4 cmt. ("[T]he attorney must use care in communicating with the unrepresented individuals and may not disclose confidential information without the client's consent.").

209 Aspirational Stand. E § 6 cmt. ("The professional responsibility rules permit an attorney to disclose a client's confidential information without the client's express consent when disclosure is reasonably necessary to comply with a law, court order, or other professional responsibility rule.").

210 Aspirational Stand. G § 1 cmt. ("If the client's diminishing or changing capacity results in the need for increasing levels of assistance, preservation of the client's right to self-determination and confidentiality remain.").

211 Aspirational Stand. G § 6 cmt. ("Even if the attorney is authorized to divulge confidential information to take protective action, the attorney may disclose only that information necessary for the protective action.").

212 Stevenson, *supra* n. 8, at 360; *see also*, Model Rule 1.14(c) and Aspirational Stand. G § 5 cmt.

213 Aspirational Stand. E § 1 cmt.

214 Imwinkelried, *supra* n. 55, at 317 (citing J. Wigmore, *supra* n. 9, at § 2285, 527).

215 Aspirational Stands. Preamble ("These Aspirational Standards for the Practice of Elder and Special Needs Law are core to NAELA's mission. NAELA requires all members to support these Standards. This condition of membership distinguishes NAELA from all other legal associations.").

216 Aspirational Stand. E § 1 cmt.

217 Imwinkelried, *supra* n. 55, at 317 ("In [John Henry] Wigmore's words, the recognition of a *privilege* must be truly "essential" to the "satisfactory maintenance of the [protected] relationship." (emphasis added) (citing J. Wigmore, *supra* n. 9, at § 2285, 527)).

218 *See* Gustafsson, *supra* n. 199, at 13 (positing that guilds protected the economic interests of members and its own class cohesiveness using "instruments for these objectives such as control of membership, control of quality, limitation of production and prohibition against competition along with a comprehensive sanctioning system for safeguarding the working of the rules.").

219 Snyder, *supra* n. 7; Stevenson, *supra* n. 8; Imwinkelried, *supra* n. 55; Zacharias, *supra* n. 8; Coffee, *supra* n. 73; Posner, *supra* n. 73; Fischel, *supra* n. 159; Zacharias, *supra* n. 173.

220 Aspirational Stands. Preamble ("While each state's professional responsibility rules mandate the minimum requirements of conduct for attorneys to maintain their licenses, the Aspirational Standards build upon and supplement those rules." In other words, the Aspirational Standards are subordinate to ABA Model Rule 1.6.).

221 Aspirational Stand. A § 2 cmt. (although the elder law guild member may use law-related services that fall outside the guild's traditional legal services, "Regardless of how the attorney provides these nonlegal services, the attorney should exercise caution to comply with the attorney's duties of confidentiality, loyalty and independent judgment, and state bar rules of professional responsibility."); *see also supra* n. 72.

222 *Supra* n. 54.

223 Aspirational Stand. E § 1 cmt.

224 *See supra* n. 98.

225 Aspirational Stand. G § 2 cmt. ("[T]he attorney should exercise caution to comply with the attorney's duties of confidentiality, loyalty and independent judgment, and state bar rules of professional responsibility.").

226 Aspirational Stand. H (providing elder law practitioner guidelines to enhance attorney-client communication and advocacy).

227 *See infra* n. 241; *see also* Aspirational Stand. F § 2 cmt. ("The elder and special needs law attorney manages his or her caseload to ensure that all clients are assisted in a timely manner."); *see also Annotated Model Rules, supra* n. 3, at 49, Model R. 1.3 cmt. 3 (imposing an ethical duty to act with reasonable promptness).

228 Aspirational Stand. G § 1 cmt. (illustrating the existence of this tension by stating, "If the client's diminishing or changing capacity results in the need for increasing levels of assistance, preservation of the client's right to self-determination and confidentiality remain."); *see* Aspirational Stand. G § 5 cmt. (instructing lawyers, "In determining what is in the client's best interests, the attorney should consider the client's rights, remedies, and economic interests and the extent to which the attorney can preserve the client's self-determination while still protecting the client."); *see also* Aspirational Stand. G § 7 cmt. (cautioning lawyers to observe the rule of confidentiality when "seeking the appointment of a guardian *ad litem,* conservator, or guardian."); Aspirational Stand. G § 6 cmt. (stating that "since such action undermines client confidentiality ... [a]ny disclosure, even limited, can have serious negative consequences for the client").

229 Sarah S. Sandusky, *The Lawyer's Role in Combating the Hidden Crime of Elder Abuse*, 11 Elder L.J. 459, 490 (2003) (arguing that the confidentiality rule inhibits the ability of attorneys to report elder abuse).

230 *Supra* n. 227; *but see Annotated Model Rules, supra* n. 3, at 49-56 (noting that not one example of an ethical opinion is cited under Rule 1.3 that involves violating the ethical rule of reasonable diligence in reporting elder abuse).

231 Sandusky, *supra* n. 229.

232 Dept. of Health & Human Servs., Administration for Community Living, Administration on Aging, *2018 Profile of Older Americans* (Apr. 2018), https://acl.gov/sites/default/files/Aging_and_Disability_in_America/2018OlderAmericansProfile.pdf (accessed June 9, 2020). Principal sources of data for this publication are the U.S. Census Bureau, National Center for Health Statistics, and Bureau of Labor Statistics.

233 *Id.* at 1.

234 *Id.* at 3.

235 Dept. of Health & Human Servs., *supra* n. 232, at 3; *see also* Betsy J. Grey, *Aging in the 21st Century: Using Neuroscience to Assess Competency in Guardianships*, 18 Wis. L. Rev. 735 (2018) (noting that by 2030, more than 71 million Americans will be older than 65, accounting for about 20 percent of the U.S. population).

236 Dept. of Health & Human Servs., *supra* n. 232, at 3.

237 *See* Jonathan Vespa, Lauren Medina & David M. Armstrong, *Demographic Turning Points for the United States: Population Projections for 2020 to 2060,* Current Population Report P25-1144 (U.S. Census Bureau, revised Feb. 2020) ("The year 2030 marks a demographic turning point for the United States. Beginning that year, all baby boomers will be older than 65. This will expand the size of the older population so that one in every five Americans is projected to be retirement age. Later that decade, by 2034, we project that older adults will outnumber children for the first time in U.S. history .... Beyond 2030, the U.S. population is projected to grow slowly [but] to age considerably ..... America is graying.").

238 *2018 Profile of Older Americans, supra* n. 232, at 6.

239 Dept. of Health & Human Servs., Administration for Community Living, Administration on Aging, *Adult Maltreatment Report | 2018* (2019), https://acl.gov/sites/default/files/programs/2019-12/2018%20Adult%C20Maltreatment%C20Report%20-%20Final%20v1.pdf (accessed June 9, 2020); *also* John J. Regan, Rebecca C. Morgan & David M. English, *Tax, Estate & Financial Planning for the Elderly,* vol. 1 § 11.02 (Matthew Bender 2020)

(noting that the Elder Justice Initiative states that an estimated 10 percent, at minimum, of those 65 and older experience some type of elder abuse every year). Dept. of Just., Elder Just. Initiative, *About Elder Abuse* https://www.justice.gov/elderjustice/about-elder-abuse (accessed June 9, 2020).

240 *See* Grey, *supra* n. 235, at 780 (concluding that as our population ages, the need to evaluate decision-making capacity will become even more prevalent than it is today and biomarker evidence will become a significant tool that will assist courts in addressing legal competency questions); *see also* James H. Pietsch, *Becoming a "Dementia-Capable" Attorney--Representing Individuals With Dementia,* 19 Haw. B.J. 1 (2015) (arguing that Alzheimer's disease and related disorders or dementias are growing proportionately with America's aging population and are becoming a global problem that will require legal professionals to be trained to recognize the signs of these dementias and to address the problems they cause.

241 Aspirational Stand. A § 1 cmt. (Two fundamental principles the holistic approach promotes is "independence and autonomy" and "protection from exploitation, abuse and neglect."); John C. Craft, *Preventing Exploitation and Preserving Autonomy: Making Springing Powers of Attorney the Standard,* 44 U. Balt. L. Rev. 407, 416 (Summer 2015) (noting that one of the societal costs is that victims of elder abuse, neglect, and financial exploitation are three times more likely to die at an earlier age than elders who are not victims of abuse and recommending that springing powers of attorney play a greater role in reducing the mortality rate for abused elders).

242 Sandusky, *supra* n. 229, at 479.

243 *Id.* at 474 ("Under a Model Rule jurisdiction, no matter its variation of Model Rule 1.6, the hypothetical lawyer would probably not be allowed to reveal the abuse against his client's consent."); *see also Annotated Model Rules, supra* n. 3, at 253, Model R. 1.14 cmt. 8; Aspirational Stand. G § 1 cmt.; *see also* Aspirational Stand. E § 4 cmt.

244 *See* 89 Ill. B.J. 93 (2001) (acknowledging that attorneys are generally not included in mandatory reporting statutes but that reporting attorneys would be protected through immunity and exceptions to confidentiality requirements. *Id.* at 93-94.); *see e.g.* § 48.051 of the Texas Human Resources Code, which created a mandatory reporting statute and criminalized noncompliance. Now everyone, including attorneys, are required to report abuse.

245 *Supra* n. 16.

246 Fla. Stat. Ann. § 415.1034 (2019).

247 *Id.* at (1)(a) (listing a variety of professionals who are mandated to report elder abuse, which excludes attorneys).

248 Fla. R. Prof. Conduct 4-1.6 cmt. 21 ("Whether another provision of law supersedes rule 4-1.6 is a matter of interpretation beyond the scope of these rules, but a presumption should exist against a supersession."); *see also Annotated Model Rules, supra* n. 3, at 107, Model R. 1.6 cmt. 15 (repeating the presumption against supersession); *but see* Aspirational Stand. G § 4 cmt. (cautioning elder law practitioners that "some states place a mandatory reporting requirement on attorneys who learn of elder abuse or exploitation," implying that supersession is not a presumption).

249 *Supra* n. 16; *see also* NAELA Aspirational Stand. G § 6 ex. 1 ("An APS [adult protective services] inquiry should be considered only if all least restrictive protective actions have been considered.").

250 *Annotated Model Rules, supra* n. 3, at 103, Model R. 1.6(a) (allowing the revelation of client secrets or confidences with the client's informed consent); *see* Aspirational Stand. E § 6 cmt. (mirroring Model Rule 1.6(a) in stating, "In some

narrow instances, the attorney may reveal confidential information without first obtaining the informed consent of the client if the disclosure of such information is impliedly authorized to carry out the representation.").

251 *Annotated Model Rules, supra* n. 3, at 103 (A lawyer may reveal information "to comply with other law or a court order.").

252 Sandusky, *supra* n. 229.

253 Aspirational Stand. G § 2 ex. (which implores, "Attorneys should presume capacity until the facts and circumstances override that presumption.").

254 Barry Kozak, *The Forgotten Rule of Professional Conduct-- Representing a Client With Diminished Capacity*, 49 Creighton L. Rev. 827 (Sept. 2016) (acknowledging the subjective circularity in Rule 1.14, noting: "All attorneys who maintain client-lawyer relationships must continually, or at least periodically, assess each client's mental capacity. Under the Model Rules of Professional Conduct, this assessment is a two-step process. First, the attorney must ensure that an individual has enough mental capacity to establish or maintain a normal client-lawyer relationship, and second, the attorney must ensure that the individual has enough mental capacity to legally bind him or herself in the desired transaction or intended course of action. If the attorney determines that at any point in time, a client has diminished capacity, then Model Rule 1.14 requires the attorney to take whatever extra steps are required to maintain a normal client-lawyer relationship. However, if the client does have diminished capacity and such diminished capacity puts the client at risk of substantial harm, then the attorney is allowed under Model Rule 1.14 to take certain protective actions on behalf of the client, even though the diminished capacity means that the client cannot consent to those actions, and even if the attorney's actions permitted under this rule actually violate other canon rules governing the client-lawyer relationship.").

255 *Id.* at 834 ("Model Rule 1.14 absolutely requires the *attorney* to assess a *client's* mental capacity at every meeting or interaction, and then, arguably requires a second assessment to be made." (emphasis added)).

256 Aspirational Stand. G § 7 cmt. ("Prior to choosing a course of action, consideration should be given to the client's wishes and values to the extent known; the consequences of intruding into the client's decision-making autonomy; and the potential impact on the client's family and social relationships."); *see also* Aspirational Stand. G § 5 cmt. ("[W]hen a client has diminished capacity and the attorney does not know the client's wishes, the attorney should act in accordance with the client's known values. When the attorney is representing a client with diminished capacity and is unable to determine the client's particular wishes and values, the attorney must advocate for the client's best interests.").

257 *See Annotated Model Rules, supra* n. 3, at 252-253, Model R. 1.14 cmt. 7 ("[T]he lawyer should be aware of any law that requires the lawyer to advocate the least restrictive action on behalf of the client."); *see* Aspirational Stand. G § 5 cmt. ("Any protective action should be the least restrictive alternative, tailored to the degree of the client's incapacity ....").

258 Aspirational Stand. G § 6 cmt. (cautioning that the "attorney should take the least restrictive action possible and only disclose the confidential information that is reasonably necessary to protect the client").

259 Kozak, *supra* n. 254, at 844-857 (discussing Model Rule 1.14's two-prong test concerning diminished capacity determinations); *see also supra* n. 255.

260 *See e.g.* Martha Albertson Fineman, *Elderly" as Vulnerable: Rethinking the Nature of Individual and Societal Responsibility*, 20 Elder L.J. 71, 84-95 (2012) (describing older adults as a "vulnerable population" whose social rights are replaced by "liberty and autonomy: the right to make choices, the right to contract .... Those who are not seen as

sufficiently autonomous and independent actors are herded together in designated ‘vulnerable populations' ... based on judgmental assumptions about the choices they have made in the past or are deemed able to make for themselves in the future.” Thus, “paternalism guides society's response--which is to ... take away agency based on assumptions about lack of capacity, as we do with many of the elderly.” Fineman also notes the tension between autonomy and protective action because “[s]afety and security are necessary to have the ability to fully and freely exercise options and make choices.”).

261 Sandusky, *supra* n. 229, at 479 (alluding to the fact that the Model Rules have not provided lawyers with a working definition of capacity); *see* Peter Margulies, *Access, Connection, and Voice: A Contextual Approach to Representing Senior Citizens of Questionable Capacity,* 62 Fordham L. Rev. 1073, 1082 (Mar. 1994) (introducing the contextual capacity model, which incorporates the following six factors, to resolve the black hole dilemma: “(1) ability to articulate reasoning behind decision; (2) variability of state of mind; (3) appreciation of consequences of decision; (4) irreversibility of decision; (5) substantive fairness of transaction; (6) consistency with lifetime commitments.” *Id.* at 1085.); *see also* James D. Gallagher & Cara M. Kearney, *Current Development 2002-2003 Representing a Client With Diminished Capacity: Where the Law Stands and Where It Needs to Go*, 16 Geo. J. Leg. Ethics 597 (Summer 2003) (noting the failure of the ABA to differentiate what characteristics encompass “diminished capacity” as opposed to “seriously diminished capacity,” thus creating a dilemma for an attorney making the judgment of whether a client's capacity is so seriously diminished as to warrant a violation of attorney-client confidentiality norms. *Id.* at 601.).

262 *Annotated Model Rules, supra* n. 3, at 252, Model R. 1.14 cmt. 6 (listing factors that should be considered and balanced in determining the extent of the client's diminished capacity); *see also* Aspirational Stand. G § 2 ex. (stating that “the attorney should evaluate client capacity by a legal standard” and listing seven factors the attorney should consider in assessing a client's diminished capacity).

263 Sandusky, *supra* n. 229, at 481 (stating that the attorney can forego the use of a diagnostician as a cost-effective measure for the client).

264 *Annotated Model Rules, supra* n. 3, at 258 (“To determine what, if any, protective action is appropriate, the lawyer must first assess the client's capacity.”).

265 Craft, *supra* n. 241, at 444.

266 *Id.*

267 Stasi, *infra* n. 274, at 710-712 (arguing that lawyers are at a disadvantage in assessing capacity due to a lack of medical or scientific training and that the usual capacity tests (i.e., Baird Brown Legal Capacity Questionnaire (LCQ), Mini Mental State Examination (MMSE)) yield incomplete data and serve only to indicate a need for further assessment by an independent source).

268 Aspirational Stand. A § 2 cmt. (“Regardless of how the attorney provides these nonlegal services, the attorney should exercise caution to comply with the attorney's duties of confidentiality ....”).

269 *Annotated Model Rules, supra* n. 3, at 252, Model R. 1.14 cmt. 6; *see also* ABA Comm. on L. & Aging & Am. Psychol. Assn., *Assessment of Older Adults With Diminished Capacity: A Handbook for Lawyers* 3 (2005) (The handbook is intended to provide lawyers with useful approaches to “understanding, assessing, and responding to clients and potential clients with diminished capacity.” *Id.* at iii.).

270 Whipple, *infra* n. 288, at 390 n. 232 (noting that values and preferences are another part of the framework that must be factored in an assessment and that the clinical assessment is the psychologist's or psychiatrist's final judgment as to whether a client has the requisite capacity for the transaction.).

271 *Supra* n. 250.

272 *See e.g.* Carolyn Dessin, *Should Attorneys Have a Duty to Report Financial Abuse of the Elderly?* 38 Akron L. Rev. 707, 709 (2005) (listing all state reporting statutes in footnotes 10-13); see Aspirational Stand. E § 6 cmt. ("In making such a disclosure without the client's express consent, the attorney should be cautious to disclose only enough information that is required to comply with the law, court order, or other professional responsibility rule that requires disclosure."); *see also* Aspirational Stand. G § 6 cmt. ("Even if the attorney is authorized to divulge confidential information to take protective action, the attorney may disclose only that information necessary for the protective action.").

273 *See* Marilyn Levitt, *The Elderly Questionably Competent Client Dilemma: Determining Competency and Dealing With the Incompetent Client, 1 J. Health Care L. & Policy 202, 220 (1998).*

274 *See Thomas Richard Stasi, Reform That Understands Our Seniors: How Interdisciplinary Services Can Help Solve the Capacity Riddle in Elder Law,* 45 U. Mich. J.L. Reform 695, 718 (Spring 2012) (noting that the Model Rules deter attorneys from using diagnosticians because Model Rule 1.6 forbids disclosure of client confidences without informed consent and Model Rule 1.14 only permits an exception to Rule 1.6 if an attorney has a reasonable belief that the client has diminished capacity. Thus, a lawyer is not afforded a disclosure exception during the assessment of a client's capacity.).

275 *See Annotated Model Rules, supra* n. 3, at 104, Model R. 1.6 cmt. 2 (restating that the "fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation."); *see also* Aspirational Stand. E § 5 cmt. ("A client who decides to waive confidentiality and direct the release of confidential information should do so with a written waiver specifying the scope of information to be disclosed and to whom.").

276 *Id.*

277 Spencer Rand, *Hearing Stories Already Told: Incorporating Third Party Professionals Into the Attorney-Client Relationship*, 80 Tenn. L. Rev. 1, 32-42 (Fall 2012) (arguing that common law supports the view that third-party professional communications in attorney-client meetings should be privileged communications under the interpreter exception but also acknowledging that consent forms executed by the client do not guarantee that the privilege will be maintained); *see also* Aspirational Stands. J1-J4 cmts. (which are dominated by the ethical requirement to obtain the client's informed consent before involving a nonattorney in a client representation).

278 Dessin, *supra* n. 272, at 723 (concluding that the societal interest in protecting a vulnerable person from abuse makes reporting abuse a necessary limitation on client confidences and advocating that an attorney should report potential abuse to the appropriate protective authority if the client seems incapable of consenting to the allegedly abusive conduct or if the attorney learns of the abusive conduct from the abuser).

279 *Annotated Model Rules, supra* n. 3, at 49, Model R. 1.3 ("A lawyer shall act with reasonable diligence and promptness in representing a client."); *Atty. Grievance Commn. v. Davis*, 825 A.2d 430 (Md. 2003) (stating that "no harm, no foul" is not a viable defense to discipline inquiry under this rule); *see also supra* n. 227.

280 Sandusky, *supra* n. 229, at 481 (Model Rule 1.14 does not specify who should bear the cost of the diagnostician.).

281 Zacharias, *supra* n. 72, at 648 n. 234 (giving examples of cases in which the client's tort remedy for an attorney's confidentiality breach is a malpractice suit for damages).

282 Aspirational Stand. A § 2 cmt.

283 Aspirational Stand. A § 2 (which provides examples of nonlegal services--also called "ancillary services" or "law-related services"-- including, inter alia, capacity screening by a psychologist or neurologist); *see also Annotated Model Rules, supra* n. 3, Model R. 5.7 (describing law-related services); see pt. IV(E) (generally discussing how the rule of confidentiality stunts the application of law-related services in the present legal services model).

284 Aspirational Stand. A § 1 cmt. ("While elder and special needs law includes traditional estate planning, many times the focus of an elder or special needs law representation is the 'life needs' of the person whose interests are being promoted in the legal representation .... The holistic approach requires the attorney, when appropriate, to address these and other issues in the legal representation.").

285 Aspirational Stand. A § 2 cmt. ("[T]he guidance of nonlegal professionals may be useful in accomplishing the holistic approach. Examples of nonlegal services (other common names for nonlegal services are 'ancillary services' or 'law-related services"' may include, inter alia, "advocacy by a health care professional" and "capacity screening by a psychologist or neurologist ....").

286 Rand, *supra* n. 277.

287 Stasi, *supra* n. 274.

288 *See* pt. IV(E) (discussing the rule of confidentiality stunting innovative business models in delivering legal and law-related services that are more efficient and cost-effective to the consumer); *see e.g.* Jennifer L. VanderVeen, *Taking a Look at Elder Law Practice,* 52 Res Gestae 36 (May 2009) (addressing why elder law practitioners would benefit from a multidisciplinary practice whose business model incorporates the holistic model of legal services that includes social workers, financial planners, insurance advisors, and medical professionals, thus delivering legal planning services to the elderly with greater efficiency and competitiveness); *see also* Laura J. Whipple, *Navigating Mental Capacity Assessment,* 29 Temp. J. Sci. Tech. & Envt. L. 368, 396-401 (generally discussing advocating MDPs as the best models of practice for attorneys who are frequently required to assess mental capacity).

289 Deborah Rhode, *Access to Justice: Connecting Principles to Practice*, 17 Geo. J. Leg. Ethics 369, 410-415 (2003-2004) (discussing MDPs providing access for low-income and moderate-income consumers but noting that "the focus of the bar's opposition to MDPs has been on the interests of lawyers, and only secondarily or ritualistically on the needs of clients"); see Marcia M. Boumil, Debbie F. Freitas & Christina F. Freitas, *Multidisciplinary Representation of Patients: The Potential for Ethical Issues and Professional Duty Conflicts in the Medical-Legal Partnership Model*, 13 J. Health Care L. & Policy 107 (2010) (positing that the very nature of the medical-legal partnership (MLP) model is to use the holistic approach to health care by seeking to address the underlying socioeconomic determinants that perpetuate poor health).

290 Perlman, *supra* n. 173.

291 Stacy L. Brustin, *Legal Services Provision Through Multidisciplinary Practice--Encouraging Holistic Advocacy While Protecting Ethical Interest*s, 73 U. Colo. L. Rev. 787, 799-821 (Summer 2002) (discussing the general history of the ethical arguments against the collaborative interdisciplinary business model being adopted by the ABA and noting that since the 1960s, multidisciplinary programs offering legal services have emerged throughout the country); *see also* ABA, *Commission on Multidisciplinary Practice Final Report* (June 1999) and *Second Report* (2000) (The ABA House of Delegates rejected both these reports to allow MDPs even though the commission recommended that no change be made to the lawyer's obligation to protect confidential client information.); *see Annotated Model Rules, supra* n. 3, Rule 5.4 (generally forbidding MLPs and MDPs).

292 Perlman, *supra* n. 173 (reviewing recent ABA attempts to reform the ethical regime governing lawyer conduct and concluding that it failed to align its rules with current market demands); *see also* Perlman, *supra* n. 195.

293 Rand, *supra* n. 277, at 32-41 (discussing *Restatement (Third)* support for privilege law protecting third-party communications if the interdisciplinary third party has a confidentiality duty similar to an attorney's ethical duty of confidentiality and the client reasonably expects information to be kept confidential when it is disclosed during an attorney-client meeting where the interdisciplinary third party is also present).

294 *Restatement (Third)* § 71 cmt. b ("Given the objectives of the attorney-client privilege (see § 68, Comment c), a communication must be made in circumstances reasonably indicating that it will be learned only by the lawyer, client, or another privileged person (*see* § 70).").

295 Rand, *supra* n. 277, at 34-36 (noting that social workers, doctors, accountants, engineers, and many other professionals have an ethical duty similar to an attorney's ethical duty to keep client confidences confidential, thus arguing that the attorney-client privilege remains intact).

296 *Id.* at 33.

297 *Id.* (citing *Restatement (Third)* § 71: "A communication is in confidence within the meaning of § 68 if, at the time and in the circumstances of the communication, the communicating person reasonably believes that no one will learn the contents of the communication except a privileged person as defined in § 70 or another person with whom communications are protected under a similar privilege."); *see also id.* at § 70 cmt. (f): "A person is a confidential agent for communication if the person's participation is reasonably necessary to facilitate the client's communication with a lawyer or another privileged person and if the client reasonably believes that the person will hold the communication in confidence. Factors that may be relevant in determining whether a third person is an agent for communication include the customary relationship between the client and the asserted agent, the nature of the communication, and the client's need for the third person's presence to communicate effectively with the lawyer or to understand and act upon the lawyer's advice.").

298 Rhode, *supra* n. 289, at 407 (observing that the bar's opposition generally serves to preserve the lawyer monopoly over the provision of legal services); see also supra n. 227.

299 *Supra* pt. IV(D).

300 *Supra* pt. III(A).

301 *Supra* pt. IV(B).

302 *Supra* pt. IV(E).

303 *Supra* pt. VI(C).

304 Stevenson, *supra* n. 8.

305 *See supra* n. 74; *see also* Gustafsson, *supra* n. 199.

306 Zacharias, *supra* n. 171 (arguing that the ABA paradigm of self-regulation is designed to fend off external regulatory efforts); *but see* Perlman, *supra* n. 173 (generally arguing that globalization of the economy and informational and technological transformative changes in how legal services can be delivered will inevitably require the ABA to reform its regulatory rules).

307 *Supra* pt. IV(E).

308 NAELA Aspirational Stands. Preamble.

309 Martha Albertson Fineman, *Symposium: Vulnerability, Resilience, and LGBT Youth*, 23 Temp. Political & Civ. Rights L. Rev. 307, 320 (Spring 2014) (Professor Fineman recognizes human beings as social beings that act and react in relationship with others and with institutions. Those social relationships structure our options, thus creating or impeding our opportunities. Dependence vulnerability is inevitable as we age; therefore, the social and political culture should be structured to reflect the fact that independence and self-sufficiency--autonomous decision-making-- are impossible to achieve for some vulnerable individuals, and institutions should be shaped to be generally and equitably responsive to such vulnerability.).

310 *See* VanderVeen, *supra* n. 288.

311 Gustafsson, *supra* n. 199, at 32 (drawing theoretical socioeconomic similarities between the following: (a) the shortcomings of the medieval craft guild business structure and its regulatory rules that severely inhibited the guild from effectively adapting to the revolutionary market forces brought on by the industrial revolution and (b) the contemporary American legal guild that refuses to reform its business structure and regulatory rules to meet the competitive market forces brought on by a global economic revolution. Based on the behavioral rationality of a confidential attorney-client social relationship, this revolution requires more effective and efficient social relations of production in the way legal and nonlegal services are being delivered).

312 Fineman, *supra* n. 309 (recognizing that social, legal, cultural, economic, and political institutions entail social relationships that structure our options, thus creating or impeding our opportunities); *see also* Remus, *supra* n. 194 (arguing that the relational dynamics of the attorney-client relationship will suffer if the bar adopts the market-exchange model but admitting that professional structures and ethical rules should be modified in new and innovative ways to harness market forces in productive, rather than protective, ways to address contemporary challenges).

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