

Everything You Tell Me Will Remain Confidential (Maybe): The Client’s Right to Know About Tennessee’s Confidentiality Disclosure Exceptions

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I. INTRODUCTION

A client in Tennessee visits his lawyer to discuss the client's dismissal from a maintenance foreman position at a local university. The client, visibly irritated yet concerned, discloses to his lawyer that he has released toxic chemicals into the university's water supply that will cause people on campus to become severely ill. The client explains that, although he regrets his actions, he fears going to the authorities. The lawyer now faces a professional dilemma. She knows that the client could carry out such an act, and she reasonably believes that the client has, in fact, released toxic chemicals into the university's water supply. But the client has confided in her under the assumption that this information will remain confidential; he is communicating with his lawyer, after all, the one person whom he can trust to keep quiet, if only because she is obligated to do so—or so he thinks. She tries unsuccessfully to convince the client to go immediately to authorities simply to prevent harm to members of the campus community. Because of a mandatory provision in Tennessee's lawyer-client confidentiality rule, the lawyer must now go to the authorities herself, disclosing the client's confidential information in an attempt to prevent the bodily harm that will likely occur if she does nothing.

The rules of professional conduct in all states require lawyers to keep information relating to the representation of their clients

confidential.¹ But no state explicitly requires lawyers to explain to clients that the duty of confidentiality is limited, allowing—and sometimes requiring—disclosure in a growing number of circumstances.² Although the empirical data relating to client perceptions of confidentiality is somewhat limited, what does exist tends to show that the typical legal client is unaware of the underlying caveats to confidentiality;³ most clients assume that a relationship with a lawyer creates a safe haven for questionable information.⁴ It makes sense, then, that the data also indicates that lawyers generally do not explain confidentiality or its nuanced exceptions to clients.⁵ This

1. See CTR. FOR PROF'L RESPONSIBILITY, AM. BAR ASS'N, VARIATIONS OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, RULE 1.6: CONFIDENTIALITY OF INFORMATION (2017) [hereinafter VARIATIONS OF RULE 1.6], http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_6.authcheckdam.pdf.

2. *Id.*

3. See generally Leslie C. Levin, *Testing the Radical Experiment: A Study of Lawyer Response to Clients Who Intend to Harm Others*, 47 RUTGERS L. REV. 81 (1994) (including results from a survey distributed to New Jersey lawyers showing that clients often misunderstand the scope of confidentiality); Fred C. Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 351 (1989) (reporting the results of a survey distributed to 63 lawyers and 105 laypersons in Tompkins County, New York, showing that most clients believe confidentiality rules provide full protection of their information); Comment, *Functional Overlap Between the Lawyer and Other Professionals: Its Implications for the Privileged Communications Doctrine*, 71 YALE L.J. 1226 (1962) (publishing results from a limited study of lawyers concerning the attorney-client privilege and discussing many concepts familiar to both the privilege and confidentiality requirements).

4. See Elisia M. Klinka & Russell G. Pearce, *Confidentiality Explained: The Dialogue Approach to Discussing Confidentiality with Clients*, 48 SAN DIEGO L. REV. 157, 158 (2011) (“[M]any clients already (mistakenly) think confidentiality is absolute.”); Zacharias, *supra* note 3, at 381 (finding that half of the clients interviewed for an empirical study regarding confidentiality responded that they believed confidentiality to cover all information). See also Eli Wald, *Taking Attorney-Client Communications (and Therefore Clients) Seriously*, 42 U.S.F. L. REV. 747, 750 (2008) (discussing the issue of confidentiality by focusing on communications between lawyers in a broad sense, explaining that the professional rules are designed in a way that provides lawyers with ample information while keeping clients uninformed, stating, “[t]his design systematically channels information in the attorney-client relationship in the lawyer’s direction . . .”).

5. See Zacharias, *supra* note 3, at 382–83. Zacharias conducted a study in which 22.6% of lawyers interviewed admitted that they never inform their clients

failure to communicate exposes clients to the risks of disclosure at a time when they feel most comfortable sharing information.

Although a majority of states grant lawyers total discretion to use a confidentiality exception to disclose client information, Tennessee is one of twelve that both permits and requires disclosure.⁶ Under Tennessee Rule of Professional Conduct 1.6(c), Tennessee lawyers must disclose confidential client information to protect people from serious harm or death, to comply with a court order, or to comply with another law (for example, a child-abuse reporting statute).⁷ This required disclosure accords with the state's compelling interests in protecting human life⁸ and maintaining candor in the legal system, and

about confidentiality. *Id.* at 382. Another 59.7% of lawyers interviewed said that they informed their clients about confidentiality in less than 50% of cases. *Id.* Clients interviewed in Zacharias's study responded that 72.9% of their "first attorneys" never explained confidentiality at all. *Id.* at 383.

6. Twelve states include mandatory confidentiality disclosure exceptions. *See* ARIZ. RULES OF PROF'L CONDUCT ER 1.6(b) (2015); CONN. RULES OF PROF'L CONDUCT 1.6(b) (2014); FLA. BAR REG. R. 4-1.6(b) (2014); ILL. SUP. CT. R. PROF'L CONDUCT 1.6(c); NEV. RULES OF PROF'L CONDUCT R. 1.6(d) (2014); N.J. COURT RULES, RPC 1.6(b) (2016); N.D. R. PROF. CONDUCT RULE 1.6(b) (2016); TENN. RULES OF PROF'L CONDUCT R. 1.6(c); TEX. R. PROF'L CONDUCT 1.05(e) (2011); VA. SUP. CT. R. PT. 6, § II, 1.6(c); WASH. RULES OF PROF'L CONDUCT 1.6(b) (2016); WIS. SCR 20: 1.6(b).

7. TENN. RULES OF PROF'L CONDUCT R. 1.6(c) provides:

A lawyer shall reveal information relating to the representation of a client to the extent the lawyer reasonably believes disclosure is necessary:

- (1) to prevent reasonably certain death or substantial bodily harm;
- (2) to comply with an order of a tribunal requiring disclosure, but only if ordered to do so by the tribunal after the lawyer has asserted on behalf of the client all non-frivolous claims that the information sought by the tribunal is protected against disclosure by the attorney-client privilege or other applicable law; or
- (3) to comply with RPC 3.3, 4.1, or other law.

TENN. RULES OF PROF'L CONDUCT R. 1.6(c).

8. TENN. RULES OF PROF'L CONDUCT R. 1.6 cmt. 17a ("Paragraph (c)(1) recognizes the overriding value of life and physical integrity and requires disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm."). Much of the language in Comment 17a to Tennessee Rule of Professional Conduct 1.6 is identical to Comment 6 of ABA Model Rule 1.6. *See* MODEL RULES

it arguably serves society's best interests—but it deepens the rift between what clients believe about confidentiality and the reality of the ethical rule and its exceptions.⁹

This disconnect creates a bevy of issues for legal clients. A client who is unaware of the rules of confidentiality cannot choose a lawyer on his or her own terms¹⁰ or participate in the development of a strong lawyer-client relationship.¹¹ In the event of an unforeseen

OF PROF'L CONDUCT r. 1.6 cmt. 6 (AM. BAR ASS'N 2012). All states adhere to Model Rule 1.6 in some form, and all retain the rationale of Comment 6 as justification for the exception authorizing disclosure to prevent bodily harm or death. *See* CTR. FOR PROF'L RESPONSIBILITY, AM. BAR ASS'N, STATE ADOPTION OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules.html (last visited Feb. 27, 2018); VARIATIONS OF RULE 1.6, *supra* note 1.

9. *See* Levin, *supra* note 3, at 85 (1994) (suggesting that states imposing mandatory disclosure rules should emphasize that clients have a right to know about the operation of the rules before they provide information to lawyers).

10. If a client is to be affected by a rule governing the professional activities of another person (the client's lawyer), then a client has an obvious right to know about the confidentiality exceptions and to understand that they have a choice in sharing information; this belief has been echoed by many legal scholars. *See, e.g.,* Levin, *supra* note 3, at 97 ("It is widely agreed that clients are entitled to know about exceptions to client confidentiality rules in order to make informed decisions about whether to disclose information to their counsel."); Lee A. Pizzimenti, *The Lawyer's Duty to Warn Clients About Limits on Confidentiality*, 39 CATH. U. L. REV. 441, 484 (1990) ("[S]o long as the client understands that the lawyer may be hampered by a lack of information, the choice of whether to disclose belongs to the client."). Clients need to be informed that confidentiality is limited at the earliest possible time so that they know whether they want to work with a particular lawyer. *See* Roy M. Sobelson, *Lawyers, Clients and Assurances of Confidentiality: Lawyers Talking Without Speaking, Clients Hearing Without Listening*, 1 GEO. J. LEGAL ETHICS 703, 736 (1988) ("[I]f attorneys faced with the choice of resisting on principle or complying with all 'orders' will choose to obey rather than suffer personal consequences, clients should know that from the outset. Knowing that would allow the client to make an informed choice about who he wants as his counsel, based on what may turn out to be an important consideration.").

11. *See, e.g.,* Klinka & Pearce, *supra* note 4, at 180 (noting that when lawyers fail to explain confidentiality to clients, they "undermine the possibility for a mutually respectful and trusting relationship"); Pizzimenti, *supra* note 10, at 443 (discussing the general practice of lawyers to keep clients in the dark about confidentiality, stating "active deception, or even negligent failure to provide sufficient information to assure informed consent, raises serious issues at the heart of the attorney-client

disclosure of confidential information, a client may face further legal action or suffer other reputational harm while, at the very least, feeling betrayed and losing all confidence in the lawyer and possibly the legal system.¹²

Scholars, practitioners, and rule drafters have taken issue with the structure of the confidentiality rules and their controversial implications for decades, yet no consensus on a workable solution that informs the client of the risks of disclosure has emerged.¹³ Because

relationship.”). Open communication regarding confidentiality (among other aspects of the lawyer-client relationship) is necessary for a client to remain autonomous and make informed decisions, rather than simply yield to the lawyer. *See* Wald, *supra* note 4, at 752 (examining the power structure between lawyer and client and concluding that often, lawyers have the upper hand within the relationship, and paternalistically make decisions for a client who will defer to the lawyer’s instruction).

12. *See* Klinka & Pearce, *supra* note 4, at 158 (“[P]ledging absolute confidentiality creates the potential for betraying clients’ trust if lawyers later determine that they must disclose their clients’ confidences without having explained the bounds of confidentiality in the first place.”); Lloyd B. Snyder, *Is Attorney-Client Confidentiality Necessary?*, 15 GEO. J. LEGAL ETHICS 477, 478 (2002) (“The decision to disclose engenders strong feelings and widespread debate precisely because disclosure has important consequences. The decision to disclose also raises important questions about loyalty and betrayal.”).

13. *See, e.g.*, Daniel R. Fischel, *Lawyers and Confidentiality*, 65 U. CHI. L. REV. 1, 5 (1998); Sobelson, *supra* note 10, at 703. *See* generally Rebecca Aviel, *The Boundary Claim’s Caveat: Lawyers and Confidentiality Exceptionalism*, 86 TUL. L. REV. 1055 (2012); David F. Chavkin, *Why Doesn’t Anyone Care About Confidentiality? (And, What Message Does That Send to New Lawyers?)*, 25 GEO. J. LEGAL ETHICS 239 (2012); Clark D. Cunningham, *How to Explain Confidentiality?*, 9 CLINICAL L. REV. 579 (2003); Bruce A. Green & Fred C. Zacharias, *Permissive Rules of Professional Conduct*, 91 MINN. L. REV. 265 (2006); David A. Green, *Lawyers as “Tattletales”: A Challenge to the Broad Application of the Attorney-Client Privilege and Rule 1.6, Confidentiality of Information*, 20 GA. ST. U. L. REV. 617 (2004); Klinka & Pearce, *supra* note 4; Levin, *supra* note 3; Nancy J. Moore, *Mr. Prinzo’s Breakthrough and the Limits of Confidentiality*, 51 ST. LOUIS U. L.J. 1059 (2007); Stephen Pepper, *Why Confidentiality?*, 23 L. & SOC. INQUIRY 331 (1998); Pizzimenti, *supra* note 10; Snyder, *supra* note 12; Dru Stevenson, *Against Confidentiality*, 48 U.C. DAVIS L. REV. 337 (2014); Harry I. Subin, *The Lawyer as Superego: Disclosure of Client Confidences to Prevent Harm*, 70 IOWA L. REV. 1091 (1985); Rachel Vogelstein, *Confidentiality vs. Care: Re-Evaluating the Duty to Self, Client, and Others*, 92 GEO. L.J. 153 (2003); Zacharias, *supra* note 3; Limor Zergutman, *Revising the Ethical Rules of Attorney-Client Confidentiality: Towards a*

many (if not most) lawyers feel that it is more beneficial to avoid a conversation about confidentiality with their clients,¹⁴ there is no reason to believe that lawyers will suddenly begin explaining the limitations of confidentiality to clients voluntarily. Lawyers will only start explaining the rules of confidentiality when the rules impose an explicit obligation on lawyers to be candid about confidentiality with their clients. Providing an easy-to-understand explanation of the disclosure exceptions would give clients an informed choice in whether to share information with a lawyer that could have detrimental effects if disclosed under an exception to the confidentiality rule.¹⁵ To improve clarity and prevent risk, lawyers should educate clients about the confidentiality rule and its exceptions at the earliest stages of the lawyer-client relationship, before there is a possibility of harmful disclosure pursuant to an exception to the rule.¹⁶

New Discretionary Rule, 45 LOY. L. REV. 669 (1999), for discussions on the structure and implications of the confidentiality rules.

14. See Klinka & Pearce, *supra* note 4, at 170 (discussing the common practice of lawyers remaining silent regarding the confidentiality rules, explaining that lawyers prefer to keep the decision-making power from the client); Levin, *supra* note 3, at 144 (“While scholars agree that clients have a right to know about attorney disclosure rules, lawyers do not usually talk about the rules, apparently because they fear that such discussions will interfere with client trust and the client’s willingness to talk freely with counsel.”).

15. See generally Cunningham, *supra* note 13; Klinka & Pearce, *supra* note 4; Pizzimenti, *supra* note 10, at 441; Sobelson, *supra* note 10, at 703; Fred C. Zacharias, *Reconciling Professionalism and Client Interests*, 36 WM. & MARY L. REV. 1303 (1995).

16. See, e.g., Green & Zacharias, *supra* note 13, at 286 (“Announcing a practice of reporting misconduct at the outset of representation educates the client. If it is exclusively the client’s interest that will be impaired by the revelation of confidences, the lawyer arguably should inform the client *ex ante* of the circumstances under which the lawyer will disclose.”); Klinka & Pearce, *supra* note 4, at 186–88 (providing an overview of suggested approaches to explaining confidentiality and urging that “an honest discussion between lawyer and client about each other’s interests and concerns about confidentiality, beginning from the first conversation between lawyer and client,” would be the best approach to take); Sobelson, *supra* note 10, at 703 (suggesting that lawyers explain confidentiality to clients before the initial interview even begins so that “[clients] can make informed choices about the breadth of their disclosures, choosing lawyers, or even foregoing legal representation completely.”); Zacharias, *supra* note 15, at 1369–70 (“The process of explanation—which should occur in advance of any likelihood of disclosure—itsself serves the function of educating clients on the limits of the lawyer’s role.”).

This Note argues that providing clients with honest explanations regarding confidentiality and its exceptions will afford clients the opportunity to make well-considered decisions about the information they share and ensure that *unexpected* disclosures do not compromise the lawyer-client relationship or the client's interests. Clients in states like Tennessee, where the professional rules sometimes mandate disclosure, need these thorough explanations the most.¹⁷ This Note further argues that, because the legal profession self-regulates, and lawyers shy away from discussing confidentiality, the first step toward achieving any meaningful explanation of confidentiality must begin with an amendment to the rule that imposes a duty to explain on lawyers.¹⁸ This Note proposes that the Tennessee Supreme Court adopt an amendment to the Tennessee Rules of Professional Conduct ("Tennessee RPC" or "RPC") that requires lawyers within the state to explain, in plain language,¹⁹ the contours of

17. Twelve states require lawyers to disclose confidential client information under specific circumstances. *See supra* note 6.

18. *See* MODEL RULES OF PROF'L CONDUCT pmb. § 10 (AM. BAR ASS'N 2012) ("The legal profession is largely self-governing. Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement. This connection is manifested in the fact that ultimate authority over the legal profession is vested largely in the courts.").

Because the legal profession is self-regulating, it is far easier for lawyers to turn a blind eye to tricky ethical rules than it is to risk the ramifications of an unexpected disclosure of client information. For this reason, rules that have a greater potential for disrupting the lawyer-client relationship need to be strongly emphasized by the legal community. *See Zacharias, supra* note 15, at 1366–67 (arguing that rules such as the general confidentiality rule require more oversight than some other rules may require because the stakes are viewed as high for a practicing lawyer in a precarious ethical situation where the lawyer has "personal and economic incentives" that conflict with the ethical rules).

19. "Plain language" represents language that an audience will understand the first time they see or hear it. Using plain language enables an audience to "find what they need, understand what they find, and use what they need to meet their needs." *What Is Plain Language?*, PLAIN LANGUAGE ACTION & INFO. NETWORK, <https://plainlanguage.gov/about/definitions/> (last visited Feb. 25, 2018) (explaining legal concepts to clients in plain language requires a balance of precision and clarity; clients must be able to reach a sufficient understanding of the legal information without having to search beyond the words being used). *See Checklist for Plain Language*, PLAIN LANGUAGE ACTION & INFO. NETWORK,

confidentiality to all clients at the beginning of the lawyer-client relationship.

Part II of this Note explores the development of ethical rules of confidentiality in the American legal system and the development of these rules in Tennessee. Part III discusses the existing empirical data and anecdotal evidence indicating that lawyers rarely explain confidentiality to clients and that clients commonly misunderstand its scope. Part IV weighs the importance of trust in the lawyer-client relationship against the expanding list of exceptions to confidentiality in Tennessee, arguing that Tennessee lawyers have an implicit ethical obligation to explain confidentiality to clients. Part V summarizes current proposals for solving this problem and responds with a new solution: requiring lawyers to explain the limitations of confidentiality to their clients as a way of complying with an amended confidentiality rule. This proposal advocates for an amendment to the Tennessee Rules of Professional Conduct that the Tennessee Supreme Court should adopt, and a plain-language explanation that Tennessee lawyers should use. Part VI briefly concludes this Note.

II. THE EVOLUTION OF CONFIDENTIALITY RULES

A brief look at the progression of confidentiality rules in America shows how exceptions to confidentiality have eroded the protection of clients' information. Model Rule of Professional Conduct 1.6 is the standard template for confidentiality rules, and all states have endorsed it in full or in part.²⁰ The rule has broadened over time to seemingly provide a great deal of protection to client information, but many jurisdictions have added exceptions that significantly limit that protection. In 2002, Tennessee amended its professional rules to more closely resemble the Model Rules, resulting in a similar narrowing of the coverage provided by Tennessee's confidentiality rule.²¹ Tennessee continues to follow the trend set by

<https://plainlanguage.gov/resources/checklists/checklist/> (last visited Feb. 25, 2018), for guidance on plain language standards.

20. See MODEL RULES OF PROF'L CONDUCT r. 1.6 (AM. BAR ASS'N 2012); VARIATIONS OF RULE 1.6, *supra* note 1.

21. See TENN. RULES OF PROF'L CONDUCT R. 1.6 (2002) (amended 2017). See also *infra* Sections II.A, II.B (outlining the progression of the Model Rule of confidentiality and Tennessee's inclusion of similar exceptions to the rule over time).

the Model Rules, expanding the list of confidentiality exceptions with each revision, and in turn, diminishing the benefit of secrecy that a client expects to receive.²²

A. *Confidentiality Rules, Generally: Where Have We Been,
Where Are We Now?*

The requirement of lawyer-client confidentiality that the Model Rule embraces began as a basic provision in the Canons of Professional Ethics that protected client confidences from disclosure.²³ From the Canons forward, the rule has developed several exceptions that limit the effectiveness of confidentiality. In its current form, Model Rule 1.6 protects clients from the disclosure of any information “relating to the representation” of a client, but its pocketed, permissive exceptions allow for disclosure, without client consent, in a number of circumstances.²⁴

1. An Outline of the Development of Confidentiality Rules in the
American Legal System

The first professional, ethical obligation of confidentiality appeared in 1908, in which Canon 6 of the American Bar Association’s (“ABA”) Canons of Professional Ethics provided in part: “The obligation to represent the client *with undivided fidelity and not to divulge his secrets or confidences* forbids also the subsequent acceptance of retainers or employment from others in matters

22. Since 2002, Tennessee has modified its confidentiality rule to reflect the changes in Model Rule 1.6. *See* TENN. RULES OF PROF’L CONDUCT R. 1.6. Tennessee RPC 1.6 now includes every exception listed in the Model Rule, although Tennessee has gone a step further by making some of those exceptions mandatory. *See id.* The addition of mandatory exceptions to Tennessee’s confidentiality rule has rendered the concept much less effective; even if lawyers want to maintain confidentiality, under the mandatory exceptions, they must abandon the principle altogether. *See infra* Sections II.B, III.A.

23. *See* CANONS OF PROF’L ETHICS Canon 37 (AM. BAR ASS’N 1937) (specifically announcing an affirmative duty to keep a client’s confidences); CANONS OF PROF’L ETHICS Canon 6 (AM. BAR ASS’N 1908) (briefly mentioning a lawyer’s duty of confidentiality to clients).

24. *See* MODEL RULES OF PROF’L CONDUCT r. 1.6 (AM. BAR ASS’N 2012).

adversely affecting any interest of the client with respect to which confidence has been reposed.”²⁵ Thus, Canon 6 combined the obligation of confidentiality with a conflicts-of-interest directive and, in effect, afforded a fairly broad protection to client information.

In 1933, the ABA promulgated Canon 37, which expressly announced the “duty of a lawyer to preserve his client’s confidences.”²⁶ Canon 37 also introduced two exceptions permitting disclosure of confidential information to prevent crime or to defend a lawyer from the accusations of a client.²⁷ This limited-exception provision still provided the client a general guarantee of privacy but marked a turn toward taking other considerations into account, specifically the interests of the lawyer and the interests of the public, when drafting confidentiality rules.

The ABA superseded Canon 37 when it published the Model Code of Professional Responsibility in 1969.²⁸ DR 4-101 of the Model Code prohibited lawyers from revealing client “confidences” and “secrets.”²⁹ “Confidences” referred to information protected by the attorney-client privilege.³⁰ “Secrets” was defined by the Code as “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.”³¹ The additional coverage of client secrets broadened the scope of confidentiality, but DR 4-101 also had its limitations. DR 4-101 increased the variety of circumstances under which the rules would permit disclosure of client confidences or secrets, approving of

25. CANONS OF PROF’L ETHICS Canon 6 (AM. BAR ASS’n 1908) (emphasis added). The 1908 Canons did not define “confidences.” *Id.*

26. *See* CANONS OF PROF’L ETHICS Canon 37 (AM. BAR ASS’n 1933).

27. *See id.* (“If a lawyer is accused by his client, he is not precluded from disclosing the truth in respect to the accusation. The announced intention of a client to commit a crime is not included within the confidences which he is bound to respect. He may properly make such disclosures as may be necessary to prevent the act or protect those against whom it is threatened.”). Like the 1908 Canons, the 1937 Canons did not define “confidences.” *See id.*

28. *See* MODEL CODE OF PROF’L RESPONSIBILITY (AM. BAR ASS’n 1969).

29. MODEL CODE OF PROF’L RESPONSIBILITY DR 4-101 (AM. BAR ASS’n 1969).

30. *Id.*

31. *Id.*

disclosure to protect the interests of the lawyer,³² to prevent a client from committing a criminal act,³³ and to comply with other rules or a court order.³⁴

2. The Modern Model Rule

In 1983, the Model Rules of Professional Conduct, which introduced Model Rule 1.6, replaced the Model Code.³⁵ Model Rule 1.6, as originally enacted, was similar to DR 4-101 of the Model Code but protected from disclosure all “information relating to the representation” of the client, and it only limited that protection through two exceptions.³⁶ The 1983 version of the rule represented the most expansive duty of confidentiality for which the Model Rules would call. But three revisions to Model Rule 1.6 between 2002 and 2012 resulted in the addition of five more exceptions permitting disclosure of confidential information.³⁷ In its current form, Model Rule 1.6

32. See MODEL CODE OF PROF'L RESPONSIBILITY DR 4-101(C)(4) (AM. BAR ASS'N 1969) (allowing a lawyer to disclose client “[c]onfidences or secrets” when necessary for the lawyer “to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct”).

33. See MODEL CODE OF PROF'L RESPONSIBILITY DR 4-101(C)(3) (AM. BAR ASS'N 1969) (allowing disclosure of “[t]he intention of his client to commit a crime and the information necessary to prevent the crime”).

34. See MODEL CODE OF PROF'L RESPONSIBILITY DR 4-101(C)(2) (AM. BAR ASS'N 1969) (allowing disclosure of client “[c]onfidences or secrets when permitted under [the] Disciplinary Rules or required by law or court order”).

35. See MODEL RULES OF PROF'L CONDUCT r. 1.6 (AM. BAR ASS'N 1983).

36. *Id.* The 1983 version of Model Rule 1.6 authorized disclosure only to prevent crime or to protect a lawyer's interests. *Id.* This was a paring back from Model Code DR 4-101, which included a third exception authorizing disclosure to comply with ethical rules or court order. See MODEL CODE OF PROF'L RESPONSIBILITY DR 4-101 (AM. BAR ASS'N 1969). This exception returned through a subsequent revision to the Model Rules. See MODEL RULES OF PROF'L CONDUCT r. 1.6(b)(4) (AM. BAR ASS'N 2002).

37. In 2002, as a result of the work of the 2000 Ethics Commission, Model Rule 1.6 was amended to add subsections (b)(2) and (b)(4). MODEL RULES OF PROF'L CONDUCT r. 1.6(b)(2), (b)(4) (AM. BAR ASS'N 2002). Subsection (b)(2) allows disclosure of confidential information to secure advice about compliance with the ethical rules; subsection (b)(4) allows disclosure in order to comply with another law or court order. *Id.* In 2003, the rule was amended to include disclosure exceptions permitting disclosure when the client has used or is using the lawyer's services in furtherance of crime or fraud. See MODEL RULES OF PROF'L CONDUCT r. 1.6(b)(2)–

includes seven permissive exceptions to strict lawyer-client confidentiality, in part reading as follows:

(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

(3) (AM. BAR ASS'N 2003). Finally, in 2012, the rule was amended to provide an exception permitting disclosure of confidential information to aid in uncovering conflicts of interest when a lawyer changes employment. *See* MODEL RULES OF PROF'L CONDUCT r. 1.6(b)(7) (AM. BAR ASS'N 2012).

compromise the attorney-client privilege or otherwise prejudice the client.³⁸

Because Model Rule 1.6(b)'s permissive exceptions represent concern for interests apart from the client's, they have caused widespread debate among those arguing the merits of maintaining strict confidentiality.³⁹ The exceptions of subsection (b) that authorize disclosure to prevent or mitigate client crime or fraud (protecting the interests of third parties and society)⁴⁰ and protect the integrity of courts and lawyers instigate the most controversy.⁴¹ These exceptions

38. MODEL RULES OF PROF'L CONDUCT r. 1.6(b) (AM. BAR ASS'N 2012).

39. See, e.g., Chavkin, *supra* note 13, at 256 (“[S]upporters of strict confidentiality argue that because they are not public servants, lawyers are not required to ‘betray their clients’ confidences in the interest of public good.” (quoting Amanda Vance & Randi Wallach, *Updating Confidentiality: An Overview of the Recent Changes to Model Rule 1.6*, 17 GEO. J. LEGAL ETHICS 1003, 1004 (2004))); Levin, *supra* note 3, at 96–97 (“Proponents of strict confidentiality view the lawyer as the client’s defender against the world and rely heavily on the same justifications supporting the attorney-client privilege. They contend that confidentiality exceptions will interfere with the development of client trust and will discourage clients from using or freely communicating with their counsel.”). *But see id.* at 101 (“Supporters of permissive rules also believe that when lawyers are faced with clients who will not abandon plans to cause harm, lawyers will ‘do the right thing.’ Permissive disclosure rules are also justified on the ground that they promote lawyer morality.” (quoting W. William Hodes, *The Code of Professional Responsibility, The Kutak Rules and the Trial Lawyer’s Code: Surprisingly, Three Peas in a Pod*, 35 U. MIAMI L. REV. 739, 755–58 (1981))); Zacharias, *supra* note 3, at 358 (suggesting that the argument for strict confidentiality is based primarily on a leveling of interests from the view that (1) the adversary system only works when clients seek out lawyers and lawyers represent them effectively, (2) lawyers are only effective when fully informed by the client, and (3) clients will not employ lawyers if they think their information will not remain confidential); Zer-Gutman, *supra* note 13, at 676 (1999) (explaining that a “hierarchy of protection” created by the confidentiality rule “places the courts and lawyers on top, clients a close second, and society and third parties far behind at the unprotected end of the spectrum.”).

40. See MODEL RULES OF PROF'L CONDUCT r. 1.6(b)(2)–(3) (AM. BAR ASS'N 2012). Model Rule 1.6(b)(2) is interesting in that it requires disclosure to *prevent* a crime from occurring. MODEL RULES OF PROF'L CONDUCT r. 1.6(b)(2) (AM. BAR ASS'N 2012). This allows a lawyer to not only “rat out” his or her client, but to do so based on a reasonable belief that crime will occur, not a belief that it *has already* occurred. See *id.*

41. See MODEL RULES OF PROF'L CONDUCT r. 1.6(b)(4)–(7) (AM. BAR ASS'N 2012). There is little controversy surrounding the exception to protect someone from

implicitly relegate the interests of the client to a subordinate position, and will almost certainly result in compromising the lawyer-client relationship if a lawyer discloses information. Although many clients approve of disclosure in limited circumstances,⁴² such as when it would or may prevent harm to third parties, they typically have no idea that disclosure of their private conversations may occur for a variety of arguably lesser reasons the confidentiality rule implicates.⁴³

Other rules of conduct can affect the scope of Model Rule 1.6, specifically Model Rule 3.3 Candor Toward the Tribunal,⁴⁴ Model Rule 1.13 Organization as a Client,⁴⁵ and Model Rule 4.1 Truthfulness

bodily harm or death; the client is considered to have forfeited his or her rights to confidentiality with regard to such information. *See, e.g.,* Davalene Cooper, *The Ethical Rules Lack Ethics: Tort Liability When a Lawyer Fails to Warn a Third Party of a Client's Threat to Cause Serious Physical Harm or Death*, 36 IDAHO L. REV. 479 (2000) (arguing that the protection of human life far outweighs the importance of maintaining a client's confidentiality); Susan R. Martyn, *In Defense of Client-Lawyer Confidentiality . . . and Its Exceptions . . .*, 81 NEB. L. REV. 1320 (2003) (explaining that the exception to prevent substantial bodily harm or death is justified by a need to preserve the greater good).

42. *See* Zacharias, *supra* note 3, at 392 (discussing the results of the Tompkins County, New York, study and finding that “clients (and laypersons as a whole) overwhelmingly thought lawyers should be able to disclose [certain confidential information]”).

43. *See, e.g.,* Chavkin, *supra* note 13, at 256 (agreeing with many other commentators that clients are generally unaware of lawyers' ethical duties regarding confidentiality and its exceptions); Paul F. Rothstein, “*Anything You Say May be Used Against You*”: A Proposed Seminar on the Lawyer's Duty to Warn of Confidentiality's Limits in Today's Post-Enron World, 76 FORDHAM L. REV. 1745, 1745–46 (2007) (“Once upon a time, people speaking about legally sensitive matters with their own attorneys . . . could be relatively confident that their conversations would be protected by attorney-client privilege and the lawyer's ethical obligation of silence. Even today, most people—including law students—are under that same impression.”); Zacharias, *supra* note 3, at 383 (finding that more than 42% of clients surveyed were unaware of exceptions to lawyer-client confidentiality).

44. Model Rule 3.3, Candor Toward the Tribunal, protects the integrity of the judicial process by requiring disclosure of confidential information to the court in limited circumstances, overcoming the barrier imposed by Model Rule 1.6. *See* MODEL RULES OF PROF'L CONDUCT r. 3.3(a)(3), (b)–(c) (AM. BAR ASS'N 2012).

45. Model Rule 1.13, Organization as a Client, contains a specific whistleblower provision permitting a lawyer representing an organization to disclose certain information under specific circumstances. *See* MODEL RULES OF PROF'L CONDUCT r. 1.13(c) (AM. BAR ASS'N 2012).

in Statements to Others.⁴⁶ These rules can turn permissive disclosure exceptions under Model Rule 1.6 into mandatory disclosure exceptions, such as when a court orders a lawyer pursuant Model Rule 3.3(c) to divulge certain confidential (and otherwise protected) information.⁴⁷ All states' professional conduct schemes resemble the Model Rules and most states allow or require disclosures separate from the explicit exceptions in the general confidentiality rule.⁴⁸ Although an examination of these rules and how they interact with the confidentiality rule falls outside the scope of this discourse, it is worth pointing out that the connection between Model Rule 1.6 and other rules authorizing disclosure of information further expands the range of exceptions to confidentiality.

B. The Development of Confidentiality Rules in Tennessee

Tennessee largely bases its Rules of Professional Conduct on the Model Rules,⁴⁹ and Tennessee Rule of Professional Conduct 1.6

46. Model Rule 4.1(b) directs disclosure when necessary to avoid assisting the client in a crime or fraud. MODEL RULES OF PROF'L CONDUCT r. 4.1(b) (AM. BAR ASS'N 2012). The objectives of Model Rule 4.1(b) parallel those of Model Rules 1.6(b)(2)–(3), which direct disclosure to prevent or mitigate client crime or fraud. Compare MODEL RULES OF PROF'L CONDUCT r. 1.6(b)(2)–(3) (AM. BAR ASS'N 2012), with MODEL RULES OF PROF'L CONDUCT r. 4.1(b) (AM. BAR ASS'N 2012). But the triggering of Model Rule 4.1(b) turns the permissive exceptions under Model Rule 1.6(b) into mandatory exceptions. See MODEL RULES OF PROF'L CONDUCT r. 4.1(b) (AM. BAR ASS'N 2012).

47. MODEL RULES OF PROF'L CONDUCT r. 3.3(a)(3), (b)–(c) (AM. BAR ASS'N 2012).

48. See VARIATIONS OF RULE 1.6, *supra* note 1.

49. See *Hundreds of Attorneys Involved in Development of Rules of Professional Conduct*, TENN. BAR ASS'N, <http://www.tba.org/resource/hundreds-of-attorneys-involved-in-development-of-rules-of-professional-conduct> (last visited Feb. 24, 2018) (outlining the history of the development of Tennessee's Rules of Professional Conduct). See also *Petition of the Tennessee Bar Association for the Adoption of Proposed Rules of Professional Conduct and Supporting Memorandum*, TENN. BAR ASS'N (2000) [hereinafter *Petition of the Tennessee Bar*], http://www.tba.org/sites/default/files/TBRPCPet_0.pdf (discussing Tennessee's development alongside of the ABA Model Code); TENN. BAR ASS'N, TENNESSEE RULES OF PROF'L CONDUCT 1 (2015 ed.) (explaining that the process of revising the professional rules in Tennessee was a response to the need for Tennessee's ethical rules to more closely equate to the ABA Model Rules); CTR. FOR PROF'L

includes all of the disclosure exceptions listed in Model Rule 1.6.⁵⁰ But Tennessee's rule packages the exceptions differently: RPC 1.6 not only permits disclosure of client confidences in seven scenarios⁵¹ but also mandates disclosure in three scenarios.⁵² This evolution of Tennessee's confidentiality rule reflects a balancing of interests that has shifted dramatically over time, resulting in stricter exceptions for disclosure.

1. From the Model Code to the Model Rules

Prior to an overhaul in 2002, Tennessee structured its ethical rules in the likeness of the ABA Model Code, implementing a confidentiality rule identical to DR 4-101.⁵³ Tennessee did not change its rules in 1983 when the ABA first published the Model Rules but waited until 2002 to tackle major revisions.⁵⁴ Tennessee's more than thirty year adherence to rules mirroring the Model Code left the state far behind the majority of jurisdictions that were already following the Model Rules and forced Tennessee lawyers to abide by an outdated code of conduct during a time in which the practice of law had changed

RESPONSIBILITY, STATE ADOPTION OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, *supra* note 8.

50. *Compare* TENN. RULES OF PROF'L CONDUCT R. 1.6(b)–(c), with MODEL RULES OF PROF'L CONDUCT r. 1.6(b) (AM. BAR ASS'N 2012).

51. TENN. RULES OF PROF'L CONDUCT R. 1.6(b) (permitting disclosure of confidential information for the purposes of: preventing crime or fraud; mitigating harm caused by fraudulent conduct in which the lawyer's services are implicated; securing advice about compliance with the professional rules; raising a claim or defense in a controversy with the client; and rooting out conflicts of interest during a change of employment).

52. TENN. RULES OF PROF'L CONDUCT R. 1.6(c)(1)–(3) (*requiring* disclosure of confidential information for the purposes of: preventing substantial bodily harm or death; complying with a court order or other law; or complying with Rule of Professional Conduct 3.3 and Rule of Professional Conduct 4.1).

53. *See* Kassie Hess Wiley, *To Disclose or Not to Disclose, That Was the Question—Until Now: Tennessee's New Rule of Professional Conduct 1.6 Mandates Disclosure of Confidential Client Information to Prevent Physical Injury or Death to Third Parties*, 34 U. MEM. L. REV. 941, 965 n.153 (2004) (quoting Tennessee's version of the Model Code adopted in 1970).

54. *See* *Hundreds of Attorneys Involved in Development of Rules of Professional Conduct*, TENN. BAR ASS'N, *supra* note 49 (outlining the history of the development of Tennessee's Rules of Professional Conduct).

significantly.⁵⁵ The Tennessee Bar Association formed the Standards Committee in 1995 to address the need for a comprehensive update of Tennessee's ethical rules.⁵⁶ The Standards Committee specifically sought to promote uniformity and clarity by conforming to the Model Rules, but it also tried to preserve certain traditions and aspects of law unique to Tennessee.⁵⁷

The Standards Committee initially drafted Tennessee RPC 1.6 to be like the Model Rule, authorizing disclosure of confidential information only through permissive exceptions.⁵⁸ In a final draft of Tennessee's 2002 proposed rules, RPC 1.6(b)(1)–(2) merely permitted a lawyer to disclose confidential information to prevent reasonably certain harm or death or to prevent a client from committing a crime.⁵⁹ The Standards Committee received comments to these particular provisions from United States Attorneys and the Tennessee District Attorneys General Conference, asking that the Standards Committee make the disclosure exceptions mandatory.⁶⁰ The Standards Committee initially opposed these requests, wishing to maintain a discretionary set of exceptions,⁶¹ but when the Tennessee Supreme Court enacted the final version of the rules in 2003, the Standards Committee had altered RPC 1.6(c) to require disclosure of confidential information under three exceptions.⁶²

55. *See Petition of the Tennessee Bar*, *supra* note 49 (“As of the date of the filing of this petition, some 44 jurisdictions have now adopted a version of the ABA Model Rules. Tennessee’s failure to follow this path has left Tennessee with a set of ethics rules that are, quite simply, outdated and much in need of improvement.”).

56. *See id.*

57. *Id.*

58. TENN. RULES OF PROF’L CONDUCT R. 1.6(c) (2002) (including mandatory disclosure exceptions as opposed to purely permissive disclosure exceptions).

59. *See* COMM. FOR THE STUDY OF STANDARDS OF PROF’L CONDUCT, TENN. BAR ASS’N, REVISED FINAL REPORT: REVISED COMMITTEE DRAFT OF PROPOSED TENNESSEE RULES OF PROFESSIONAL CONDUCT 30 (2001), http://www.tba.org/sites/default/files/newfinalred-b_0.pdf.

60. *See id.* at 37.

61. *See id.*

62. *See* TENN. RULES OF PROF’L CONDUCT R. 1.6(c) (2002) (requiring disclosure of confidential information to prevent reasonably certain harm or death, to comply with a court order, or to comply with another ethical rule or law).

2. Current Exceptions to Tennessee RPC 1.6

Tennessee's confidentiality rule is expansive, including each of the seven exceptions the Model Rule sets out.⁶³ Before a very recent change to RPC 1.6, Tennessee's permissive exceptions sanctioned disclosure necessary to: prevent client crime or fraud;⁶⁴ mitigate or rectify client crime or fraud that has already occurred and in which the client used the lawyer's services;⁶⁵ seek advice on compliance with the rules of conduct;⁶⁶ and aid a lawyer in establishing or responding to a claim regarding the lawyer's representation of a particular client.⁶⁷ After soliciting and considering comments throughout 2016, the Tennessee Supreme Court enacted an amendment to RPC 1.6 creating an additional permissive exception approving disclosure of confidential information in the pursuit of uncovering conflicts of interest during a change in the circumstances of a lawyer's employment.⁶⁸ Tennessee is, therefore, still expanding the list of exceptions under which a lawyer may choose to disclose a client's confidential information without consent,⁶⁹ continuing to follow (for the most part) the trend that the Model Rules set.

63. Compare TENN. RULES OF PROF'L CONDUCT R. 1.6(b)–(c), with MODEL RULES OF PROF'L CONDUCT r. 1.6(b) (AM. BAR ASS'N 2012).

64. TENN. RULES OF PROF'L CONDUCT R. 1.6(b)(1)–(2) (2011) (amended 2017).

65. TENN. RULES OF PROF'L CONDUCT R. 1.6(b)(3) (2011) (amended 2017).

66. TENN. RULES OF PROF'L CONDUCT R. 1.6(b)(4) (2011) (amended 2017).

67. TENN. RULES OF PROF'L CONDUCT R. 1.6(b)(5) (2011) (amended 2017).

68. See TENN. RULES OF PROF'L CONDUCT R. 1.6(b)(6); *In re* Petition to Amend Selected Provisions of Tennessee Supreme Court Rule 8, No. ADM2016-01382, 2016 Tenn. LEXIS 529, at *43 (Tenn. Aug. 18, 2016). The 2017 amendment expanded the list of permissive exceptions included in RPC 1.6(b), allowing disclosure "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." TENN. RULES OF PROF'L CONDUCT R. 1.6(b)(6).

69. Both Model Rule 1.6 and Tennessee RPC 1.6 include, as the prime provision of subsection (a), language that prohibits disclosing confidential information unless it is authorized by the permissive or mandatory exceptions, or authorized by client consent. See MODEL RULES OF PROF'L CONDUCT r. 1.6(a) (AM. BAR ASS'N 2012); TENN. RULES OF PROF'L CONDUCT R. 1.6(a). Even when a permissive or mandatory disclosure exception is triggered, a lawyer is encouraged (although not required) to discuss a desire to disclose information with the client in

Tennessee's significant course change from the Model Rules is reflected in RPC 1.6(c), which expressly demands disclosure under certain circumstances.⁷⁰ Subsection (1) of RPC 1.6(c) requires lawyers to disclose confidential information to prevent reasonably certain death or substantial bodily harm.⁷¹ Comment 17a to RPC 1.6 explains that Rule 1.6(c)(1) "recognizes the overriding value of life and physical integrity,"⁷² compromising between client rights and the rights of others. RPC 1.6(c)(2) requires disclosure under court order,⁷³ and RPC 1.6(c)(3) requires disclosure "to comply with RPC 3.3, 4.1, or other law."⁷⁴ Unlike the fully permissive Model Rule, which lets lawyers at least consider whether to disclose, lawyers in Tennessee have no choice but to disclose if any of the exceptions under subsection (c) apply.⁷⁵ There is no explicit companion obligation for Tennessee lawyers to make clients aware of these potentialities.⁷⁶

order to gain consent. *See* TENN. RULES OF PROF'L CONDUCT R. 1.6 cmt. 15 ("Where practicable, the lawyer should first seek to persuade the client to take suitable action to obviate the need for disclosure."). This rests on the lawyer's general obligation to try persuading the client to abstain from the unethical conduct or to disclose information when the conduct has already occurred. *See id.*

70. TENN. RULES OF PROF'L CONDUCT R. 1.6(c).

71. TENN. RULES OF PROF'L CONDUCT R. 1.6(c)(1). Comment 17a of RPC 1.6 defines the scope and standard of this exception by explaining that "substantial bodily harm" includes "life-threatening and debilitating illnesses and the consequences of child sexual abuse." TENN. RULES OF PROF'L CONDUCT R. 1.6 cmt. 17a. The comment further explains that harm will be "reasonably certain to occur if such injuries will be suffered imminently or if there is a present and substantial threat that a person will suffer such injuries at a later date if the lawyer fails to take action necessary to eliminate the threat." *See id.*

72. TENN. RULES OF PROF'L CONDUCT R. 1.6 cmt. 17a.

73. TENN. RULES OF PROF'L CONDUCT R. 1.6(c)(2).

74. TENN. RULES OF PROF'L CONDUCT R. 1.6(c)(3).

75. *See* TENN. RULES OF PROF'L CONDUCT R. 1.6(c). *See also* VARIATIONS OF RULE 1.6, *supra* note 1.

76. There is no explicit requirement to inform clients about the exceptions to confidentiality, but there is an argument that RPC 1.4, governing communication, implicitly requires Tennessee lawyers to explain confidentiality to clients as a way of keeping the client reasonably informed. TENN. RULES OF PROF'L CONDUCT R. 1.4. This is true for the Model Rule as well; no explicit provision demands that lawyers explain confidentiality or its exceptions to clients, but Model Rule 1.4 can be seen as an implicit command to do so. *See* MODEL RULES OF PROF'L CONDUCT r. 1.4 (AM. BAR ASS'N 2012). The relatedness of these rules is discussed in more detail in

Most lawyers in Tennessee do not face daily dilemmas in which they must choose whether to breach client confidentiality or maintain a client's privacy.⁷⁷ But as the confidentiality rule continues crumbling under the weight of more and more exceptions, the restrictions on what a client can safely share with his or her lawyer continue expanding. Although many of the disclosure exceptions under Tennessee RPC 1.6 have developed to serve a greater good, the rules should balance these prudential considerations with a client's right to advance notice of risks. The only way for a lawyer to protect client confidentiality while still abiding by the ethical obligation to report certain information is to ensure that clients understand the exceptions so that they can consider the consequences of disclosure when deciding what information to share.

III. THE TRUTH ABOUT CONFIDENTIALITY AND WHY IT REMAINS HIDDEN

Clients fundamentally misunderstand lawyer-client confidentiality, and a small body of empirical research and anecdotal data makes the need to deal with this problem even more compelling. Studies have shown (and typical lawyer and client attitudes suggest) that clients are almost always in the dark about confidentiality.⁷⁸ More strikingly, most lawyers do not discuss confidentiality with their clients,⁷⁹ and those few who do overstate its breadth.⁸⁰

subsequent sections of this note. *See infra* Section IV.B (exploring the connection between RPC 1.4 and RPC 1.6).

77. *See* Subin, *supra* note 13, at 1096 (1985) (discussing the tension between confidentiality exceptions and client interests and explaining that, although lawyers likely do face situations where the need to disclose confidential information is pressing, they do not face such situations every day).

78. *See* Levin, *supra* note 3, at 107 (reporting the results of a survey distributed to New Jersey lawyers regarding confidentiality and the mandatory duty to prevent third-party harm or death); Zacharias, *supra* note 3, at 352 (1989) (reporting on the results of a survey distributed to lawyers in New York regarding the confidentiality rules in practice).

79. Zacharias, *supra* note 3, at 382 (“Perhaps the most striking revelation of the Tompkins County survey is that lawyers overwhelmingly do not tell clients of confidentiality rules.”).

80. *Id.* at 386 (“[I]f lawyers inform their clients about confidentiality at all, they overstate its scope.”).

A. The Lawyer's Perspective

Fred Zacharias conducted the first notable study to focus on common conceptions about confidentiality in the American legal system in 1989.⁸¹ Zacharias explored the connection between client misunderstanding of confidentiality and the reluctance of lawyers to discuss confidentiality.⁸² Although the samples of lawyers and clients were small, with 63 practicing lawyers and 105 laypersons participating,⁸³ the responses mostly indicated that clients are generally unaware of confidentiality exceptions, in large part because lawyers are not informing them.⁸⁴

In surveying practitioners, Zacharias found that lawyers “overwhelmingly do not tell clients of confidentiality rules,” with 22.6% responding that they “almost never” talked to clients about confidentiality and 59.7% responding that they discussed confidentiality in less than 50% of their cases.⁸⁵ Zacharias pointed to familiar reasons why lawyers prefer to avoid discussing confidentiality with clients—attempting to explain confidentiality may confuse clients, and more importantly, may cause client distrust.⁸⁶ Data indicating that lawyers occasionally discuss confidentiality with clients reflects these hesitations: 55.7% confessed that they only did so if the client asked or a confidentiality issue arose.⁸⁷ Although this suggests that some lawyers were trying to be forthcoming about confidentiality, Zacharias nevertheless found that those lawyers who did inform their clients usually overstated the scope of

81. *See id.* at 352.

82. *See id.*

83. *See id.* at 379.

84. *See generally id.*

85. *See id.* at 382.

86. *See id.* at 387 (“One can explain these figures on a practical basis. Describing confidentiality in detail might confuse clients. Telling clients of exceptions that are unlikely to come into play would deter disclosures.”). Zacharias noted that explaining confidentiality may be counterproductive and that some lawyers will opt to mislead the client when encouraging the client to share information. *Id.* Zacharias also found that 66.1% of lawyers surveyed preferred that the confidentiality rules remain as they are based on a desire to encourage full communication between lawyer and client. *See id.* at 389.

87. *See id.* at 382.

confidentiality.⁸⁸ Of the lawyer respondents who discussed confidentiality with clients in less than 50% of their cases, 84.6% reported that they merely said “all communications are confidential.”⁸⁹ Zacharias also found that 64.8% of all lawyers surveyed believed that most of their clients did not understand the confidentiality rules.⁹⁰ These results exemplify the issue of clients’ misunderstanding of confidentiality: clients tend to think that they have absolute privacy when communicating with lawyers, and lawyers are either not explaining that clients have it wrong or, worse, are fostering clients’ false beliefs that confidentiality covers everything.

In 1994, scholar Leslie Levin added to Zacharias’s empirical work, coming to similar conclusions about lawyer hesitation to inform clients of confidentiality.⁹¹ Levin conducted a survey primarily focusing on the effects of a mandatory disclosure exception to prevent bodily harm or death.⁹² Levin sent the survey to 1,950 lawyers, yielding a response rate of 40%, or 776 practicing lawyers.⁹³ Although Levin’s study was narrower in focus than Zacharias’s 1989 study,⁹⁴ the received responses to general confidentiality questions were consistent with Zacharias’s data.

Levin found that, although most lawyer respondents discussed confidentiality with some of their clients, they did not discuss the *exceptions* to confidentiality.⁹⁵ Over 65% of lawyers responded that they had not explained the disclosure exceptions to their clients within the past year.⁹⁶ Another 23% of lawyers claimed that they had explained confidentiality exceptions, but in only 10% of their cases.⁹⁷ Of the lawyers responding that they had discussed confidentiality

88. *See id.* at 386.

89. *Id.* at 386 n.181. This identifies the primary issue—even when lawyers do discuss confidentiality with clients, they do not actually *explain* how the rule and its exceptions operate.

90. *Id.* at 387.

91. *See Levin, supra* note 3.

92. *See id.* at 84.

93. *Id.* at 107–10, 110 n.118.

94. Levin did not survey clients, but instead focused her inquiry on lawyers alone. *See id.* at 110.

95. *Id.* at 120.

96. *Id.* at 121.

97. *Id.*

exceptions, 42% did so only when they believed that the client was about to disclose harmful information.⁹⁸

Levin's survey specifically asked lawyers whether they had been in situations where they reasonably believed a client was going to harm a third party (whether physically or financially), and 190 lawyers reported that they had encountered such a situation, with many of those saying they had encountered such a situation more than once.⁹⁹ Unsurprisingly, 60% of the lawyers who had cause to believe that a client would physically harm or kill someone and 80% who had cause to believe that a client would do serious financial harm based those beliefs not on a hunch, but on direct oral evidence provided by the client.¹⁰⁰ A further 20% of lawyers surveyed expressly threatened to disclose their clients' information.¹⁰¹ These results signal the issue—clients feel comfortable sharing damning information based on the belief that confidentiality is a broad safeguard, yet their lawyers know this to be untrue and often only discuss confidentiality exceptions once the damage has been done.

B. What Do Clients Think About Confidentiality?

The information produced by Levin's and Zacharias's research regarding confidentiality as seen from the lawyer's point of view is consistent with the information gathered regarding the perspective of clients. In his study, Zacharias gathered a great deal of data regarding client perceptions of confidentiality, reporting that 42.4% of clients who knew of the obligation of lawyer-client confidentiality believed that it provided impenetrable protection of their information.¹⁰² When asked whether lawyers had informed clients about confidentiality,

98. *Id.* at 124. Levin found that, of the 10% of surveyed lawyers who explained confidentiality exceptions to their clients, 25% had explained the rules at the initial meeting, while 42% waited to explain until a discussion became necessary. *See id.*

99. *Id.* at 112–13.

100. *Id.* at 115.

101. *Id.* at 117.

102. Zacharias, *supra* note 3, at 381–83 (noting that the study revealed “widespread misunderstanding among clients as to the nature of confidentiality and its scope,” and that at least half of those clients who relied on the guarantee of confidentiality “wrongly assumed that the governing standard was absolute”).

72.9% of clients surveyed answered that their lawyers had never discussed confidentiality.¹⁰³ Interestingly, however, 79.1% of clients responded that they “[knew] of confidentiality nonetheless.”¹⁰⁴ Zacharias suggested that clients tend to trust their lawyers because of “the general notion of the lawyer as a discreet professional, or the strictness of confidentiality rules.”¹⁰⁵ But where does this “general notion” of discreet lawyers and strict confidentiality come from? Zacharias emphasized two points: (1) lawyers either encourage or allow clients to hold on to incorrect ideas about confidentiality so that they can elicit as much information from clients as possible;¹⁰⁶ and (2) because clients get most of their information about confidentiality from uninformed third parties or things they see in the media, they develop an unrealistic view of how confidentiality operates.¹⁰⁷ Because lawyers do not talk to clients about confidentiality, clients have no choice but to rely on their own inclinations or other, often misinformed sources to understand the concept.

Despite clients’ misconceptions about confidentiality, Zacharias’s study indicated that most clients nevertheless believe that a lawyer *should* disclose information in certain circumstances.¹⁰⁸ For example, when asked whether a lawyer should disclose confidential information to locate a kidnap victim, 84.1% of clients answered in the

103. *Id.* at 382–83.

104. *Id.* at 383.

105. *Id.* at 386.

106. *Id.* at 381 (“[T]his exaggeration of confidentiality may well have been prompted by common practices of the local attorneys. To the extent lawyers manipulate clients into confiding based on a mistaken view of confidentiality, that undercuts another of confidentiality’s basic rationales: that confidentiality helps clients make informed choices and thus enhances their dignity and ‘autonomy.’”).

107. Of the 79.1% of clients who responded that they knew about confidentiality despite not being informed by their lawyers, 41% could not identify how they knew about confidentiality, and 32.1% reported that they learned about confidentiality from “friends, books, or television.” *Id.* at 383. Zacharias elaborated on the problems that arise when clients form their understanding of confidentiality without the aid of a legal professional, noting that “well-informed third-party sources are likely to report local rules inaccurately,” and that media projected to a national audience “cannot differentiate among the formulations in the varying jurisdictions.” *Id.*

108. *Id.* at 394.

affirmative.¹⁰⁹ When asked whether a lawyer should disclose information to protect a fatally ill adversary, 91.2% of clients surveyed answered in the affirmative.¹¹⁰ When these same clients were asked whether disclosure under such circumstances would make them less willing to use a lawyer's services, a mere 10.1% answered that it would indeed negatively affect their willingness to engage a lawyer.¹¹¹ These responses highlight a key point in the confidentiality debate: whether clients believe confidentiality to be absolute, most clients feel that lawyers have an obligation to disclose information in some situations, and the likelihood that clients will be less willing to share information with a lawyer if informed about confidentiality is quite low. This inference supports the argument that lawyers should be explaining confidentiality exceptions to clients as a way to build trust within the lawyer-client relationship without fearing that doing so will lead clients to withhold information.

When combined, Zacharias's and Levin's empirical works reveal a troubling reality: if clients do not understand confidentiality, then they are not truly protected when communicating with their lawyers. Lawyers, in turn, are withholding this fact from clients unless the nature of the client's information triggers a disclosure exception. But if a client's information triggers a disclosure exception, an explanation of confidentiality after the fact will not protect the client. This failure to correct clients' wrongly held beliefs at the outset undermines the sanctity of the lawyer-client relationship and thwarts the purpose of lawyer-client confidentiality.

IV. THE IMPORTANCE OF CONFIDENTIALITY & THE TENNESSEE LAWYER'S OBLIGATION TO HONOR IT

Clients come to lawyers when they need help that they cannot receive from anyone other than a legal professional, often when they are most financially, emotionally, and/or physically vulnerable.¹¹²

109. *Id.* tbl.5.

110. *Id.*

111. *Id.*

112. *See* Wald, *supra* note 4, at 753 (“[W]hereas the lawyer enters the relationship to do her job—providing legal services—the client enters it to pursue important values and interests. Perhaps most tellingly, the disparity within the relationship is a consequence of the circumstances under which it is created: a client

Lawyers have an ethical duty to protect and pursue their clients' interests with diligence, honesty, and zealous advocacy.¹¹³ With those obligations in mind, only trust can serve as the foundation of the lawyer-client relationship, and a clear understanding that the lawyer will keep the client's information confidential fosters that trust.¹¹⁴ Situations in which a lawyer may violate a client's trust by disclosing information to comply with a rule-based obligation are not daily occurrences (although they likely will arise in all lawyers' practices at some point),¹¹⁵ so the exceptions to strict confidentiality will not play a major role in most legal transactions. Despite these circumstances, however, the exceptions to confidentiality may become relevant at any time, which makes the need to correct a client's fundamental misunderstanding of confidentiality likewise relevant at all times.

The disclosure exceptions in Tennessee's confidentiality rule pose threats to an uninformed or misinformed client and to the integrity of the lawyer-client relationship; this alone justifies the argument that lawyers have a duty to explain confidentiality exceptions to clients.

comes to see an attorney when he faces a problem and when he needs help."); Wiley, *supra* note 53, at 970 (explaining that clients come to lawyers in pursuit of advocacy and defense).

113. See MODEL RULES OF PROF'L CONDUCT pmbi. § 2 (AM. BAR ASS'N 2012) ("As a representative of clients, a lawyer performs various functions. As advisor, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications. As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system. As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others. As an evaluator, a lawyer acts by examining a client's legal affairs and reporting about them to the client or to others."). The preamble to Tennessee's Rules of Professional Conduct contains an identical provision to section 2 of the preamble to the Model Rules of Professional Conduct. See TENN. RULES OF PROF'L CONDUCT R. pmbi. § 3.

114. See MODEL RULES OF PROF'L CONDUCT r. 1.6 cmt. 2 (AM. BAR ASS'N 2012) ("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.").

115. Subin, *supra* note 13, at 1096 ("Few lawyers face problems like these on a daily basis, but most active practitioners probably encounter them, if often in less cataclysmic form, with some regularity.").

But Tennessee lawyers must also follow Tennessee Rule of Professional Conduct 1.4, the rule governing communication, and that rule arguably requires them to explain confidentiality to clients so that clients may make informed decisions.¹¹⁶ If a client is informed about confidentiality and its exceptions, the likelihood of a lawyer harming the relationship through unexpected disclosure declines significantly.

A. Why Should Tennessee Lawyers Explain Confidentiality?

Although a client will feel surprised and betrayed by disclosure under a mandatory or permissive exception, the stakes are higher when the lawyer lacks the authority to consider whether to disclose. Tennessee lawyers who come to possess the type of potentially dangerous information specified in RPC 1.6(c) are required to disclose, despite knowing that it will negatively impact, if not destroy, the lawyer-client relationship.¹¹⁷ While this may compromise the lawyer's sense of duty to a client, the lawyer can at least take refuge in the knowledge that the choice does not belong to him or her when information he or she learns invokes a mandatory exception. But what about the client? Reconciling the need to protect third-party and judicial interests with the client's need for confidentiality and trust within the lawyer-client relationship requires full communication from day one.¹¹⁸ Tennessee lawyers can only prevent surprising their clients with a loss of confidence if their clients are aware of the possibilities of disclosure before sharing information.

Those who prefer strict confidentiality rules provide a counterargument: whereas full and frank communication between the lawyer and client can improve the effectiveness of representation,¹¹⁹ explaining that confidentiality is limited could undermine

116. See TENN. RULES OF PROF'L CONDUCT R. 1.4.

117. TENN. RULES OF PROF'L CONDUCT R. 1.6(c) (requiring disclosure of confidential information to prevent substantial bodily harm or death, to comply with a court order or other law, or to comply with Rule of Professional Conduct 3.3 and 4.1).

118. See Wiley, *supra* note 53, at 971 (“[A] client should ask the attorney about disclosure before hiring the attorney in order to eliminate surprises.”).

119. See TENN. RULES OF PROF'L CONDUCT R. 1.6 cmt. 2 (explaining that the client is encouraged to “seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter”).

representation by discouraging the client from freely disclosing facts to the lawyer. In short, if clients know that some of their information may not be protected, they will not divulge enough information to achieve effective representation.¹²⁰ This rationale fails for several client-interest-based reasons. First, there is evidence that clients will likely be forthcoming with information despite the risks of disclosure, primarily because they need legal assistance and generally trust their lawyers.¹²¹ Second, although keeping certain information from his or her lawyer may limit a client's representation, the client still has the right to notice about the possibility of disclosure and should have the opportunity to measure that risk against the benefits of sharing information with counsel.¹²² Lastly, lawyers should not

120. See Green, *supra* note 13, at 623 (“The requirement that lawyers keep client information confidential derives from the belief that in order to have an effective attorney-client relationship, a client must feel comfortable that the lawyer will keep the client’s information in confidence.”); Subin, *supra* note 13, at 1096 (“Without confidentiality, it is argued, clients would be reluctant to communicate with their lawyers, and this reluctance would prevent lawyers from protecting clients’ rights. And because individual rights can be fully protected only if lawyers guide the individual through the legal process, confidentiality is said to be fundamentally important to preserving individual autonomy.”); Zacharias, *supra* note 3, at 352–53 (“The rules stem from common assumptions about our legal system: clients won’t confide in lawyers without confidentiality; lawyers need it to represent clients effectively.”).

121. Knowing that clients will generally be forthcoming with information even if confidentiality is absent begs the question—if clients are willing to tell all whether confidentiality even exists, then why *do* confidentiality rules matter? Most rules and many principles are imperfect. Just because lawyers are obligated to maintain confidentiality and just because clients expect it, does not mean that clients will be unwilling to throw caution to the wind and disclose information in many circumstances. Clients seek out lawyers because they are already in a needy position. The data suggesting that clients will disclose regardless of confidentiality does not show a lack of concern for discretion, but shows only how clients are at the mercy of lawyers to begin with, so much so, that they will share difficult information in the pursuit of a resolution to their problems because their lawyer tells them to.

122. See Green & Zacharias, *supra* note 13, at 286 (arguing that, because the client’s interests are solely affected by confidentiality exceptions, lawyers should divulge to clients whether and under what circumstances they will disclose confidential information); Levin, *supra* note 3, at 145 (“When mandatory disclosure rules are adopted, it should be with the understanding that clients are entitled to know about these rules before they speak about future wrongdoing.”); Sobelson, *supra* note 10, at 774 (“[T]he lawyer has a duty to inform his client of these important rights.

paternalistically safeguard the interests of their clients by making all-important decisions for them.¹²³

The need to explain confidentiality to a client far outweighs the risk of a client curtailing what information will be provided. Whether or not clients are commonly in a position of need, if they understand that there are exceptions to confidentiality, any choice to withhold information that may be important to the representation belongs to the client.¹²⁴ This places more responsibility in the client's hands, increasing client independence and decreasing the potential for destruction of the relationship through operation of the confidentiality exceptions.

B. Interpreting RPC 1.4 to Require Explanation of RPC 1.6

There is a related argument that Tennessee RPC 1.4, the rule governing communication, implicitly requires lawyers to explain confidentiality and its exceptions to clients. This rule directs lawyers to keep clients reasonably informed on matters relating to the representation, reading, in part, as follows:

(a) A lawyer shall:

(1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in RPC 1.0(e), is required by these Rules;

(2) reasonably consult with the client about the means by which the client's objectives are to be accomplished;

....

The fact that the information is complicated or frightening is no excuse for hiding it.”).

123. See Klinka & Pearce, *supra* note 4, at 181 (“By withholding an explanation about confidentiality rules from clients, lawyers assume down the road that they will be in a morally superior position to make a decision as to whether a client’s confidential communication should be shared with others.”).

124. See Pizzimenti, *supra* note 10, at 484 (“[S]o long as the client understands that the lawyer may be hampered by a lack of information, the choice of whether to disclose belongs to the client.”).

(5) consult with the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law.

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.¹²⁵

The provisions outlined in RPC 1.4 directly point to the need to inform clients about the limitations of confidentiality.

Tennessee RPC 1.4(a)(1) instructs lawyers to educate clients on matters that require informed consent.¹²⁶ “Informed consent,” as defined by RPC 1.0(e), requires lawyers to communicate “adequate information and explanation about the *material risks of* and reasonably available alternatives to the proposed course of conduct.”¹²⁷ Although RPC 1.6 does not explicitly direct a lawyer to secure a client’s informed consent before disclosing under any exception,¹²⁸ the mere existence of the exceptions to confidentiality presents a “material risk” to the “proposed course of conduct”¹²⁹ and the lawyer-client relationship as a whole. This seemingly brings exceptions to confidentiality under the umbrella of informed consent.¹³⁰

Further, Tennessee RPC 1.4(a)(2), RPC 1.4(a)(5), and RPC 1.4(b) implicitly address the operation of RPC 1.6. RPC 1.4(a)(2) instructs lawyers to discuss the means and objectives of the representation with clients, which arguably includes the use of

125. TENN. RULES OF PROF’L CONDUCT R. 1.4.

126. See TENN. RULES OF PROF’L CONDUCT R. 1.4(a)(1).

127. TENN. RULES OF PROF’L CONDUCT R. 1.0(e) (emphasis added).

128. See TENN. RULES OF PROF’L CONDUCT R. 1.6.

129. See TENN. RULES OF PROF’L CONDUCT R. 1.0(e).

130. Klinka & Pearce, *supra* note 4, at 175–77 (arguing that Model Rule 1.4’s duty to inform the client about matters material to decisionmaking translates into a duty to explain confidentiality and its exceptions to clients); Pizzimenti, *supra* note 10, at 472 (suggesting that explanation about the confidentiality rule is precisely the kind of communication required under Model Rule 1.4 to enable a client to make informed decisions); Sobelson, *supra* note 10, at 707–08 (arguing that the duty to communicate under Model Rule 1.4 extends to a discussion about confidentiality, which is required for the lawyer-client relationship to “work the way it should”).

information.¹³¹ RPC 1.4(a)(5), discussing limitations on a lawyer's conduct,¹³² can be seen as relating to the exceptions identified by RPC 1.6(b)(1)–(3), which allow disclosure of confidential information to prevent client crime or fraud.¹³³ RPC 1.4(b), a catchall provision, requires lawyers to explain all matters in a way that ensures clients can make “informed decisions regarding the representation.”¹³⁴ This provision is the most compelling with regard to confidentiality: because disclosure of confidential information under an RPC 1.6 exception is likely to actually or constructively end the lawyer-client relationship, a client cannot make “informed decisions regarding the representation”¹³⁵ without explanation of the RPC 1.6 disclosure exceptions.

Professor Lee Pizzimenti has supported the idea that confidentiality explanations are integral to truly informed consent. She stressed that “[a]ttorneys may deprive those clients of information critical to intelligent decisionmaking if they fail to apprise clients of [confidentiality] exceptions, thereby limiting a client's ability to choose rationally whether to confide in counsel.”¹³⁶ Pizzimenti argued that a failure to explain the duty of confidentiality to clients at the beginning of the relationship should result in civil liability or at least disciplinary action.¹³⁷ Pizzimenti also addressed a counterargument that deciding whether to disclose client information is a “means” not “ends” decision, and that, because the lawyer controls the means, such a decision should remain with the lawyer.¹³⁸ Even under this view, Pizzimenti proffered that RPC 1.4(a)(2) requires a lawyer to “reasonably consult” with a client about the means he or she uses,¹³⁹ which relates to the information the client shares under RPC 1.6.

131. TENN. RULES OF PROF'L CONDUCT R. 1.4(a)(2).

132. TENN. RULES OF PROF'L CONDUCT R. 1.4(a)(5).

133. TENN. RULES OF PROF'L CONDUCT R. 1.6(b)(1)–(3).

134. TENN. RULES OF PROF'L CONDUCT R. 1.4(b).

135. *Id.*

136. Pizzimenti, *supra* note 10, at 450.

137. *Id.* at 489.

138. *See id.* at 473 (“The classic formulation regarding allocation of decisionmaking functions calls for the lawyer to make ‘procedural’ or ‘tactical’ decisions while the client retains authority over ‘substantive’ issues, such as accepting or rejecting settlements or plea bargains.”).

139. *See* TENN. RULES OF PROF'L CONDUCT R. 1.4(a)(2).

The logical application of RPC 1.4 to RPC 1.6 strongly supports the idea that explanations of confidentiality and its limitations are necessary. Confidentiality flows through every part of the representation, and it is essential to all material decisions a client makes and the trust that a client places in his or her lawyer. Lawyers guide these decisions with their advice, and therefore lawyers have an implicit obligation to explain to clients how the confidentiality exceptions operate.

V. CURRENT SOLUTIONS AND A BETTER CONFIDENTIALITY EXPLANATION

Whether a lawyer practices in a state with permissive-only exceptions or one of the twelve states that include mandatory-disclosure provisions,¹⁴⁰ the need to inform clients of the limitations of confidentiality remains constant. Commentators diverge about the best way to inform a client of the confidentiality rules, but most agree that lawyers should explain at the outset for the client to fully appreciate his or her rights with regard to information shared during the representation. The voluntary nature of these approaches is what renders them moot; lawyers are not going to explain confidentiality to clients unless a rule obligates them to do so.

A. *What's Being Done to Curb the Problem?*

The most common suggestions for increasing awareness all rest on one premise—lawyers should explain confidentiality because it is the right thing to do.¹⁴¹ Supporters of this idea suggest that lawyers

140. Although the provisions vary, each of the twelve states that require disclosure under certain circumstances have a provision protecting individuals from substantial bodily harm or death. *See supra* note 6 (listing states with mandatory disclosure provisions); *see also* VARIATIONS OF RULE 1.6, *supra* note 1.

141. *See* Green & Zacharias, *supra* note 13, at 286 (explaining that, because it is solely the client's interests which are impacted when confidential information is disclosed under an exception, the lawyer should take steps to inform the client of all instances in which the lawyer will disclose); Klinka & Pearce, *supra* note 4, at 180 (arguing that, when lawyers fail to explain the exceptions to confidentiality, they discount the possibility of a strong lawyer-client relationship based on trust); Levin, *supra* note 3, at 97 ("It is widely agreed that clients are entitled to know about exceptions to client confidentiality rules in order to make informed decisions about

explain to clients upon the first meeting that confidentiality is not absolute, and then provide more detail as the client inquires, ensuring that the client adequately understands the risks to his or her legal position before disclosing any information that may fall under an exception.¹⁴² One could classify this approach as a general duty to educate clients or as part of the obligation of obtaining informed consent for material decisions. Proponents of explanation disagree about the amount of information that lawyers should provide up front; some push for a very basic explanation that will inform but not overwhelm clients, and some push for a multi-page disclaimer that certainly covers all possibilities for disclosure under the confidentiality rule.¹⁴³ Regardless of the amount of information given, those who argue in favor of explanation encourage creating an open dialogue

whether to disclose information to their counsel.”); Sobelson, *supra* note 10, at 708 (“If confidentiality really does increase the attorney’s access to information, then the obligation to explain ‘confidentiality’ to the client is not only required by fairness, it is necessary to make the attorney-client relationship work the way it should.”).

142. See Klinka & Pearce, *supra* note 4, at 187 (suggesting that confidentiality be explained openly and honestly, beginning with the first conversation between the lawyer and the client); Sobelson, *supra* note 10, at 703 (explaining that clients should be informed of the limits of confidentiality during the initial interview to ensure that “they can make informed choices about the breadth of their disclosures, choosing lawyers, or even foregoing legal representation completely.”); Zacharias, *supra* note 15, at 1370 (“The intrusion on confidential communications is limited and the confidentiality exception easily explained to clients. The process of explanation—which should occur in advance of any likelihood of disclosure—itsself serves the function of educating clients on the limits of the lawyer’s role.”).

Zacharias also argued that, as long as the client is informed at the beginning of the lawyer-client relationship that the lawyer may have to disclose information under certain circumstances, then “subsequent disclosures are not unseemly.” Zacharias, *supra* note 3, at 368. Zacharias wagers that the client will be more likely to view the lawyer as an ally if fully informed of confidentiality’s limits before disclosure can occur. *Id.*

143. See, e.g., Sobelson, *supra* note 10, at 772 (noting that a full explanation may need to be lengthy and recommending a written disclosure explanation that covers the confidentiality exceptions in detail, illustrating how they may affect the client).

between the lawyer and the client¹⁴⁴ in a way in which the client feels comfortable asking for more information.¹⁴⁵

These suggested approaches, while highly informative, rely on a voluntary change in the way lawyers practice, yet most lawyers are not willing to explain confidentiality without some form of external pressure.¹⁴⁶ The lawyer alone should not control the flow and use of confidential information. Only some form of regulation will overcome lawyers' reluctance to openly discuss confidentiality and its exceptions with clients.

B. A Better Solution—Amending the Confidentiality Rule to Require Explanation

Amending the confidentiality rules to include a provision requiring explanation to clients is a starting point from which the practice of confidentiality discussions between lawyers and clients can grow. In Tennessee, the need for such an amendment is more pressing than in states with permissive-only exceptions to strict confidentiality because of the possibility for mandatory disclosures of confidential information.¹⁴⁷ An ideal modification to the rule would not only require Tennessee lawyers to present a full and fair explanation of RPC 1.6 but would also require lawyers to give the explanation in a way that clients can easily understand. Such an explanation would provide important information such as when and how information may give rise to an exception, whether a particular lawyer will disclose under a

144. See Klinka & Pearce, *supra* note 4, at 158–59 (urging lawyers to create an open dialogue of honest communication regarding the confidentiality rule and exceptions).

145. See Pizzimenti, *supra* note 10, at 485 (suggesting that the lawyer provide an overview of the confidentiality rule and its exceptions so that the client “will have enough information to enable him to ask intelligent questions as specific confidentiality issues arise”).

146. Lawyers typically only explain confidentiality exceptions when they believe that a client is about to share certain information or already has shared certain information; in other words, once the confidentiality exceptions are activated in some way. See *supra* Section III.A. But once a disclosure exception has been triggered, an explanation of confidentiality's limitations will only inform the client of what his or her choices would have been had the client known of disclosure exceptions from the start. See *supra* Section III.

147. See VARIATIONS OF RULE 1.6, *supra* note 1.

permissive exception, and most importantly that a lawyer has a duty to disclose under mandatory exceptions.

1. A Suggested Amendment to RPC 1.6

An amendment requiring confidentiality explanations would be consistent with the current provisions of Tennessee RPC 1.6 and would also encourage compliance with any implicit duty under RPC 1.4 to keep clients reasonably informed.¹⁴⁸ An additional provision in RPC 1.6 mandating explanation would result in a subsection resembling the following:

(d) A lawyer shall explain to prospective and current clients the duty of confidentiality and the exceptions to lawyer-client confidentiality as listed in this rule; such an explanation of confidentiality must:

- (1) be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation; and
- (2) be provided in plain language that a client may easily understand; and
- (3) inform the client of the lawyer's position with regard to disclosure under permissive exceptions.¹⁴⁹

An official comment describing the connection between RPC 1.6, RPC 1.4, and RPC 1.0(e) should accompany the proposed subsection (d) above.¹⁵⁰ Such a comment would explain that knowledge and understanding of the confidentiality exceptions is necessary for a client to make informed decisions. An official comment that meets these criteria might look like the following:

Explaining confidentiality and its exceptions to clients not only satisfies the obligation as set forth by this rule,

148. *See supra* Section IV.B (arguing that RPC 1.0 and RPC 1.4 implicitly require Tennessee lawyers to explain confidentiality and its exceptions to clients as a way of keeping them informed).

149. To envision how this subsection would fit into the rule in its current form, see TENN. RULES OF PROF'L CONDUCT R. 1.6.

150. *See supra* Section IV.B (arguing that the rule requiring communication and the rule defining informed consent apply to discussions about confidentiality).

but also satisfies the implicit obligations of both RPC 1.4 and RPC 1.0(e). RPC 1.4 requires lawyers to discuss the means and objectives of the representation with clients, keep clients reasonably informed, and gain informed consent. Informed consent under RPC 1.0(e) refers to the agreement a client affirmatively provides as to the course of conduct after being reasonably apprised of all relevant information and material risks. Because a lawyer's ethical responsibilities include the sensitive handling of a client's private information, informed consent cannot be given unless and until the client is fully aware of confidentiality exceptions and the possibilities of disclosure as a material risk.

2. What Would the Proposed Amendment Accomplish?

If the Tennessee Supreme Court adopted the proposed amendment listed as subsection (d) above, lawyers in the state would have an explicit professional obligation to inform clients about the limits of confidentiality. The proposed amendment would ensure that Tennessee lawyers set aside time during the first encounter with a potential client to explain the confidentiality exceptions. A failure to follow the mandatory explanation provision would subject lawyers to professional discipline¹⁵¹ and possibly civil liability for failing to uphold an obligation to a client.

151. Provision 20 of the preamble to the Tennessee Rules of Professional Conduct states that “[f]ailure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process.” See TENN. RULES OF PROF’L CONDUCT R. 1.6 pmb. § 20. See also TENN. RULES OF PROF’L CONDUCT R. 8.4 cmt. 1 (“Lawyers are subject to discipline when they violate or attempt to violate the Rules of Professional Conduct . . .”).

The Tennessee Supreme Court created the Tennessee Board of Professional Responsibility in 1976 for the purpose of facilitating the ethical rules of conduct in Tennessee and overseeing their impact on lawyers and the public. *About the Board of Professional Responsibility*, TENN. BD. OF PROF’L RESPONSIBILITY, <http://www.tbpr.org/about-the-board> (last visited Mar. 2, 2018). The Board of Professional Responsibility is also in charge of the disciplinary process when lawyers are accused of misconduct. *Mission Statement*, TENN. BD. OF PROF’L RESPONSIBILITY, <http://www.tbpr.org/about-the-board/mission-statement> (last visited Mar. 1, 2018). See also TENN. SUP. CT. R 9 § 4.5 (granting the Tennessee Board of

Explaining confidentiality in the earliest stage of the lawyer-client relationship, or even before it begins, is crucial—the client needs to know that certain things conveyed may be used in a way adverse to his or her interests before there is any possibility of that happening. A requirement that Tennessee lawyers explain confidentiality and its exceptions would also provide the opportunity for a lawyer to inform the client about his or her position with regard to permissive disclosure, which will impact whether a client feels comfortable working with a specific lawyer. Educating Tennessee clients about confidentiality exceptions will help them choose lawyers they can trust and will give them more control over how the lawyer they ultimately choose uses their information.

C. Using Plain Language to Explain Confidentiality

Whether written or oral, lawyers need to give confidentiality explanations in a way that clients can easily comprehend. The proposed subsection (d) instructs Tennessee lawyers to take a “plain-language”¹⁵² approach when explaining confidentiality so that clients will fully understand the risks of disclosure and their right to safeguard information. The use of plain language creates an explanation that the lawyer can clearly, concisely, easily, and effectively deliver to the recipient.¹⁵³ Because much of the law and legal ethics turns on terms of art and sophisticated verbiage, it is especially important that lawyers

Professional Responsibility the power to investigate charges against lawyers licensed in Tennessee and to take disciplinary measures such as public censure, reprimand, and the filing of formal charges for misconduct).

152. *See What Is Plain Language?*, THE PLAIN LANGUAGE ACTION AND INFO. NETWORK, *supra* note 19; *See generally* THE PLAIN LANGUAGE ACTION AND INFO. NETWORK, FEDERAL PLAIN LANGUAGE GUIDELINES (2011), <https://plainlanguage.gov/media/FederalPLGuidelines.pdf>.

The Plain Language Action Information Network suggests that speakers and writers used active voice to eliminate ambiguity and emphasize important messages, keep the message as short as possible, eliminate jargon and acronyms so that the listener/reader is familiar with the terms being used, and avoid legalese. *See id.* (finding that lawyers take twice as long as other professionals to translate legalese). Because the intricacies of the confidentiality rule are somewhat difficult to understand, let alone explain, lawyers must take the time to craft plain-language explanations that will be understood by a wide audience. *Id.*

153. *See id.*

take a plain-language approach to adequately conveying the nuances of confidentiality to clients.

A plain-language explanation of Tennessee's confidentiality rule would describe the general obligation to keep client information confidential but would also note that there are permissive and mandatory exceptions to the rule.¹⁵⁴ This explanation could vary in detail depending on the relative sophistication of the client, the lawyer's experiences with the client, and the client's level of engagement in the confidentiality discussion; as long as the client walks away with a realistic understanding of confidentiality, lawyers could personalize these explanations. This approach would grant the lawyer some discretion but would ultimately still inform the client. At best, a Tennessee lawyer would carefully explain to a client that some information given may fall under a permissive or mandatory disclosure exception and provide some examples of how the exceptions operate, being sure to inform the client of the lawyer's inclination to disclose or withhold such information under a permissive exception and the lawyer's duty to disclose under the mandatory exceptions. This form of discussion would give the client information necessary to understand the implications of their own conduct when communicating with the lawyer.

A lawyer could deliver the following plain-language explanation of the operation of RPC 1.6 orally or in writing:

I want us to be open and honest with each other, so we should discuss confidentiality and how it affects our relationship. I have an ethical duty to keep your information confidential. But there are certain times when I may be allowed or required by an ethical rule or a law to report your confidential information to others without your permission. For example, if you tell me that you are going to commit a crime, the law *allows* me to share that information with the proper authorities—the decision would be up to me. But if you tell me that you are going to physically hurt yourself or someone else, and I believe that you're serious, the law *requires* me to report that information, even if you ask me not to. There are four other situations in which the law allows

154. TENN. RULES OF PROF'L CONDUCT R. 1.6.

me to report your confidential information to others, and two other situations in which the law requires me to report your confidential information to others. I want you to know that my personal preference is to keep all of your information private unless the law requires me to share it. If you want to talk about any of the exceptions to confidentiality, I would like to discuss them with you. And if you have any questions or concerns about the confidentiality between us, what information is protected, or how I will handle your confidential information, I encourage you to discuss those with me now.

Any individual lawyer can modify this template to match their voice and intent. But, to fully comply with the proposed rule, a lawyer would need to at least add his or her position regarding permissive disclosure exceptions to the main points addressed (as shown in the example). If the client is willing to explore the topic, a more substantial conversation concerning confidentiality could develop from this explanation and would represent due diligence on the part of the lawyer to keep the client informed.

VI. CONCLUSION

Clients misunderstand the scope of the confidentiality rules that govern the lawyer-client relationship. This misunderstanding puts clients at risk of a host of adverse actions if their lawyer discloses information under a permissive or mandatory exception. Because the exceptions to Tennessee's confidentiality rule are expanding, the protection offered to client information is narrowing, and the issues created by the exceptions to confidentiality are becoming more pervasive in legal transactions.

Scholars and practitioners who argue for the solution of explaining confidentiality to clients have not put forth a process that lawyers are likely to pick up, primarily because lawyers have little incentive to explain the exceptions, and there is currently no regulation

requiring lawyers to do so.¹⁵⁵ But this does not mean that lawyers do not have an ethical obligation to adequately inform clients.¹⁵⁶ Clients have a right to know—and lawyers a responsibility to explain—that confidentiality is not absolute and that disclosure of information may even be mandatory.

Because Tennessee requires disclosure in some circumstances,¹⁵⁷ the need to provide confidentiality explanations to Tennessee clients has become more critical than in states with explicit, permissive-only exceptions. It is highly doubtful that Tennessee lawyers will commit to providing an explanation of confidentiality to clients because they feel that it is the best route to take.¹⁵⁸ An effective first step toward resolving this issue is to impose a rule-based obligation on lawyers licensed in Tennessee, commanding lawyers to give an explanation of confidentiality to every client. The threat of disciplinary action would likely encourage discussion of confidentiality exceptions. By approving the amendment to RPC 1.6, for which this Note advocates, the Tennessee Supreme Court could enact this change, increasing client autonomy and transparency of the legal profession and preserving the sanctity of confidentiality as a bedrock principle of the lawyer-client relationship.

If one considers this proposal in light of the hypothetical lawyer and client from the introduction of this Note,¹⁵⁹ the benefits of a confidentiality explanation are easily seen. If the lawyer had previously explained to the client that she is under an obligation to disclose certain information—such as knowledge that a client has

155. Although explaining confidentiality to clients would be easily incorporated into practice, many lawyers fear that doing so would overwhelm clients and cause them to withhold needed information. *See supra* Section III.A.

156. *See supra* Section IV (discussing the need to explain confidentiality to maintain trust within the lawyer-client relationship as well as to comply with other rules requiring lawyers to inform clients on material matters).

157. *See* TENN. RULES OF PROF'L CONDUCT R. 1.6.

158. *See supra* Section III.A, IV.A (explaining that lawyers are generally opposed to discussing the exceptions to confidentiality, primarily out of concern that doing so would disrupt the free flow of information between client and lawyer).

159. As a refresher, the illustration set out in the introduction involves a client who has visited his lawyer to confess that he has poisoned the water supply at a university campus where he was formerly employed. The lawyer is unable to convince the client to go to the authorities and remedy the urgent situation, leaving her with the affirmative obligation to do so herself. *See supra* Section I.

poisoned a water supply which will likely harm other people—she would not find herself in a position where she must compromise the relationship at a time when the client is in dire need of legal assistance. It is likely that her client would have come to her to confess his actions anyhow; as indicated, he was regretful but not quite ready to go to the police or other on-campus officials. His lawyer could then respond by assisting her client in informing the proper authorities with counsel at his side. This outcome would not only save potential victims from harm but would also preserve (and possibly strengthen) the lawyer-client relationship.