

DEFENSIBLE ETHICS: A PROPOSAL TO REVISE THE ABA MODEL RULES FOR CRIMINAL DEFENSE LAWYER-AUTHORS

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This Note identifies ethical issues raised when criminal defense lawyers write non-fiction books about their clients, and it proposes new ethical rules that shift the balance of interests to weigh more heavily in favor of the client. Two principal ethical considerations arise for lawyers who write books about their clients. First, lawyer-authored publications may cause the attorney-client privilege to be waived and may result in adverse legal consequences for the client. Even where legal consequences do not inure, however, publication may violate the lawyer's duty of confidentiality, principles of client dignity and autonomy, or both. Second, the lawyer-author's interest in the commercial viability of the client's story may conflict with the defendant-client's interests. This Note offers revisions to the American Bar Association (ABA) Model Rules of Professional Conduct that would impose a substantial waiting period before defense counsel may publish stories about their clients. The revisions strike a balance between the client's interest in effective representation, the lawyer's interest in self-promotion, and the public's interest in a transparent criminal justice system.

INTRODUCTION

Betty Lou Beets murdered her fourth and fifth husbands, burying them in sleeping bags under her yard.¹ Wayne E. Dumond was castrated by vigilantes after being charged with rape.² William George Bonin, dubbed the “Freeway Killer,” was sentenced to death ten times—one for each of his murder convictions.³

What Betty Lou Beets, Wayne E. Dumond, William George Bonin, and many others have in common is defense lawyers who bought or sold their stories. There is no shortage of criminal defense lawyers seeking book and movie deals⁴ to capitalize on the insider

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¹ *Beets v. Scott*, 65 F.3d 1258, 1261–62 (5th Cir. 1995).

² *Dumond v. State*, 743 S.W.2d 779, 784 (Ark. 1988).

³ *People v. Bonin*, 765 P.2d 460, 465 (Cal. 1989).

⁴ *See, e.g., Beets*, 65 F.3d at 1261, 1281 (involving defense lawyer who secured literary and media rights for his son as part of fee agreement with client); *Buenoano v. Singletary*, 963 F.2d 1433, 1438 (11th Cir. 1992) (involving defense lawyer who contracted for right to negotiate book and movie contracts for client's story and for first \$250,000 of client's profits from same); *Zamora v. Dugger*, 834 F.2d 956, 961 n.4 (11th Cir. 1987) (involving defense lawyer who contracted to write book about client's trial); *United States v. Hearst*,

details of sensational crimes.⁵ In response to this problem, the American Bar Association (ABA) adopted Model Rule of Professional Responsibility 1.8(d),⁶ which recognizes that these deals pose serious ethical problems. Yet Rule 1.8(d) does not go far enough to minimize lawyers' incentives to promote their own interests above the interests of their clients. Here I fill the gap left by Rule 1.8(d). Specifically, I propose new rules that shift the balance of interests in favor of the client.

Two principal ethical considerations arise for lawyers who write nonfiction⁷ about their clients: conflicts of interest and confidentiality. First, the lawyer-author's interest in the commercial viability of the client's story may conflict with the client-defendant's interest in, for example, plea bargaining or acquittal. This deprives the client of her constitutional right to conflict-free, loyal counsel.⁸ Second, lawyer-authored publications may cause the evidentiary attorney-client privilege to be waived, resulting in adverse legal consequences for the client in subsequent criminal or civil proceedings. Even where legal consequences do not inure, however, publication may violate the lawyer's duty of confidentiality, principles of client dignity and autonomy, or both. These problems hinge importantly on the client's ability to give informed consent to disclosure.

638 F.2d 1190, 1192 (9th Cir. 1980) (same); *Neelley v. State*, 642 So. 2d 494, 500–01 (Ala. Crim. App. 1993) (involving defense lawyer who contracted for one-half of profits from publicity of client's story); *Dumond*, 743 S.W.2d at 784 (involving defense lawyer who obtained publication and literary rights to client's story); *Bonin*, 765 P.2d at 470–71, 477 (involving defense lawyer who allegedly entered literary rights fee agreement with client); *Maxwell v. Superior Court*, 639 P.2d 248, 250–51 (Cal. 1982) (involving defense lawyers who contracted for all entertainment and commercial exploitation rights); *People v. Corona*, 145 Cal. Rptr. 894, 903–04 (Ct. App. 1978) (involving defense lawyer who entered literary and dramatic rights fee agreement with client).

⁵ See generally Rita M. Glavin, Note, *Prosecutors Who Disclose Prosecutorial Information for Literary or Media Purposes: What About the Duty of Confidentiality?*, 63 *FORDHAM L. REV.* 1809, 1809 (1995) (identifying “enormous temptations for the attorneys involved in [high-profile] cases to ‘tell all’”).

⁶ MODEL RULES OF PROF'L CONDUCT R. 1.8(d) (2007) (“Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.”).

⁷ I use the term “nonfiction” to mean accounts that purport to be true, whether or not the client is identified by name. This Note will not address the ethical issues raised in fiction by or about lawyers. For analysis of ethical issues raised by the conduct of lawyers in fiction, see generally Kathryn A. Lee & Elizabeth Morgan, *Legal Fictions and the Moral Imagination: Female Fictional Lawyers Encounter Professional Responsibility*, 10 *WM. & MARY J. WOMEN & L.* 569 (2004).

⁸ This right is embedded in the Sixth Amendment's guarantee of effective assistance of counsel. *Wood v. Georgia*, 450 U.S. 261, 271 (1981).

I offer revisions to the ABA Model Rules of Professional Conduct that impose a substantial waiting period on defense counsel before they may write or contribute to stories about their clients or cases—regardless of whether counsel has obtained client consent. This revision strikes a better balance between the client's interest in effective representation, the lawyer's interest in self-promotion, and the public's interest in a transparent criminal justice system.

After a brief introduction to the system of professional self-regulation that governs lawyers, Part I discusses problems with the current Rules. I address separately the provisions regarding conflicts of interest and confidentiality. Part I also introduces the practice of changing names and other identifying details to avoid needing client consent—a practice the current Rules do not address. This practice is often employed in clinical scholarship⁹ and raises the question of whether changing some identifying details satisfies the duty of confidentiality.¹⁰

Part II introduces the text of the proposed rules and discusses their major implications. While the current Rules apply to all lawyers, the proposed revisions would apply only to lawyers representing criminal defendants. This reflects the unique pressures facing both criminal defendants and their lawyers. Unlike parties to civil cases, criminal defendants face conviction, incarceration, lifelong collateral consequences, and, in some cases, death. These serious penalties typically outweigh the risks facing civil litigants. Given America's obsession with crime stories,¹¹ criminal cases also present highly marketable stories more often than their civil counterparts. The intersection of these problems provides the strongest rationale for my proposed

⁹ Clinical faculty have drawn on client narratives with increasing frequency since the 1990s. Binny Miller, *Telling Stories About Cases and Clients: The Ethics of Narrative*, 14 *GEO. J. LEGAL ETHICS* 1, 9 (2000). For an early example, see *LAWYERS, CLIENTS & ETHICS: USING THE LAW SCHOOL CLINIC FOR TEACHING PROFESSIONAL RESPONSIBILITY* (Murray Teigh Bloom ed., 1974).

¹⁰ For a thoughtful discussion of this issue, see Miller, *supra* note 9, at 35–37, 48–52.

¹¹ See *infra* notes 99–100 and accompanying text. The market for books by defense counsel represents only a small portion of the public appetite for stories about crime, see Jacques Steinberg, *This Season, It's Law & Reorder*, *N.Y. TIMES*, July 16, 2006, § 2, at 1 (describing effect of proliferation of new crime dramas on sixteen-year run of popular franchise about criminal investigation and prosecution), and about lawyers generally, see David D. Kirkpatrick, *After 2-Year Detour, Grisham Returns to Legal Thrillers*, *N.Y. TIMES*, Feb. 4, 2002, at E1 (noting that legal-thriller author John Grisham is “the best-selling writer of adult novels alive”); Kathleen Howe, Note, *Is Free Speech Too High a Price To Pay for Crime? Overcoming the Constitutional Inconsistencies in Son of Sam Laws*, 24 *LOY. L.A. ENT. L. REV.* 341, 341 (2004) (“Many people want to hear stories about famous crimes, criminals, and trials . . .”).

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rules. Whether these new rules should also apply to prosecutors¹² and civil lawyers is a question beyond the scope of this Note.

At the core of the proposal is a waiting period during which defense counsel must refrain from publishing stories about her clients—even if she has obtained informed consent. While the waiting period is new, the justification for it is not. The current Rule already incorporates a “waiting period” of sorts during the pendency of criminal litigation by preventing lawyers from negotiating literary and media rights agreements until the conclusion of the representation. My proposal follows this bright-line approach and merely extends the time frame. This is necessary because the current Rules define potential conflicts of interest from the lawyer’s point of view—i.e., the conflict lasts only during the lawyer’s employment. My proposed revisions define potential conflicts from the client’s perspective, so that the conflict continues until the underlying factual dispute that led to retention or appointment of counsel is resolved. The proposal uses the waiting period as a rough proxy for the amount of time needed for such final resolution. This temporal move mitigates what I call the “subjective intent problem”: separating the lawyer’s interest—conscious or not—in selling the story from the tactics and objectives of the representation. By making remote the possibility of publication, both client and lawyer can focus on defending against the criminal charge.

After discussing the proposed rule in more detail, I respond to several counterarguments to the proposed rules in Part III. One counterargument is that informed consent cures the conflict of interests. I explore the practical failure of the current informed consent requirement, which justifies a new framework under which lawyers may not seek such consent until significantly after the conclusion of the representation. I also address constitutional concerns raised by restrictions on attorney speech, concluding that my proposal is permissible under the First Amendment. The most serious counterargu-

¹² A significant difference between defense and prosecution is that prosecutors represent the general public. It is therefore unclear to whom a duty of confidentiality is owed. Glavin, *supra* note 5, at 1811–12. A recent case held that a California prosecutor who turned over virtually his entire file in a pending case violated his duty of confidentiality because the contents of the file were public property and attorney work product. *Hollywood v. Superior Court*, 49 Cal. Rptr. 3d 598, 607 (Ct. App. 2006). In a companion case, the same court granted defense counsel’s motion for recusal where the prosecutor self-published a novel based in large part on a rape case she was then prosecuting. *Haraguchi v. Superior Court*, 49 Cal. Rptr. 3d 590, 591 (Ct. App. 2006). The *Haraguchi* court found that the prosecutor suffered from a “disabling” conflict of interest. *Id.* at 597. For a discussion of ethical issues raised by prosecutors’ publications, see generally Glavin, *supra* note 5, and Rachel Luna, Note, *The Ethics of Kiss-and-Tell Prosecution: Prosecutors and Post-Trial Publications*, 26 AM. J. CRIM. L. 165 (1998).

ment, given my focus on the client, is that the proposed rules decrease client autonomy by limiting choice. While my revisions do limit choice in a literal sense, the benefits to the lawyer-client relationship and to the quality of representation outweigh the minimal cost to client autonomy.

In reaching this proposal, I take a client-focused approach to lawyering. I use the term “client-focused” rather than “client-centered” because the solution proposed here does not fit squarely within traditional client-centered lawyering theory. Client-centered counseling has its origins in David Binder and Susan Price’s seminal 1977 text, which advocated a radical change in the lawyer-client relationship.¹³ Commentators noted that the “most controversial aspect” of Binder and Price’s new approach was that lawyers should not give clients advice about how to proceed and should defer entirely to client decisions.¹⁴ Today, client-centered counseling encompasses several different approaches that adhere to Binder and Price’s original theory to differing degrees.¹⁵ Yet the core principle of client-centered counseling remains the primacy of client decisionmaking.¹⁶ In contrast, I attempt to balance the various interests at stake and, in so doing, eliminate the client’s ability to consent to lawyer publication during a waiting period following representation. Traditional client-centered lawyers might find this solution paternalistic.¹⁷ Although the waiting period does marginally limit client autonomy, the term “client-focused” is appropriate because my approach borrows a key concept of client-centered lawyering: the belief that clients’ problems encompass many dimensions—only some of which are legal—and that lawyers should make a conscious attempt to address all of these concerns.¹⁸ I thus expand on the traditional lawyer-client model—which the ABA Model Rules follow¹⁹—but do not depart fully from it.

¹³ See DAVID A. BINDER & SUSAN C. PRICE, *LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH* (1977) (advocating heightened awareness of lawyer-client interactions and complete decisionmaking by client).

¹⁴ Robert D. Dinerstein, *Client-Centered Counseling: Reappraisal and Refinement*, 32 *ARIZ. L. REV.* 501, 509 (1990); see also Katherine R. Kruse, *Fortress in the Sand: The Plural Values of Client-Centered Representation*, 12 *CLINICAL L. REV.* 369, 379 (2006) (noting controversy regarding Binder and Price’s suggestion to withhold advice).

¹⁵ See Kruse, *supra* note 14, at 371–72 (describing various approaches).

¹⁶ *Id.* at 372.

¹⁷ See Dinerstein, *supra* note 14, at 512–14 (noting importance of enhanced client autonomy to client-centered advocates).

¹⁸ See Kruse, *supra* note 14, at 377 (describing focus on nonlegal considerations as “cornerstone” of client-centered approach).

¹⁹ While the American Bar Association (ABA) has incorporated some concepts that originated in client-centered lawyering theory, the Model Rules on the whole “perpetuate

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THE CURRENT RULES AND THEIR SHORTCOMINGS

A. *The Regulation of Lawyers and the ABA Model Rules of Professional Conduct*

Lawyers practice within a web of regulation consisting of ethical codes, formal and informal ethics opinions, statutes, and common law doctrines.²⁰ I take as my starting point the ABA Model Rules of Professional Conduct (Model Rules).²¹ The Model Rules—or their immediate predecessor, the ABA Model Code of Professional Responsibility (Model Code)²²—form the basis of every state’s ethical code, with the notable exception of California.²³ These model regulations are not binding, however,²⁴ until adopted by state high courts in their supervisory capacity.²⁵ Most state courts adopt the Model Rules with some modifications.²⁶ Courts then delegate the authority to enforce the Rules to bar association ethics committees.²⁷ Enforcement and punishment, however, are rare.²⁸

fairly traditional conceptions of the lawyer-client relationship.” Dinerstein, *supra* note 14, at 534. As noted, client-centered lawyering emphasizes client decisionmaking. The Model Rules, on the other hand, assign only very “basic” decisionmaking to the client. *Id.* at 536; *see also* MODEL RULES OF PROF’L CONDUCT R. 1.2(a) (2007) (providing that lawyer must obey client’s decisions regarding “objectives” of representation but merely consult with client as to means); *id.* R. 1.2 cmt. 2 (observing that clients usually “defer” to lawyers’ decisions regarding “means” used to accomplish objectives).

²⁰ DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY*, at xxviii (1988). This system is usually referred to as “professional self-regulation.” *Theories of Professional Regulation*, in *LAWYERS’ ETHICS AND THE PURSUIT OF SOCIAL JUSTICE: A CRITICAL READER* 13, 15 (Susan D. Carle ed., 2005).

²¹ MODEL RULES OF PROF’L CONDUCT (2007).

²² MODEL CODE OF PROF’L RESPONSIBILITY (1969). Although this Note focuses on the current ABA text, the old Model Code provisions are cited for comparison.

²³ LUBAN, *supra* note 20, at xxvii–xxviii. The ABA’s first effort at standardizing lawyers’ ethics, however, is nearly a century old. *Id.* at xxvii. In 1983, the Model Rules replaced the Model Code, which, with its “mandatory Disciplinary Rules (DRs) and ‘aspirational’ Ethical Considerations (ECs),” was “cumbersome and flawed,” despite the fact that the Model Code was less than twenty years old at that time. *Id.* at xxvii–xxviii. New York has retained the old Model Code, while most other states have adopted the Model Rules in large part. STEPHEN GILLERS & ROY D. SIMON, *REGULATION OF LAWYERS: STATUTES AND STANDARDS* 3 (2007). California is exceptional because it has written its own distinct code of ethics. *Id.*

²⁴ LUBAN, *supra* note 20, at xxvii.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ Richard L. Abel, *Why Does the ABA Promulgate Ethical Rules?*, in *LAWYERS’ ETHICS AND THE PURSUIT OF SOCIAL JUSTICE*, *supra* note 20, at 18, 20 (“Study after study has shown that the current rules of professional conduct are not enforced.”). Lawyers know that underenforcement is the norm. *See* LUBAN, *supra* note 20, at xxvii (“[I]t is a well-known problem that the disciplinary system does not work very well” (citing AM. BAR ASS’N SPECIAL COMM. ON EVALUATION OF DISCIPLINARY ENFORCEMENT, PROBLEMS

This scheme raises several threshold questions. First, why focus on a set of rules that has “no legal force”?²⁹ No state, after all, has adopted the Model Rules in toto.³⁰ However, almost every state has sculpted its code from the ABA’s block; the Model Rules remain the benchmark. Accordingly, these Rules are the most useful and logical starting point for any project of ethical reform in the legal profession.³¹

More troubling is the possibility that even codified ethical rules do not affect lawyer behavior because they remain unenforced. On an empirical level, no studies examine whether rules actually influence lawyer behavior. On a theoretical level, however, rules create ethical norms. Rules of ethics communicate ideals of behavior regardless of whether these ideals are attained. Ideals function like speed limits: We transgress them, but only by a limited amount.³² The function of ideal communication is significant enough to justify careful attention to, and revision of, the Model Rules.

There is also a more practical justification: To the extent that the proposed rules set out bright lines rather than vague standards of conduct, they may be particularly easy to follow³³—and breaches particu-

AND RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT 1, 3 (1970)); Adam Liptak, *Prosecutor Becomes Prosecuted*, N.Y. TIMES, June 24, 2007, § 4, at 4 (“There is widespread agreement that sanctions for prosecutorial misconduct are quite unusual . . .”). The recent case of Michael B. Nifong, the Durham, North Carolina, district attorney who was disbarred for his mishandling of the rape case against members of the Duke University lacrosse team, is an exception that proves the rule. *See id.* (“[A] former prosecutor in Manhattan . . . said the Nifong case was handled differently because of the publicity.”). For a brief overview and critique of the disciplinary system, see David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799, 802 (1992). A related question is whether the ethics codes should be enforced by mechanisms other than disciplinary procedures, such as civil tort actions. Commentators—and jurisdictions—disagree on this point. *See* Bruce A. Green & Fred C. Zacharias, *Permissive Rules of Professional Conduct*, 91 MINN. L. REV. 265, 268 & n.9 (2006) (listing authorities discussing extradisciplinary enforcement of ethics codes).

²⁹ LUBAN, *supra* note 20, at xxvii.

³⁰ GILLERS & SIMON, *supra* note 23, at 3.

³¹ In taking the Model Rules as my starting point, I do not mean to suggest that the ABA is best suited to the task of drafting model codes, or that ethical codes are preferable to other forms of regulation of lawyers. For an extensive analysis of various regulation systems, see generally Wilkins, *supra* note 28.

³² Charles Fischette, Note, *Psychopathy and Responsibility*, 90 VA. L. REV. 1423, 1482 (2004) (“[P]eople break [the speed limit] within exactly those bounds that are administratively infeasible to enforce.”).

³³ *Cf.* Basic Inc. v. Levinson, 485 U.S. 224, 236 (1988) (“A bright-line rule indeed is easier to follow than a standard that requires the exercise of judgment in the light of all the circumstances.”).

larly easy to detect.³⁴ Thus lawyers may conform their behavior more closely to bright-line rules.

With these general principles in mind, I now turn to the specific provisions implicated by lawyer-authored publications: avoiding conflicts of interest and maintaining confidentiality.

B. Avoiding Conflicts of Interest: Rule 1.8(d)

Model Rule 1.8 addresses most conflicts of interest that lawyers may face. The lawyer's duty to avoid conflicts of interest stems from her duty of loyalty to her client.³⁵ Conflicts of interest may arise in many ways. A clear example is when counsel represents multiple defendants in the same criminal case,³⁶ particularly where each defendant seeks to exculpate herself by inculpating the others.

Conflicts can also arise when a lawyer and client enter into a literary rights contract, in which a client sells the rights to her story to her lawyer—usually as payment for the representation.³⁷ Ethical codes have warned against this practice at least since the adoption of the old Model Code.³⁸ Today, Model Rule 1.8(d) provides: “Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.”³⁹ The comment to the Rule explains that literary or media rights contracts create a conflict of interest because “[m]easures suitable in the representation of the client may detract from the publication value of an account of the representation.”⁴⁰

³⁴ See Wilkins, *supra* note 28, at 821 & n.85 (arguing that when clear rules are broken, officials are likely to impose sanctions because arguments that lawyers did not knowingly violate rules are less plausible).

³⁵ The lawyer's duty of loyalty underpins many ethical rules: “Loyalty . . . [is an] essential element[] in the lawyer's relationship to a client.” MODEL RULES OF PROF'L CONDUCT R. 1.7 cmt. 1 (2007).

³⁶ Confronted with this situation in *Cuyler v. Sullivan*, 446 U.S. 335 (1980), the Supreme Court declined to adopt a per se rule that multiple representation creates a conflict of interest. *Id.* at 346.

³⁷ *E.g.*, *Beets v. Scott*, 65 F.3d 1258, 1281 (5th Cir. 1995); *People v. Bonin*, 765 P.2d 460, 470–71, 477 (Cal. 1989); *Maxwell v. Superior Court*, 639 P.2d 248, 250–55 (Cal. 1982); *People v. Corona*, 145 Cal. Rptr. 894, 903–04 (Ct. App. 1978).

³⁸ MODEL CODE OF PROF'L RESPONSIBILITY DR 5-104(b) (1980). Although the old Model Code used different phrasing, it imposed the same substantive requirements on counsel as the current Model Rule 1.8(d). Interestingly, the “aspirational” Ethical Consideration accompanying the mandatory Disciplinary Rule went further, recommending that the lawyer avoid literary or media rights agreements “prior to the termination of all aspects of the matter giving rise to the employment, even though his employment has previously ended.” MODEL CODE OF PROF'L RESPONSIBILITY EC 5-4 (1980). The new Model Rules drop this recommendation.

³⁹ MODEL RULES OF PROF'L CONDUCT R. 1.8(d) (2007).

⁴⁰ *Id.* R. 1.8 cmt. 9 (2007).

Examples of such measures may include the decision whether to call a particular witness to the stand⁴¹ (including the defendant⁴²), to seek a change of venue,⁴³ to negotiate a guilty plea,⁴⁴ and to investigate certain defenses,⁴⁵ such as battered woman syndrome.⁴⁶ The conflict is most direct when the client's interest in presenting a diminished capacity defense conflicts with the lawyer's interest in demonstrating the client's capacity to enter into the literary rights contract.⁴⁷

Currently, the client bears the burden of proving that the lawyer's conflict compromised her representation.⁴⁸ Why should this be? One answer is that the lawyer's interest in a saleable story is so often aligned with the client's interest in acquittal that a conflict should not be presumed.⁴⁹ This answer assumes that marketability is correlated with competent performance—a dubious assumption in the tabloid era.

For example, in one federal case, defense counsel argued to the jury that the defendant's insanity was a result of "television intoxication."⁵⁰ The defendant later asserted that this sensational theory had destroyed any possibility of a successful insanity defense leading to acquittal. Given the low probability of succeeding on an insanity defense, counsel may have decided that the publicity generated by a "television intoxication" defense—even if the defense resulted in a conviction—was preferable to no publicity at all.

⁴¹ *E.g.*, *Dumond v. State*, 743 S.W.2d 779, 784 (Ark. 1988).

⁴² *E.g.*, *United States v. Hearst*, 638 F.2d 1190, 1193 (9th Cir. 1980).

⁴³ *E.g.*, *Neelley v. State*, 642 So. 2d 494, 500 (Ala. Crim. App. 1993).

⁴⁴ *E.g.*, *id.*

⁴⁵ *E.g.*, *Maxwell v. Superior Court*, 639 P.2d 248, 250 (Cal. 1982). California has not adopted the Model Rules. *See supra* note 23 and accompanying text. In the absence of Rule 1.8(d) or its equivalent, the *Maxwell* court upheld the validity of literary rights fee agreements, in which the defendant assigns to counsel the rights to all or a portion of his life story as payment for representation. *Maxwell*, 639 P.2d at 249. For criticism of *Maxwell*, see Mark R. McDonald, *Literary-Rights Fee Agreements in California: Letting the Rabbit Guard the Carrot Patch of Sixth Amendment Protection and Attorney Ethics?*, 24 LOY. L.A. L. REV. 365, 379–83, 390 (1991).

⁴⁶ *E.g.*, *Neelley*, 642 So. 2d at 500.

⁴⁷ *E.g.*, *Maxwell*, 639 P.2d at 250.

⁴⁸ *See infra* note 190 and accompanying text.

⁴⁹ *Zamora v. Dugger*, 834 F.2d 956, 961 (11th Cir. 1987) ("[E]ven if it had been established that [defense counsel] was interested in publicity, his reputation would have been more enhanced by a successful defense of so serious a case rather than by its loss." (internal quotation marks omitted)); *United States v. Hearst*, 638 F.2d 1190, 1193 (9th Cir. 1980) ("This alleged conflict was not total, for surely the salability of [defense counsel's] book would have been enhanced had he gained an acquittal . . ."); *Neelley*, 642 So. 2d at 502 ("[Defendant's] attorney's publicity rights would have been more valuable had she been acquitted.").

⁵⁰ *Zamora*, 834 F.2d at 958.

In a more famous example, newspaper heiress Patty Hearst argued that her attorney, F. Lee Bailey, undermined her defense by putting her on the witness stand. While testifying, Hearst claimed her Fifth Amendment privilege against self-incrimination forty-two times.⁵¹ Bailey had a reputational interest in winning the case, but he may well have believed that in the case of a wealthy defendant accused of bank robbery, a conviction would be more salacious than an acquittal.⁵² As these examples demonstrate, lawyer-authored publications can create unacceptable conflicts that compromise a client's defense.

C. *The Duty of Confidentiality: Rule 1.6(a)*

Current Rule 1.6 embodies the lawyer's duty of confidentiality, which is among the "oldest and most sacrosanct" ethical duties⁵³ and which predates formal ethics codes.⁵⁴ Confidentiality between lawyer and client encourages open and full communication between the two.⁵⁵ This leads to better representation for the client and can aid the truth-seeking process of the forum.⁵⁶

The Model Rules codify this traditional duty as follows: "A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent."⁵⁷ Rule 1.6(a) applies

⁵¹ *Hearst*, 638 F.2d at 1192.

⁵² In the *Hearst* case, Bailey contracted to write a book about the trial while the prosecution against his client was still proceeding. Although this contract alone would not violate current Rule 1.8(d), Bailey also secured Hearst's agreement that she would not write about the case until eighteen months after the publication of Bailey's book—an arrangement that closely resembles media rights contracts forbidden under the current Rules. See *supra* notes 35–47 and accompanying text. As it turned out, the publisher later rejected Bailey's manuscript and the book never reached the market. *Hearst*, 638 F.2d at 1191–92 & n.2. Despite the book's failure, the case illustrates how conflicts of interest potentially compromise representation.

⁵³ *McClure v. Thompson*, 323 F.3d 1233, 1250 (9th Cir. 2003) (Ferguson, J., dissenting).

⁵⁴ See LUBAN, *supra* note 20, at 187–89 (noting that attorney-client privilege was firmly established by time of Elizabeth I).

⁵⁵ See MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 2 (2007) ("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."); MODEL CODE OF PROF'L RESPONSIBILITY EC 4-1 (1980) ("A client must feel free to discuss whatever he wishes with his lawyer."); LUBAN, *supra* note 20, at 181 ("It is agreed on all sides that the purpose of confidentiality is to permit clients to 'tell all' to their lawyers . . .").

⁵⁶ For example, confidentiality protects a battered woman who kills her attacker in self-defense. Otherwise, the woman may fear telling her lawyer about past abuse, unaware that her actions were legally justified and believing that such information confirms her guilt. LUBAN, *supra* note 20, at 190.

⁵⁷ MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (2007). The old Model Code contained a mens rea provision: A lawyer should not "knowingly" reveal client confidences. MODEL CODE OF PROF'L RESPONSIBILITY DR 4-101(b) (1980). This version also allowed for disclosure after client "consent" but included no reference to informed consent, as that

to any and all “information relating to the representation of a client,” whether or not rules of evidence would bar disclosure under the attorney-client privilege.⁵⁸ In some cases, Rule 1.6(a) may even prevent a lawyer from disclosing a client’s identity.⁵⁹

Attorneys may disclose confidential information only under extraordinary circumstances⁶⁰ or when the client gives informed consent to the disclosure.⁶¹ The Rule is silent, however, with respect to the practice of changing client names and other identifying details in order to publish without consent after the representation ends. The Rule’s failure to define “disclosure” creates this gap. A narrow interpretation justifies the practice of altering identifying information on the theory that there is no “disclosure” within the meaning of the Rule if names and other details are changed.⁶²

This practice, common in clinical scholarship,⁶³ also occurs in other contexts. One example is a day-in-the-life book recently authored by public defender David Feige.⁶⁴ In one passage, Feige describes one of his clients:

term was not included or defined in the Model Code. However, DR 4-101 included the requirement of “full disclosure” before consent could be obtained, which may have the same practical effect as the requirement of “informed consent.” See *McClure*, 323 F.3d at 1242–45 (applying DR 4-101 and requiring informed consent). The older provisions are still in effect in New York, which elected not to adopt the new Model Rules. See *supra* note 23 (discussing adoption of Model Rules).

⁵⁸ See, e.g., *In re* Advisory Opinion No. 544, 511 A.2d 609, 612–13 (N.J. 1986) (discussing Rule 1.6(a)’s requirement of confidentiality with respect to all information relating to attorney-client relationship).

⁵⁹ See *id.* at 613–14 (collecting ethics opinions and holding identity of legal services clients is protected under Rule 1.6(a)); *Sealed Party v. Sealed Party*, No. Civ.A. H-04-2229, 2006 WL 1207732, at *13 n.44 (S.D. Tex. May 4, 2006) (citing *In re* Goebel, 703 N.E.2d 1045, 1047–48 (Ind. 1998), for proposition that Model Rule 1.6(a) prohibits disclosure of identity or location of client).

⁶⁰ Extraordinary circumstances include disclosure to prevent death, MODEL RULES OF PROF’L CONDUCT R. 1.6(b)(1) (2007), or certain crimes, *id.* R. 1.6(b)(2). For an interesting discussion of permissive ethics rules, see Green & Zacharias, *supra* note 28.

⁶¹ The difficulties of obtaining informed consent *ex ante* and of determining *ex post* whether such consent was in fact obtained are discussed *infra* Part III.A.

⁶² See Miller, *supra* note 9, at 33 (“[M]ost authors assume that by changing some [of] the facts, they have satisfied the ethical requirement that they not disclose client confidences without permission . . .”).

⁶³ *Id.* at 33–34. An oft-cited example is Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1, 19–58 (1990) (describing personal characteristics of legal-aid client and detailing client’s journey through legal system).

⁶⁴ DAVID FEIGE, *INDEFENSIBLE* (2006). Feige gives little account of his efforts to protect client confidentiality. Interestingly, Feige did not change the names of judges and prosecutors, a decision which has already resulted in two libel suits against his publisher. Jose Martinez, *Throws the Book: Ex-Bx. Prosecutor Sues Rival over Tell-All Tome*, N.Y. DAILY NEWS, Sept. 19, 2006, at 6. One suit, *Schall v. Little, Brown & Co.*, was settled on December 13, 2007. N.Y. State Unified Court Sys., eCourts WebCivil Supreme,

Cassandra is big and round and overweight, with a puffy, moon-pie face. Her eyes are set deep, and they betray no expression at all—ever. She speaks in a halting, childish monotone with the kind of bluntness that suggests she has long since given up trying to hide anything. Cassandra has just about all the problems a person can have—she’s drug dependent, deeply depressed, homeless, suicidal, and mentally ill.⁶⁵

Feige goes on to describe his long-term representation of Cassandra: In 1997, he represented Cassandra in an attempted arson case in which she pled guilty to reckless endangerment;⁶⁶ several years later, Cassandra called him after being arrested for “using her index finger to try to rob a livery cab driver.”⁶⁷ Detail after detail follows. “Cassandra” would undoubtedly recognize herself in the book; others might recognize her as well.⁶⁸

Because Cassandra’s identity is confidential information relating to her representation under Rule 1.6(a),⁶⁹ Feige breached his ethical obligation by describing her in detail. His duty to maintain Cassandra’s confidentiality persists even if her friends and family are already aware of everything Feige disclosed about her.⁷⁰ This violation has particular significance in the context of an indigent-defense organization. Merely receiving services from such organizations reveals private information—that the client is poor and charged with a crime.⁷¹

iapps.courts.state.ny.us/webcivil/FCASSearch?param=I (search “Index Number” for “113277/2006”; then follow “Index Number” hyperlink; then click “Show All Appearances” button) (last visited Mar. 13, 2008). The other suit, *Brenner v. Little, Brown & Co.*, was settled on September 6, 2007. *Id.* (same, but search “Index Number” for “118653/2006”) (last visited Mar. 13, 2008).

⁶⁵ FEIGE, *supra* note 64, at 40.

⁶⁶ *Id.*

⁶⁷ *Id.* at 41.

⁶⁸ See Miller, *supra* note 9, at 48, 50–51 (“[A]uthors who have carefully crafted their stories to avoid disclosing the identity of the client often inadvertently reveal a great deal of information about the client. . . . In many instances clients would instantly recognize themselves, and friends and family would know the identity of the person described.”).

⁶⁹ MODEL RULES OF PROF’L CONDUCT R. 1.6(a) (2007); see also *supra* note 59 and accompanying text.

⁷⁰ See *Sealed Party v. Sealed Party*, No. Civ.A. H-04-2229, 2006 WL 1207732, at *13 (S.D. Tex. May 4, 2006) (“A lawyer breaches the duty of confidentiality under Model Rule 1.6(a) by revealing information that is available from sources other than the client, including information filed in the public record.”).

⁷¹ *Cf. In re Advisory Opinion No. 544*, 511 A.2d 609, 613 (N.J. 1986) (noting that disclosure of identity of Community Health Law Project client revealed that client was poor, mentally ill, and had legal problem).

Ethics codes developed in other fields, such as psychiatry⁷² and psychology,⁷³ permit disclosures of otherwise confidential information, provided that the professional has “adequately disguised”⁷⁴ the client. To the extent that these codes recognize that disclosure without client consent occurs and provide guidance to professionals, they are superior to the Model Rules. But even these codes fail to define key terms, such as “reasonable steps”⁷⁵ or “every effort,”⁷⁶ that describe what professionals must do. They also fail to define what constitutes identifying information requiring disguise.⁷⁷

Telling Cassandra’s story as Feige does may satisfy the current Model Rule (which does not address the situation explicitly) as well as other professional codes (which do), but it is inconsistent with the policies underlying the duty of confidentiality. The purpose of confidentiality, as discussed above, is to encourage full communication between client and lawyer. Unfettered communication serves the individual client by providing counsel with the best information on which to base her legal strategy. It serves the public by fueling the truth-seeking process. Clients will be hesitant to communicate freely with counsel when lawyers publish clients’ stories in identifiable form. In addition, disclosure without consent violates principles of client

⁷² PRINCIPLES OF MEDICAL ETHICS WITH ANNOTATIONS ESPECIALLY APPLICABLE TO PSYCHIATRY (Am. Psychiatric Ass’n 2006) [hereinafter MEDICAL ETHICS].

⁷³ ETHICAL PRINCIPLES OF PSYCHOLOGISTS AND CODE OF CONDUCT (Am. Psychological Ass’n 2002) [hereinafter PSYCHOLOGY ETHICS].

⁷⁴ MEDICAL ETHICS, *supra* note 72, § 4(3), at 6 (“Clinical and other materials used in teaching and writing must be adequately disguised in order to preserve the anonymity of the individuals involved.”). Doctors also rely on case histories as teaching tools. The American Medical Association promulgates a code of medical ethics that the American Psychological Association annotates for its members. The core text is the same for both professions. *Id.* at 1–2. For brevity, only the annotated version is cited here.

⁷⁵ PSYCHOLOGY ETHICS, *supra* note 73, at § 4.07 (“Psychologists do not disclose in their writings, lectures, or other public media, confidential, personally identifiable information concerning their clients/patients . . . that they obtained during the course of their work, unless (1) *they take reasonable steps to disguise the person or organization*, [or] (2) the person or organization has consented in writing.” (emphasis added)).

⁷⁶ CODE OF ETHICS III(d) (Clinical Soc. Work Fed’n 1997) [hereinafter CLINICAL SOCIAL WORK ETHICS]. The principle reads in relevant part: “Whether or not [informed] consent is obtained, every effort will be made to protect the true identity of the client. Any such presentation will be limited to the amount necessary for the professional purpose, and will be shared only with other responsible individuals.” *Id.* This principle, however, leaves open a host of new questions. How much information is necessary, and who decides? In this case, presumably the clinical social worker decides what is necessary. What about the responsible individuals—is that category limited to consulting professionals, to all clinical social workers, or to individuals whom the clinical social worker trusts?

⁷⁷ CODE OF ETHICS 1.07(p) (Nat’l Ass’n of Soc. Workers 1999) (“Social workers should not disclose identifying information when discussing clients for teaching or training purposes unless the client has consented to disclosure of confidential information.”).

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dignity and autonomy.⁷⁸ The fact that Cassandra may never know about her role in the book may aggravate, rather than mitigate, the problem.

II

PROPOSED RULES

As the above discussion illustrates, the Model Rules recognize that contracts for book and movie rights pose serious ethical issues. Yet the current Rules do not go far enough to minimize the impact of potential conflicts on criminal defendants. This Note's proposed rules, below with deletions from current Rules crossed out and additions in underscore, strike a better balance between this conflict and the client's interest.⁷⁹

Proposed Rule 1.6(a):

A lawyer shall not reveal information relating to the representation of a ~~client~~ criminal defendant unless the ~~client~~ defendant gives informed consent A lawyer shall not disclose such information, even though the lawyer has changed the defendant's name and other identifying details, for financial profit except in accordance with Rule 1.8(d).

Proposed Rule 1.8(d):

~~Prior to the conclusion of representation of a client, During the course of representation of a criminal defendant and for a period of [five years] thereafter,~~ a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the

⁷⁸ See Nina W. Tarr, *Clients' and Students' Stories: Avoiding Exploitation and Complying with the Law To Produce Scholarship with Integrity*, 5 CLINICAL L. REV. 271, 277 (1998) (citing OFFICE OF THE SEC'Y, U.S. DEP'T OF HEALTH, EDUC., & WELFARE, THE NAT'L COMM. FOR THE PROT. OF HUMAN SUBJECTS OF BIOMEDICAL & BEHAVIORAL RESEARCH, THE BELMONT REPORT: ETHICAL PRINCIPLES AND GUIDELINES FOR THE PROTECTION OF HUMAN SUBJECTS OF RESEARCH (1978)) (highlighting importance of dignity and autonomy of persons in human subject research); cf. CLINICAL SOCIAL WORK ETHICS, *supra* note 76, at III(d) ("When confidential information is used for purposes of professional education, research, or publication, the primary responsibility of the clinical social worker is the protection of the clients from possible harm, embarrassment, or exploitation.").

⁷⁹ These rules are intended to supplement, not replace, existing protections. The proposal is not meant to create a gap by removing protections from civil clients or from the government when the lawyer is a prosecutor. Therefore, the current Rules should be retained, with the provision that they apply except as provided for criminal defense lawyers, in which case the proposed rules apply. Additionally, the proposed rules do not govern or affect lawyer communications with news media during the representation, which are addressed elsewhere in the Rules. *E.g.*, MODEL RULES OF PROF'L CONDUCT R. 3.6 (2007).

representation, nor shall the lawyer make or contribute to an account for literary or media purposes for the same period.

The current Rule 1.8(d) creates a bright line for when lawyers may contract with clients for media rights. The proposal expands the rule to cover contracts for the lawyer's account of the representation.⁸⁰ The key innovation is a temporal move in Rule 1.8(d) from the conclusion of the representation to a later point in time. While this significantly expands the current prohibition, the core principle remains the same. Both the current and proposed rules address potential conflicts of interest with a bright-line rule for when lawyers may and may not enter into such contracts.

The waiting period reduces the risk of adverse collateral legal consequences resulting from the publication of previously confidential material due to waiver of the attorney-client privilege. To effectuate this purpose, jurisdictions must allow sufficient time for litigation to be resolved. A good starting point is five years. While each jurisdiction may wish to adjust the number slightly to reflect local conditions,⁸¹ the length of the waiting period should bear some relationship to the following factors: the length of criminal and civil cases, statutes of limitations, and post-conviction remedies.

Criminal litigation: Criminal cases are usually resolved within one year,⁸² though it is likely that celebrity prosecutions take longer.⁸³ Most criminal cases are covered under current Rule 1.8(d), since the lawyer's employment generally continues until the conclusion of prosecution. However, there may be cases in which the lawyer is retained only for a portion of the case, and Rule 1.8(d) will cease operation before the prosecution is resolved. For example, a lawyer may agree to represent a client only for a preliminary stage of the criminal case,

⁸⁰ This represents an extension of the approach taken in a recent ethics opinion. See D.C. Bar Legal Ethics Comm., Op. 334 (2006) (recommending that lawyer who receives offers of book or movie deals for lawyer's own story must notify client and obtain valid consent).

⁸¹ See Michael Heise, *Justice Delayed?: An Empirical Analysis of Civil Case Disposition Time*, 50 CASE W. RES. L. REV. 813, 836 (2000) (noting that "local legal culture influences disposition time" although "causation questions remain").

⁸² See OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, COMPENDIUM OF FEDERAL JUSTICE STATISTICS, 2004, at 59, available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/cfjs04.pdf> (noting that "average time for processing [federal criminal] defendants was 9.5 months"); OFFICE OF JUSTICE PROGRAMS, U.S. DEP'T OF JUSTICE, STATE COURT SENTENCING OF CONVICTED FELONS, 2002, at tbl.4.9, available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/scscf02.pdf> (noting that eighty-four percent of state court criminal convictions were completed within one year).

⁸³ See Gary C. Williams, *Introduction to Symposium: Celebrity Prosecutions*, 39 LOY. L.A. L. REV. 1157, 1159-60 (2006) (describing celebrity prosecutions' consumption of court resources).

such as the grand jury investigation.⁸⁴ Under the current Rule, the lawyer would be free to publish an account when that stage terminated, i.e., when the client was indicted. In a complex federal investigation the grand jury stage may last longer than a year.⁸⁵ A lengthy investigation may well produce a marketable story for which public appetite will be greatest during the pendency of the criminal case. The lawyer would have an incentive to publish quickly—in order to benefit from news coverage of the case—creating the possibility of a tell-all in circulation at the same time as the criminal trial.⁸⁶

Civil litigation: The waiting period should allow for resolution of civil litigation related to the same underlying transaction or dispute at issue in a criminal case. On average, most civil litigation—like criminal litigation—is resolved within one year.⁸⁷

Statute of limitations: If relevant litigation has not yet commenced, counsel and client may be unaware of a potential conflict with such litigation. The statute of limitations for related crimes and civil actions may be a consideration in determining how long the conflict persists. However, competing interests, such as the public interest in transparency, may outweigh this factor.⁸⁸

Post-conviction remedies: Defendants may spend years or decades seeking post-conviction relief such as exculpation.⁸⁹ Similar

⁸⁴ Cf. NYSBA Comm. on Prof'l Ethics, Op. 604 (1989) (“[I]t is not unethical for a lawyer to limit the scope of the representation in a criminal matter to the grand jury stage.”).

⁸⁵ See 18 U.S.C. § 3331 (2000) (providing for summoning of special grand jury to serve at least eighteen months and not longer than thirty-six months).

⁸⁶ Other rules may still prevent lawyers from discussing cases in the news media. See MODEL RULES OF PROF'L CONDUCT R. 3.6 (2007) (regulating circumstances and content of lawyers' extrajudicial statements so as not to prejudice adjudicative proceedings).

⁸⁷ See Kevin M. Clermont & Theodore Eisenberg, *Litigation Realities*, 88 CORNELL L. REV. 119, 129 n.54, 130 fig.2 (2002) (noting that ninety-five percent of civil cases in state courts are resolved before trial and many in under one year). Cases that proceed to trial, although rare, take significantly longer to reach disposition. See Thomas H. Cohen, *Do Federal and State Courts Differ in How They Handle Civil Trial Litigation: A Portrait of Civil Trials in State and Federal District Courts* 16 (Second Annual Conference on Empirical Legal Studies, Working Paper, 2006), available at <http://ssrn.com/abstract=912691> (noting that, on average, federal civil trials concluded eighteen months after filing, while state civil trials concluded after twenty-three months).

⁸⁸ For example, there is no statute of limitations for murder in most U.S. jurisdictions. 1 WHARTON'S CRIMINAL LAW § 92 (Charles E. Torcia ed., 15th ed. 1993); e.g., 18 U.S.C. § 3281 (2000); N.Y. C.P.L.R. 30.10 (McKinney 2008). However, it would be anomalous to bar lawyer-authored books about murder trials forever, as these cases are also the most likely to have historical value.

⁸⁹ See, e.g., Andrea Elliott, *City Gives \$5 Million to Man Wrongly Imprisoned in Child's Rape*, N.Y. TIMES, Dec. 16, 2003, at B3 (reporting on civil damages awarded for wrongful criminal conviction). Congress, however, has curbed options in federal court. E.g., 28 U.S.C. § 2244(d)(1) (2000) (providing for one-year statute of limitations for habeas actions in federal court).

to the statute of limitations, the potential for ongoing litigation in this arena may be a consideration in establishing the revised rule's time frame.

The current Rule problematically refers to the conclusion of representation from the lawyer's perspective, i.e., the conclusion of that lawyer's representation in a particular criminal proceeding. The Rule fails to consider the client's perspective, i.e., the conclusion of any additional disputes arising from the underlying factual issues. From the latter point of view, potential conflicts of interest do not disappear until the conclusion of all litigation related to the transaction.

Another advantage of the waiting period is that it further minimizes the chance that an attorney will make tactical decisions with an eye toward publication—a subjective intent problem the current Rule ignores. Because few cases will still attract public attention years after the criminal trial, under the proposed rule defense counsel will not be able to reasonably rely on a forthcoming contract. Lawyers can predict when a case will attract commercial interest—for example, a case involving a celebrity client or salacious allegations.⁹⁰ In such a case, the lawyer might reasonably anticipate publisher interest in the case and act accordingly.⁹¹ Nothing in the current Rule prevents a lawyer from tailoring her defense for publicity value and then entering into a publication contract the day after the criminal case concludes. Another problematic possibility would be for the lawyer to write the manuscript or screenplay during the course of the representation but refrain from selling it until later.

Considering the situation from the client's perspective, she also will assess the media interest in the case. The possibility that the lawyer might publish a tell-all after the conclusion of the case—as early as after trial but before the direct appeal—will erode the client's trust in the lawyer. The client may choose not to divulge information relevant to her defense or may second-guess the lawyer's tactical choices, believing (correctly or not) that the lawyer is more concerned

⁹⁰ See, e.g., *Beets v. Scott*, 65 F.3d 1258, 1261 (5th Cir. 1995) (case of wife allegedly murdering husband for insurance money that generated “significant local and national media interest”); *United States v. Hearst*, 638 F.2d 1190, 1192 (9th Cir. 1980) (case against Randolph Hearst's well-known daughter for robbery that became “cause celebre”); *People v. Bonin*, 765 P.2d 460, 465–67 (Cal. 1989) (trial of “Freeway Killer” who murdered at least ten young men and boys in Los Angeles); *Maxwell v. Superior Court*, 639 P.2d 248, 249 (Cal. 1982) (trial for ten murders); *People v. Corona*, 145 Cal. Rptr. 894, 897–98 (Ct. App. 1978) (murders of twenty-five migratory farmworkers); *People v. Gacy*, 530 N.E.2d 1340, 1341 (Ill. 1988) (murders of thirty-three young men).

⁹¹ The lawyer might actually receive offers of publication during the case and rely on these offers in making strategic choices.

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with the profit-making potential of the story than with winning the case.

I take seriously the claim that financial or reputational profit compromises the quality of representation despite the lawyer's best efforts. The proposed rule uses an objective test to determine when publication would be allowed in order to minimize the influence of the lawyer's self-interest—even if subconscious—on the loyalty of her representation. The waiting period realigns counsel's priorities by making any potential publication remote in all but a few extraordinary cases,⁹² while the client's representation and objectives remain immediate. With commercial concerns reduced, both client and lawyer should be able to focus on the client's goals.

The proposal is not perfect. It creates the possibility that lawyers will act to further their future interests five years down the line. These future interests might diverge even further from the client's interests than do the lawyer's current interests. However, the presently existing risk is most likely greater than the risk the proposal creates because future interests, discounted to present value, are worth less to lawyers and are therefore less likely to influence behavior.

A second issue is that the proposal attempts to strike a balance between competing interests, of which the client's interest is admittedly only one. Another is the historical value of criminal trials. This value is likely to be greater in cases that still attract attention five years after the trial than in those which are quickly forgotten. In such cases, the high historical value may tip the scales in favor of publication, and the client's interests in privacy and reputation may receive correspondingly less weight.

The proposed rules balance the client's interest in effective representation, the lawyer's interest in self-promotion and financial gain, and the public's interest under the First Amendment.⁹³ The proposal affects only minimally the public's interest in transparent criminal pro-

⁹² The O.J. Simpson case is one example. See William L. Hamilton, *Repulsed, Yet Watching All the Same*, N.Y. TIMES, Dec. 3, 2006, § 4, at 5 (reporting that copy of O.J. Simpson's cancelled "fictional 'confession,'" *If I Did It*, reached \$1600 on eBay).

⁹³ The First Amendment protects the right of the press to cover trials, *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 570 (1976), and the right of the public to attend criminal trials, *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980). These cases reflect the principle that "the criminal justice system exists in a larger context of a government ultimately of the people, who wish to be informed about happenings in the criminal justice system, and, if sufficiently informed about those happenings, might wish to make changes in the system." *Gentile v. State Bar*, 501 U.S. 1030, 1070 (1991). The public's interest in transparency of the criminal justice system is arguably less with respect to private counsel than government lawyers, and I leave open the question of whether the proposed rule should apply to prosecutors in light of this significant difference. See *supra* note 12 and accompanying text.

ceedings. It does not affect the right of defendants,⁹⁴ defendants' family members,⁹⁵ journalists,⁹⁶ witnesses,⁹⁷ and even jurors⁹⁸ to write books about criminal trials. The rule affects only one category of trial stories: those told by defense counsel. At least as far back as Clarence Darrow,⁹⁹ criminal defense lawyers have written professional memoirs.¹⁰⁰ Some of these publications teach important lessons, yet the historical value of those lessons becomes clear only in hindsight. Books published on the heels of sensationalized criminal trials are little more than bound tabloids.¹⁰¹ In contrast, a case is more likely to have historical significance if it still attracts paying publishers or producers years after the fact.¹⁰² Under the proposed rule, the publishers' willingness to wait serves as a proxy for historical value. The passage of time will help clarify when publication value outweighs the attending risks to clients' privacy and future litigation interests.¹⁰³

In addition to extending the nondisclosure period, the proposed rules also make distinctions where the current Rules do not. On the most basic level, the proposal applies only to criminal defense lawyers.¹⁰⁴ The proposal also introduces "financial profit" as an element,

⁹⁴ "Son of Sam" laws may limit this right. See *infra* notes 177–78 and accompanying text.

⁹⁵ E.g., ANNE BIRD, *BLOOD BROTHER: 33 REASONS MY BROTHER SCOTT PETERSON IS GUILTY* (2005).

⁹⁶ E.g., CLIFFORD L. LINEDECKER, *THE MURDER OF LACI PETERSON: THE INSIDE STORY OF WHAT REALLY HAPPENED* (2003).

⁹⁷ E.g., AMBER FREY, *WITNESS: FOR THE PROSECUTION OF SCOTT PETERSON* (2005).

⁹⁸ E.g., GREG BERATLIS ET AL., *WE, THE JURY: DECIDING THE SCOTT PETERSON CASE* (2007).

⁹⁹ CLARENCE DARROW, *THE STORY OF MY LIFE* (1932).

¹⁰⁰ Recent examples include ROY BLACK, *BLACK'S LAW: A CRIMINAL DEFENSE LAWYER REVEALS HIS DEFENSE STRATEGIES IN FOUR CLIFFHANGER CASES* (Touchstone ed., 2000); ALAN M. DERSHOWITZ, *THE BEST DEFENSE* (1984); FEIGE, *supra* note 64; and MICHAEL E. TIGAR, *FIGHTING INJUSTICE* (2002).

¹⁰¹ See David Sternbach, *Son of Son of Sam: Trashing Popular Media and Criminalizing Crime-Related Expression*, 19 HASTINGS COMM. & ENT. L.J. 771, 778–82 (1997) (noting that politicians and judges condemn such books as trashy and exploitative, but defending such books as protected speech).

¹⁰² Reviewing no fewer than eight books written about the O.J. Simpson case, one commentator noted: "[T]here is a reason history usually waits to be written until its makers are dead. Then, with gigantic egos cleared from the scene, more dispassionate observers can reconstruct facts, assign blame, and speculate on the larger interconnections of things. These books come much too soon for that." George Fisher, *The O.J. Simpson Corpus*, 49 STAN. L. REV. 971, 972 (1997) (book review).

¹⁰³ Cf. Patrick Shilling, Note, *Attorney Papers, History, and Confidentiality: A Proposed Amendment to Model Rule 1.6*, 69 FORDHAM L. REV. 2741, 2742 (2001) (proposing exception to rule of confidentiality that would allow lawyers to place files relating to deceased clients in historical repositories if historical value outweighs harm to deceased client and family).

¹⁰⁴ See *supra* note 12 and accompanying text.

distinguishing between disclosures made for profit, such as book publications, and disclosures made for educational or other purposes, such as clinical teaching scholarship. Limited disclosure—changing names and identifying details—would be prohibited in the former but permitted in the latter. My emphasis on purpose is a departure from existing ethics opinions, which have declined to apply different standards of confidentiality depending on the reason for disclosure.¹⁰⁵ Yet the move is not without precedent, as ethical codes developed for psychiatrists, psychologists, and clinical social workers do distinguish between teaching, for example, and other purposes of disclosure.¹⁰⁶ The experience of other professions suggests that the distinction is workable for lawyers.

The proposal's emphasis on profit, however, is not a perfect proxy for value, illustrating the inherent difficulty of drawing lines. The profit rule may be overinclusive. David Feige's *Indefensible*,¹⁰⁷ for example, surely does more than simply line the author's pockets. The book also raises public awareness about the criminal justice system in general and the problem of indigent defense in particular. Conversely, the profit element may be underinclusive. Clinical scholarship surely does more than share best practices with students and practitioners; publication in a law review also benefits the individual author.¹⁰⁸

One reason to draw the line between for-profit publications and clinical scholarship is that clinical scholars have had a relatively short time to develop ethical norms, as compared to other professionals.¹⁰⁹

¹⁰⁵ NYSBA Comm. on Prof'l Ethics, Op. 718 (1999) (disclosure of information to bar association); NYSBA Comm. on Prof'l Ethics, Op. 485 (1978) (disclosure for survey conducted by nonprofit group); ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1287 (1974) (same); ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 1150 (1970) (disclosure of information to student researcher). While New York has not adopted the new Model Rules, it has followed the old Model Code and its analogous rule. See MODEL CODE OF PROF'L RESPONSIBILITY DR 4-101 (1981); *supra* note 23.

¹⁰⁶ See *supra* notes 72–77. These codes permit disclosure by changing names and other identifying details in limited contexts, such as teaching, but implicitly prohibit similar disclosures in other contexts, such as screenplays. Permitted contexts differ across professions. For example, the National Association of Social Workers is the most restrictive, limiting disclosure to “teaching or training,” CODE OF ETHICS, *supra* note 77, at 1.07(p), while the American Psychological Association refers broadly to disclosure for “writings, lectures, or other public media,” PSYCHOLOGY ETHICS, *supra* note 73, at § 4.07.

¹⁰⁷ See *supra* notes 64–68 and accompanying text.

¹⁰⁸ Miller, *supra* note 9, at 37. The benefit of publication, for example, may be to increase an author's chance of receiving academic tenure.

¹⁰⁹ See *id.* (partially linking “lawyer storytelling movement” in recent decades to “acceptance of clinical teachers into the academy”). To my knowledge, Miller's article is the first, and the only, to take the ethics of clinical scholarship and practice as its principal subject. Tarr also touches on clinical ethics, though she divides her analysis between duties

Client narrative has a foundation in other disciplines: Where would psychiatry be without Dora?¹¹⁰ Narrative may play a similar role in the delivery of legal services and the professional development of young lawyers. It is true that ethics rules should not permit experimentation at the expense of clients. To the extent that clinical scholarship actually improves the delivery of legal services to clinic clients, however, these clients will be the ultimate beneficiaries of a rule permitting such disclosures.

III

COUNTERARGUMENTS AND RESPONSES

A. *The Difficulty of Informed Consent: Rule 1.0(e)*

Many of the problems identified in this Note hinge importantly on the definition of informed consent. The proposed rules replace informed consent with a waiting period during which lawyers may not seek or obtain client permission to tell the client's story. One counterargument to this proposal is that the current informed consent standard is sufficient if properly applied. However, informed consent alone is insufficient to protect client interests. Due to factual and legal uncertainty, lawyers can rarely, if ever, fully inform clients of the consequences of disclosure. In addition, courts face evidentiary problems when they apply the informed consent standard *ex post*. The *von Bulow* case study is a powerful example illustrating these problems.¹¹¹ Even though Claus von Bulow was a wealthy, educated client who retained a famous lawyer—Alan Dershowitz¹¹²—von Bulow was still unable to give meaningful informed consent. Because most criminal defendants lack von Bulow's advantages and most defense lawyers lack Dershowitz's resources, this case study highlights the enormous shortcomings of informed consent doctrine for most litigants. Before exploring these issues further, however, I will briefly introduce informed consent doctrine.

owed to clients and duties owed to clinic students. Tarr, *supra* note 78. Both articles discuss law school clinics generally; they do not focus on criminal defense.

¹¹⁰ SIGMUND FREUD, DORA: AN ANALYSIS OF A CASE OF HYSTERIA (Philip Rieff ed., Simon & Schuster 1997). For a description of how Freud's study of Dora became a landmark clinical study in psychoanalysis, see, for example, IN DORA'S CASE (Charles Bernheimer & Claire Kahane eds., 2d ed. 1990).

¹¹¹ See *infra* Part III.A.2.

¹¹² See *infra* text accompanying note 132.

1. *What Is Informed Consent?*

The doctrine of informed consent, developed in tort law,¹¹³ now applies to many substantive areas of law,¹¹⁴ including professional ethics. The Model Rules provide the following definition: Informed consent “denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.”¹¹⁵ By design, this definition depends almost entirely on context. The Model Rules require informed consent in a variety of situations.¹¹⁶ Nevertheless, some core requirements may apply universally. The Comments to Rule 1.0(e) elaborate on the definition and explain that adequate information and explanation may depend on the client’s experience and sophistication.¹¹⁷ The Comments further clarify that an “affirmative response” is usually required, though in some cases consent may be inferred.¹¹⁸ Neither qualification, however, lessens the lawyer’s duty to ensure that the client has reasonably adequate information on which to base her decision.

In some contexts, such as when a client is informed of and accepts representation despite counsel’s conflict of interest, the Rules require

¹¹³ Informed consent derives from the principle of bodily integrity. The most famous formulation of this principle is Justice Cardozo’s statement that “every human being of adult years and sound mind has a right to determine what shall be done with his own body” *Schloendorff v. Soc’y of N.Y. Hosp.*, 105 N.E. 92, 93 (N.Y. 1914). From this case formulation flows the rule that surgery performed without informed consent constitutes a battery. *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 269 (1989) (quoting *Schloendorff*, 105 N.E. at 93). For an overview of informed consent doctrine in tort law, see generally Barbara L. Atwell, *The Modern Age of Informed Consent*, 40 U. RICH. L. REV. 591 (2006).

¹¹⁴ Commentators have applied the doctrine of informed consent to a variety of social problems. See, e.g., Jordan M. Blanke, “Robust Notice” and “Informed Consent:” *The Keys to Successful Spyware Legislation*, 7 COLUM. SCI. & TECH. L. REV. 2, 16–18 (2006) (computer users who download software); Lela P. Love & John W. Cooley, *The Intersection of Evaluation by Mediators and Informed Consent: Warning the Unwary*, 21 OHIO ST. J. ON DISP. RESOL. 45, 65–69 (2005) (parties in mediation); Laura Montgomery, *Space Tourism and Informed Consent: To Knowingly Go*, FED. LAW., July 2004, at 26, 26 (space tourists); Bradley R. Stark & James S.H. Null, *Suitability and ‘Financial Informed Consent’: Brokers’ Minimal Obligation to Inform Investors of Material Risks Prior to Generating Risk Tolerance and Investment Objective Forms*, in 1 SECURITIES ARBITRATION 2005: TELLING YOUR STORY, at 317, 326–32 (PLI Corp. Law & Practice, Course Handbook Series No. 1502, 2005) (retail brokerage clients); Ellen Wertheimer, *Of Apples and Trees: Adoption and Informed Consent*, 25 QUINNIPIAC L. REV. 601, 624–29 (2007) (adoptive parents).

¹¹⁵ MODEL RULES OF PROF’L CONDUCT R. 1.0(e) (2007). The old Model Code contained no analogous provision.

¹¹⁶ *Id.* R. 1.0 cmt. 6 (cross-referencing Rule 1.2(c) (limiting scope of representation), Rule 1.6(a) (confidentiality), and Rule 1.7(b) (waiver of concurrent conflict of interest)).

¹¹⁷ *Id.*

¹¹⁸ *Id.*

that the client's informed consent be "confirmed in writing."¹¹⁹ In others, such as a client's consent to disclosure of confidential information, a writing is not required.¹²⁰ As this discrepancy suggests, informed consent requirements may vary significantly depending on the circumstances.

While few cases interpret Rule 1.0(e) requirements in the context of disclosure of confidential information, a recent Ninth Circuit opinion, *McClure v. Thompson*,¹²¹ provides a useful analysis. There, the court found that counsel had not properly obtained informed consent where he "did not . . . advise [his client] of *all* potential adverse consequences."¹²² Significantly, the court noted that counsel's duty was no less where "common sense" should have informed the client what would happen as a result of disclosure: "The onus is not on the client to perceive the legal risks himself and then to dissuade his attorney from a particular course of action."¹²³ Rather, the duty rests solely on counsel to inform her client of the potential consequences of disclosure and to advise the client accordingly.¹²⁴

There are more opinions discussing the requirements of informed consent where a writing is required.¹²⁵ These cases are consistent with

¹¹⁹ *E.g.*, *id.* R. 1.7(b)(4) (waiver of conflict of interest due to another current client); *id.* R. 1.9(a) (waiver of conflict of interest due to former client). "Confirmed in writing" refers both to a writing by the client giving informed consent and to a writing by the lawyer confirming the client's oral informed consent. *Id.* R. 1.0(b). Other Rules specifically require informed consent in a writing signed by the client. *E.g.*, *id.* R. 1.8(a)(3) (waiver of conflict of interest due to lawyer's financial interest).

¹²⁰ *Id.* R. 1.6(a).

¹²¹ 323 F.3d 1233 (9th Cir. 2003). *McClure* reviewed a district court's denial of federal habeas relief arising from a conviction in Oregon state court. *Id.* at 1235. As a result, the *McClure* court applied the old DR 4-101—then in force in Oregon—not current Model Rule 1.6(a). *Id.* at 1242. The court's construction of DR 4-101, however, required consultation by counsel very similar to the requirement of informed consent. *See id.* at 1244–45. As such, the court's analysis is applicable to the Model Rules.

¹²² *Id.* at 1244 (quoting *McClure v. Thompson*, No. 97-CV-6182 (D. Or. May 25, 2001)) (internal quotation marks omitted) (emphasis added).

¹²³ *Id.* This holding is particularly striking in light of the facts. Robert McClure was arrested on suspicion of killing his female friend and her two young children, whose bodies were missing. *Id.* at 1235. McClure told his lawyer the location of the bodies, and the lawyer notified the local sheriff. *Id.* at 1235–37. In a federal habeas proceeding, McClure argued that his lawyer's disclosure of confidential information amounted to ineffective assistance of counsel. *Id.* at 1235. Although the Ninth Circuit was compelled to adopt the district court's finding that McClure consented to the disclosure, the court found that his consent was not informed, *id.* at 1245, even though the consequences of reporting two dead bodies might be considered obvious. Nevertheless, the court found that the lawyer's disclosure fit a permissive exception to confidentiality and was not ineffective assistance of counsel. *Id.* at 1247.

¹²⁴ *Id.* at 1244.

¹²⁵ *See, e.g.*, *In re Congoleum Corp.*, 426 F.3d 675, 688 (3d Cir. 2005) (discussing informed consent in context of concurrent conflict of interest); *United States v. White Buck Coal Co.*, Crim. Action No. 2:06-00114, 2007 WL 130322, at *9 (S.D. W. Va. Jan. 16,

McClure in that they require “thorough” discussion of the proposed course of conduct and its “possible ramifications.”¹²⁶ As such, this case law confirms that cursory or indirect references to potential adverse consequences are insufficient.¹²⁷ With these general principles in mind, I now turn to the specific question of when a lawyer is permitted to reveal client confidences.

2. *The von Bulow Case: An Illustration of (Un)informed Consent*

As the above discussion illustrates, informed consent is ideally a demanding standard. The *von Bulow* case, however, illustrates the inherent difficulty of obtaining informed consent from lay clients in the face of legal and factual uncertainty. Perhaps more troubling, the *von Bulow* case reveals the evidentiary difficulties courts face in determining whether informed consent was given.

While Claus von Bulow’s name may not be as familiar to young lawyers as O.J. Simpson’s, his murder trial once fascinated the American public¹²⁸—ultimately serving as the subject of a musical¹²⁹ and an Oscar-winning film.¹³⁰ The dramatic facts of *von Bulow* unfolded as follows: A Rhode Island jury convicted Claus von Bulow of attempting to murder his wife, Martha, by injecting her with insulin.¹³¹ Von Bulow then retained Harvard law professor Alan Der-showitz to represent him on appeal to the state supreme court.¹³² The appeal was successful, and von Bulow was acquitted on retrial.¹³³ Following the acquittal, Martha’s children from a previous marriage brought a civil suit against von Bulow, alleging common law assault, negligence, fraud, and RICO violations.¹³⁴

2007) (same); Bd. of Regents v. BASF Corp., No. 4:04CV3356, 2006 WL 2385363, at *6, *7 (D. Neb. Aug. 17, 2006) (same).

¹²⁶ *BASF*, 2006 WL 2385363, at *9.

¹²⁷ This is true even when a client is a sophisticated corporation with litigation experience. *Id.*

¹²⁸ See Donald A. Dripps, *Ineffective Assistance of Counsel: The Case for an Ex Ante Parity Standard*, 88 J. CRIM. L. & CRIMINOLOGY 242, 292 (1997) (noting that “[a]nyone who reads the newspapers” was familiar with *von Bulow* case).

¹²⁹ See Enid Nemy, *Broadway*, N.Y. TIMES, Apr. 25, 1986, at C2 (announcing staged reading of musical drama *Beautiful People*, based on von Bulow story).

¹³⁰ REVERSAL OF FORTUNE (Sovereign Pictures 1990). For an analysis of how the movie informs popular legal knowledge, see Suzanne Shale, *The Conflicts of Law and the Character of Men: Writing Reversal of Fortune and Judgment at Nuremberg*, 30 U.S.F. L. REV. 991, 994 (1996).

¹³¹ State v. von Bulow, 475 A.2d 995, 999 (R.I. 1984).

¹³² Von Bulow *ex rel.* Auersperg v. von Bulow, 114 F.R.D. 71, 73 (S.D.N.Y. 1987).

¹³³ *Id.*

¹³⁴ *Id.*

In the meantime, with von Bulow's "active[] encourage[ment]," Dershowitz published an "insider's diary" about the case¹³⁵ maintaining von Bulow's innocence.¹³⁶ A federal district judge found that von Bulow's promotion of the book "waived his attorney-client privilege with respect to the subject matter and conversations published in the book"¹³⁷ and permitted broad discovery in the civil case.¹³⁸ The Second Circuit later limited the scope of the waiver, but affirmed the district court's determination that von Bulow had given his informed consent.¹³⁹ While commentators¹⁴⁰ and practitioners¹⁴¹ continue to cite the Second Circuit decision as a leading case on the waiver issue, they have largely ignored that portion of the opinion addressing informed consent.¹⁴² The district court opinion thus provides a useful, yet underexamined, case study of how courts struggle to apply the informed consent standard¹⁴³ and why a new framework is necessary.

In finding consent to waiver of attorney-client privilege, the district court relied on several factors that do not satisfy the requirements of informed consent, whether evaluated independently or together. First, the court noted that von Bulow was enthusiastic about

¹³⁵ *Id.* at 77.

¹³⁶ ALAN M. DERSHOWITZ, *REVERSAL OF FORTUNE: INSIDE THE VON BULOW CASE* xviii, xxii (1986).

¹³⁷ *Von Bulow*, 114 F.R.D. at 77.

¹³⁸ *Id.* at 79–80.

¹³⁹ That is, the Second Circuit agreed that von Bulow gave his informed consent to the publication, thereby waiving the attorney-client privilege, but concluded that the waiver extended only to those topics actually disclosed in the book. *In re von Bulow*, 828 F.2d 94, 102 (2d Cir. 1987).

¹⁴⁰ See, e.g., Kenneth S. Broun & Daniel J. Capra, *Getting Control of Waiver of Privilege in the Federal Courts: A Proposal for a Federal Rule of Evidence 502*, 58 S.C. L. REV. 211, 253 (2006) (citing *von Bulow* as example of case in which fairness did not demand subject matter waiver of privilege); Jeffrey S. Nestler, Comment, *The Underprivileged Profession: The Case for Supreme Court Recognition of the Journalist's Privilege*, 154 U. PA. L. REV. 201, 218 n.68 (2005) (using *von Bulow* standard to determine application of journalist's privilege).

¹⁴¹ See, e.g., James M. Lynch, *War of the [Tax] Worlds: Privilege Versus Transparency*, in *TAX PLANNING FOR DOMESTIC & FOREIGN PARTNERSHIPS, LLCs, JOINT VENTURES & OTHER STRATEGIC ALLIANCES 2005*, at 265, 345 (PLI Tax Law & Practice, Course Handbook Series No. 660, 2005) (naming *von Bulow* leading case limiting privilege waivers in nonadversarial contexts); Ronald C. Minkoff, *A Leak in the Dike: Expanding the Doctrine of Waiver of the Attorney-Client Privilege (2006–07 Update)*, in *ETHICS IN CONTEXT WINTER 2006*, at 181, 188–89 (PLI N.Y. Practice Skills, Course Handbook Series No. 163, 2006) (citing *von Bulow* for proposition that extrajudicial waivers are more limited than waivers in litigation context).

¹⁴² A Westlaw search for the phrase "von Bulow" in journals and law reviews located 494 results, none of which focused on the informed consent issue (from www.westlaw.com, search the database JLR for "von Bulow"; search conducted Mar. 4, 2008).

¹⁴³ New York State, as noted *supra* note 57, has not replaced DR 4-101 with Model Rule 1.6(a). While the newer Rule uses the term "informed consent" where the old used "consent" after "full disclosure," courts have construed these requirements to be the same.

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publication. He appeared with Dershowitz on two television talk shows to promote the book.¹⁴⁴ Common sense suggests that no one would expect information disclosed in a book to remain private. However, the fact that common sense suggests a particular result did not relieve Dershowitz of his duty to explain that result to his client.¹⁴⁵ Moreover, von Bulow did not read the book prior to its publication and thus did not know what would be disclosed in it.¹⁴⁶

The district court interpreted von Bulow's blind consent as a tactical choice to improve the book's credibility.¹⁴⁷ This may be accurate, but the rules of ethics should have demanded that Dershowitz be specific about what would be disclosed.¹⁴⁸ In addition, informed consent requires the lawyer to propose "reasonably available alternatives" to the proposed course of conduct.¹⁴⁹ As a logical matter, Dershowitz could not fulfill this responsibility without first explaining the proposed course of conduct. Lacking a clear understanding of what would be disclosed, von Bulow could not evaluate the book as compared to alternatives—if, in fact, any were presented. If no alternative was presented, this omission itself would violate the principle of informed consent.

The district court also relied on a letter written from Dershowitz to his client prior to publication.¹⁵⁰ The letter read in full:

Dear Claus:

I really appreciate your confidence in me, in encouraging me to write an honest book about the case without showing it to you before publication. I think this will enhance the credibility of my strong case for your total innocence. Especially in light of our attack on (William) Wright (whose book, *The von Bulow Affair*, put forth a case for defendant's guilt), it is especially important for this to be *my* book. As you will see when my book comes out, it whets the reader's appetite to read your book.

¹⁴⁴ *Von Bulow ex rel. Auersperg v. von Bulow*, 114 F.R.D. 71, 75 (S.D.N.Y. 1987).

¹⁴⁵ *See supra* text accompanying note 123 (noting that standard of informed consent does not change where client could have perceived risks of disclosure using common sense).

¹⁴⁶ *Von Bulow*, 114 F.R.D. at 74.

¹⁴⁷ *Id.* at 76.

¹⁴⁸ *Cf. Bd. of Regents v. BASF Corp.*, No. 4:04CV3356, 2006 WL 2385363, at *9 (D. Neb. Aug. 17, 2006) (detailing attorney's failure to fully inform client of possible conflict of interest and potential adverse effects of conflict).

¹⁴⁹ MODEL RULES OF PROF'L CONDUCT R. 1.0(e) (2007).

¹⁵⁰ *Von Bulow*, 114 F.R.D. at 76.

I look forward to joining you at the opera in the near future.

With every good wish,

Cordially,

Alan Dershowitz.¹⁵¹

While written consent is not required under Rule 1.6(a), the district court relied on the letter as written confirmation of von Bulow's oral consent. The letter refers to earlier conversations between Dershowitz and von Bulow, raising the possibility that Dershowitz could have provided specific advice at another time. However, the court had no way of knowing what, if anything, was said in those conversations, and no evidence was presented on this point. Nothing in the record suggests that Dershowitz explained to von Bulow the risk of waiver, its scope, or its potential implications in future litigation. Absent evidence that Dershowitz did, in fact, satisfy his ethical duties, the court should not have found informed consent.¹⁵² When the client consents by oral agreement, rather than in writing, the court must rely on sparse evidence of informed consent. This is why a new rule is necessary to protect clients.¹⁵³

In finding consent, the court also relied on letters sent by plaintiff's counsel warning von Bulow that Dershowitz's book waived attorney-client privilege.¹⁵⁴ In doing so, plaintiff's counsel—unlike von Bulow's own counsel—did identify the risk of allowing publication to proceed. However, the letters do not explain the risk as required by Rule 1.0(e).¹⁵⁵ The Model Rules contemplate the possibility that someone other than the client's own lawyer will play a role in providing information, but caution that counsel assumes the risk that a third party will not adequately inform the client.¹⁵⁶ If recitation without explanation is inadequate—given the requirements of thoroughness and specificity—then the failure is still attributable to the client's attorney. Perhaps more importantly, the principles underlying the duty of confidentiality—in particular, unfettered communication between client and her counsel—suggest that the client's own lawyer

¹⁵¹ *Id.* at 73–74 (alterations in original).

¹⁵² *Cf. BASF*, 2006 WL 2385363, at *9 (refusing to find informed consent where attorney had not given “adequate” information or explanation).

¹⁵³ While an obvious solution would be to require a writing, this would impose additional administrative burdens on client and counsel without ensuring meaningful discussion, *see* Tarr, *supra* note 78, at 288, 306, especially where the client lacks von Bulow's sophistication.

¹⁵⁴ *Von Bulow*, 114 F.R.D. at 74.

¹⁵⁵ Rule 1.0(e) requires the lawyer both to communicate the risk and to explain it. MODEL RULES OF PROF'L CONDUCT R. 1.0(e) (2007).

¹⁵⁶ *Id.* R. 1.0 cmt. 6.

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should be the one to communicate the benefits and risks of disclosure. Communication by an adverse party does not further the attorney-client relationship, and may harm it.

The facts suggest that Claus von Bulow did not give informed consent within the meaning of the Model Rules. Dershowitz likely failed to communicate the relevant information to him, so von Bulow did not know enough to give meaningful consent. Issues such as the scope of a waiver are topics for professional responsibility courses in law school, and are not easily digestible by a lay client.¹⁵⁷ In this case, however, understanding the scope of the waiver proved particularly central. Even Dershowitz, a law professor, could not have predicted that the district court would find a waiver encompassing von Bulow's entire life story.¹⁵⁸ Reasonable minds can differ; here, three circuit judges disagreed with the district judge.¹⁵⁹

At a minimum, the *von Bulow* case represents poor application of ethical rules by the district court and the court of appeals. Failure to apply a protective standard in this case—a case involving renowned defense counsel and a wealthy client¹⁶⁰—raises the question of how the current Rules will fare in less celebrated cases. In a typical criminal case, there will be less scrutiny applied after the fact and fewer resources available both to counsel and to client. In these cases, further deterioration of the demanding (but mandatory) ethical provisions can be anticipated.

The problem of proving informed consent, coupled with the intrinsic difficulty of obtaining truly informed consent, justifies a more client-focused rule. The proposed revisions are a departure from current Rule 1.8(d): Publication is not permitted during the extended

¹⁵⁷ See *Maxwell v. Superior Court*, 639 P.2d 248, 259 (Cal. 1982) (Bird, C.J., concurring and dissenting) (“To a person trained in the law, a host of legal problems come easily to mind.”).

¹⁵⁸ *Von Bulow*, 114 F.R.D. app. at 82. Martha's children, plaintiffs in the civil litigation, submitted the following question: “Did defendant and his attorney ever discuss the story of defendant's life? What was the attorney's reaction to what was said?” *Id.* The court quoted the following passage from Dershowitz's book: “‘In preparation for [Claus's] possible testimony, I [Dershowitz] had Claus relate to me *the entire story of his life.*’” *Id.* (emphasis added) (quoting DERSHOWITZ, *supra* note 136, at 207). The court concluded that this statement constituted a waiver of the attorney-client privilege as to the plaintiffs' questions. *Id.* Compelling disclosure of Dershowitz's reaction would naturally compel disclosure of substantial portions of the underlying story. On appeal, the Second Circuit agreed that von Bulow had implicitly consented to waiver of the privilege, though the court narrowed the scope of the waiver. *In re von Bulow*, 828 F.2d 94, 102 (2d Cir. 1987).

¹⁵⁹ *Von Bulow*, 828 F.2d at 102. To the extent that the Second Circuit opinion in *von Bulow* now controls, a defense lawyer practicing within its jurisdiction can better inform her client regarding the risks of disclosure.

¹⁶⁰ See Associated Press, *Von Bulow Files Suit to Rebut Stepchildren*, N.Y. TIMES, Oct. 4, 1986, § 1, at 26 (describing von Bulow as “Danish socialite”).

time period even if the lawyer has obtained informed consent. Any publication within the waiting period would be per se unethical.

B. First Amendment Considerations

Whether or not the proposed rule is desirable as a matter of ethics, detractors may argue that it violates First Amendment principles. The rule, after all, restrains speech.¹⁶¹ But a state's¹⁶² imposition of restraint begins, rather than ends, the constitutional inquiry. The First Amendment does not forbid all restraints on speech.¹⁶³ Current jurisprudence already permits restraint under certain conditions; the quintessential example is when the restraint is necessary for national defense.¹⁶⁴

When the speaker is a lawyer, the First Amendment inquiry changes shape. In *Gentile v. State Bar of Nevada*, the Supreme Court held that state-imposed restrictions on attorney speech are subject to less stringent review than state-imposed restrictions on other speakers.¹⁶⁵ The Court has also suggested in dicta that rules of ethics

¹⁶¹ See René L. Todd, Note, *A Prior Restraint by Any Other Name: The Judicial Response to Media Challenges of Gag Orders Directed at Trial Participants*, 88 MICH. L. REV. 1171, 1172 & n.10 (1990) (collecting cases that apply prior restraint analysis to judicial orders limiting trial participant speech). While circuit courts are split on the question of whether limitations on attorney speech are "prior restraints," those courts that answer in the negative review such limitations under a deferential "reasonableness" standard. *Id.* at 1172. Accordingly, my analysis will focus on whether the proposed rule could survive a stricter standard of review. It is hornbook First Amendment law that "[a]ny system of prior restraint of expression comes to th[e] Court bearing a heavy presumption against its constitutional validity." *N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971) (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963)) (holding that government could not restrain *Washington Post* from publishing previously classified report about Vietnam).

¹⁶² State bar associations and their ethics subcommittees are state actors for First Amendment purposes. See *Gentile v. State Bar*, 501 U.S. 1030, 1033 (1991) (attributing application of disciplinary rule by state bar association to State of Nevada).

¹⁶³ The existence of the "clear and present danger" test affirms the necessity of exceptions to the rule. See *Bridges v. California*, 314 U.S. 252, 262 (1941) ("'[C]lear and present danger' is an appropriate guide in determining the constitutionality of restrictions upon expression . . .").

¹⁶⁴ *Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829, 849 n.* (1978) (Stewart, J., concurring) (declaring national defense "most obvious justification for government restrictions on publication").

¹⁶⁵ 501 U.S. 1030, 1071, 1075 (1991) (holding that states may impose prior restraints on attorney speech on showing of "substantial likelihood of material prejudice," rather than "clear and present danger"). For an analysis of *Gentile*, see Michael W. McTigue, Jr., Case Comment, *Court Got Your Tongue? Limitations on Attorney Speech in the Name of Federalism: Gentile v. State Bar*, 72 B.U. L. REV. 657, 658 (1992). Similar restrictions may apply to judges. See *Landmark Commc'ns*, 435 U.S. at 848-49 (Stewart, J., concurring) (declaring constitutional validity of Virginia criminal statute that prohibits "any person" from divulging confidential information about proceedings).

may trump First Amendment freedoms.¹⁶⁶ These cases reflect Justice Cardozo's maxim that "[m]embership in the bar is a privilege burdened with conditions,"¹⁶⁷ among them restrictions on speech for a lawyer who represents a criminal defendant.¹⁶⁸

Because Model Rule 1.8 already imposes a restriction on attorney speech—by forbidding lawyers from entering media rights contracts prior to the conclusion of representation¹⁶⁹—the proposed rule should not raise any new First Amendment concerns. The constitutionality of the existing Rules depends on the nexus between the Rules and the professional relationship.¹⁷⁰ Whether extending the waiting period raises additional First Amendment concerns depends in part on what the attorney-client relationship entails. The current Rule imagines a relationship that—for conflict of interest purposes, but not for confidentiality purposes¹⁷¹—ends with the conclusion of the representation.¹⁷² A client-focused approach, however, would concentrate on the client's objectives rather than on an isolated legal proceeding. If the relationship is defined in these client-focused terms, the relevant protective scope expands to include other disputes arising from the same facts underlying the criminal case. The proposed rule uses an objective waiting period as a proxy for this client-focused approach to catch collateral issues without creating an unduly burdensome administrative scheme. Rather than extending the time bar beyond the attorney-client relationship, the proposed rule extends the scope of the relationship—and the time bar follows. The proposed rule thus

¹⁶⁶ See *In re Sawyer*, 360 U.S. 622, 646–47 (1959) (Stewart, J., concurring) (“Obedience to ethical precepts may require abstention from what in other circumstances might be constitutionally protected speech.”). Many subsequent cases have made the same point, citing Justice Stewart’s concurrence in *Sawyer*. E.g., *In re Pyle*, 156 P.3d 1231, 1247 (Kan. 2007); *Grievance Adm’r v. Fieger*, 719 N.W.2d 123, 141–42 (Mich. 2006); *State ex rel. Counsel for Discipline v. Sipple*, 660 N.W.2d 502, 509–10 (Neb. 2003); *In re Hoffman*, 704 N.W.2d 810, 814 (N.D. 2005).

¹⁶⁷ *Gentile*, 501 U.S. at 1066 (quoting *In re Rouss*, 116 N.E. 782, 783 (N.Y. 1917)).

¹⁶⁸ See *id.* at 1071 (“[I]n the courtroom itself, during a judicial proceeding, whatever right to ‘free speech’ an attorney has is extremely circumscribed. . . . Even outside the courtroom . . . lawyers in pending cases [are] subject to ethical restrictions on speech to which an ordinary citizen would not be.”).

¹⁶⁹ MODEL RULES OF PROF’L CONDUCT R. 1.8(d) (2007).

¹⁷⁰ See *Gentile*, 501 U.S. at 1071 (noting that speech rights of attorneys may be circumscribed during “pending” cases).

¹⁷¹ The duty of confidentiality continues indefinitely. See MODEL RULES OF PROF’L CONDUCT R. 1.6 cmt. 18 (2007) (“The duty of confidentiality continues after the client-lawyer relationship has terminated.”).

¹⁷² The Model Rules create a limited duty to avoid conflicts with former clients, which does not cover the problem addressed here. *Id.* R. 1.9 (2007).

differs from an outright ban,¹⁷³ which would be unlikely to survive constitutional scrutiny.¹⁷⁴

C. *Client Autonomy*

The proposed rules may also be problematic because they limit client autonomy in at least two ways. First, they appear to limit criminal defendants' choice of counsel. Assume, for example, that the price of retaining Alan Dershowitz includes agreeing to the post-trial publication of one's story. The current Rules would prevent Dershowitz from entering into an explicit contract of this type, but we can easily imagine how an implicit agreement might form.¹⁷⁵ The prospective client might decide that, in her personal estimation, the benefits of retaining Dershowitz outweigh the costs of a post-trial tell-all. Under the proposed rules the solution is straightforward: No lawyer can condition her representation on immediate publication rights, because every lawyer is subject to the mandatory waiting period. As a result, the client does not suffer any reduction in options.¹⁷⁶ A variation on this problem is the defense counsel who only takes cases either for a large upfront payment or for publication rights to the client's story. Eliminating the latter option adversely affects clients who lack the ability to pay cash. But current Rule 1.8(d), which forbids a lawyer from purchasing the rights to her client's story in exchange for the representation, already eliminates this cruel dilemma.

Second, and more worrisome, is the client who seeks out a defense lawyer *specifically* to tell her story. A client may want a lawyer to do this because she herself cannot, due to legal or personal limitations. For example, widespread "Son of Sam" laws prohibit

¹⁷³ In *Gentile*, the Supreme Court reasoned that Nevada's ethical rule was permissible because "[t]he regulation of attorneys' speech is limited[;] . . . it merely *postpones* the attorneys' comments until after the trial." 501 U.S. at 1076 (emphasis added). The proposed rule creates precisely the same limitation: It postpones, but does not ban, a form of attorney speech.

¹⁷⁴ *Cf.* Luna, *supra* note 12, at 181 ("[W]hile the Court might accept some cautionary measures, they [sic] would never allow an outright ban against prosecutor tell-alls.").

¹⁷⁵ Suppose that Dershowitz arranges a meeting with a prospective client in his office. The office is lined with bookshelves filled with Dershowitz's professional memoirs about prior cases. The client infers that retaining Dershowitz implicitly entails allowing Dershowitz to include her case in a future publication. I thank Bruce Green for this example.

¹⁷⁶ This assumes that no criminal defense lawyers leave the market due to the proposed rules. If some lawyers currently choose to represent criminal defendants solely or primarily for the purpose of publishing trial stories, the proposed rules may cause these lawyers to stop practicing criminal defense. This would, of course, result in a smaller number of lawyers from which to choose.

many people convicted of crimes from profiting from their stories.¹⁷⁷ While jurisdictions that have adopted Son of Sam laws prohibit convicted criminals from profiting from their stories, these laws do not prohibit such persons from telling their stories, provided that any profits are available to crime victims who sue in tort. An important avenue of publicity thus remains open even in Son of Sam jurisdictions.¹⁷⁸ Nevertheless, Son of Sam laws create obvious financial disincentives that may make it impractical for criminal defendants to author their own stories.

In some jurisdictions, Son of Sam laws also work to limit the rights of third parties to profit from crime stories,¹⁷⁹ a rule that may already ban lawyer publication of these stories. Even where profit restrictions do not apply, a client may want or need assistance in

¹⁷⁷ New York passed the first Son of Sam law in 1977 after infamous killer David Berkowitz, who used the nickname in crime-scene notes, received multiple offers to publish his story. Howe, *supra* note 11, at 344–45. The original law applied to any person accused or convicted of a crime and required profits generated from telling crime stories to be turned over to the New York State Crime Victims Compensation Board. *Id.* at 345. Many states and the federal government soon passed copycat statutes. *Id.* The Supreme Court later struck down New York's statute in *Simon & Schuster, Inc. v. Members of New York State Crime Victims Board*, 502 U.S. 105 (1991). Applying strict scrutiny, the Court found a compelling state interest in compensating crime victims but held that the law was not narrowly tailored to this purpose. *Id.* at 120–23. Following *Simon & Schuster*, many states have revised their Son of Sam laws. Howe, *supra* note 11, at 350. Son of Sam laws have been well-parsed elsewhere and will not be addressed in detail here. *E.g.*, Jessica Yager, *Investigating New York's 2001 Son of Sam Law: Problems with the Recent Extension of Tort Liability for People Convicted of Crimes*, 48 N.Y.L. SCH. L. REV. 433 (2004) (criticizing New York's recently amended Son of Sam law as unnecessarily and inappropriately harsh); Suna Chang, Note, *The Prodigal "Son" Returns: An Assessment of Current "Son of Sam" Laws and the Reality of the Online Murderabilia Marketplace*, 31 RUTGERS COMPUTER & TECH. L.J. 430 (2005) (arguing current Son of Sam laws fail to address reality of online "murderabilia" market or to cure constitutional shortcomings); Howe, *supra* note 11 (arguing that Son of Sam laws could be structured and defended so as to withstand constitutional scrutiny); Orly Nosrati, Comment, *Son of Sam Laws: Killing Free Speech or Promoting Killer Profits?*, 20 WHITTIER L. REV. 949 (1999) (examining constitutionality of California's recently revised Son of Sam law); Lori K. Zavack, Note, *Can States Enact Constitutional "Son of Sam" Laws After Simon & Schuster, Inc. v. New York State Crime Victims Board?*, 37 ST. LOUIS U. L.J. 701 (1993) (evaluating constitutionality of recently amended Son of Sam laws).

¹⁷⁸ At least forty states and the federal government have adopted Son of Sam laws. Howe, *supra* note 11, at 342. Obviously, criminal defendants in other states remain free to publish and profit from their stories. In addition, some states' Son of Sam laws permit persons convicted of a crime to profit from their stories because these profits create a source of victim compensation. *See, e.g.*, WASH. REV. CODE ANN. § 7.68.200 (West 2007) (providing that any profits from "reenactment" of crime be paid directly to fund for victims' benefit); *see also* Howe, *supra* note 11, at 358–59 (describing application of Washington's Son of Sam law to permit teacher Mary Kay Letourneau to profit from her story about unlawful romantic relationship with her thirteen-year-old student).

¹⁷⁹ *See* Chang, *supra* note 177, at 442–48 (describing extension of laws to include third parties).

presenting her story. Personal resources, such as friends and family members, may be attractive options for those clients who are fortunate enough to have them. A quick survey of titles written by friends and family of criminal defendants suggests, however, that many have betrayed those to whom they were formerly close.¹⁸⁰

While the unpopular defendant may have limited options for telling her story, the best response may be to liberalize Son of Sam laws, rather than assigning the storytelling task to defense counsel. Defense lawyers learn the clients' stories in strict confidence and for the specific purpose of defending against criminal charges. A lawyer abuses her client's trust when she attempts to use such information for another purpose, such as enhancing the lawyer's reputation. Moreover, the existence of the attorney-client privilege speaks to the enduring value placed on confidentiality. Lawyers-turned-authors invert the privilege by exploiting confidences, diminishing public trust in all lawyers. This is why, even if the client consents, lawyers should not undertake the dual roles of counsel and public relations representative.¹⁸¹ While the proposed rules limit a client's options in a literal sense, more choices do not always equal more autonomy.¹⁸² This is especially true in situations, such as those addressed by the proposed rules, in which the client cannot exercise truly informed consent due to lack of information.

The lawyer-client relationship can be conceptualized as a contract.¹⁸³ Courts¹⁸⁴ and legislatures¹⁸⁵ regularly impose limits on the

¹⁸⁰ See *supra* notes 95–98 (collecting titles related to Scott Peterson case).

¹⁸¹ See David S. Rudolf & Thomas K. Maher, *Behind Closed Doors*, CHAMPION, Jan.–Feb. 1997, at 39, 39 (warning that lawyers who serve clients in both legal and public relations capacities risk waiving attorney-client privilege); cf. David A. Lenrow, *The Treating Physician as Researcher: Is Assuming this Dual Role a Violation of the Nuremberg Code?*, 25 TEMP. J. SCI. TECH. & ENVTL. L. 15, 15–16, 47 (2006) (arguing that difficulties in obtaining informed consent justify prohibiting doctors from serving dual roles of treating physician and researcher).

¹⁸² See Kruse, *supra* note 14, at 413 (discussing different theories of autonomy in context of attorney-client relationship).

¹⁸³ NYSBA Comm. on Prof'l Ethics, Op. 604 (1989) (“The lawyer-client relationship is sometimes characterized as a contractual one.”).

¹⁸⁴ See RESTATEMENT (SECOND) OF CONTRACTS § 178(1) (1981) (“A promise . . . is unenforceable on grounds of public policy if legislation provides that it is unenforceable or the interest in its enforcement is clearly outweighed in the circumstances by a public policy . . .”).

¹⁸⁵ *Id.* § 178 cmt. a (“Occasionally, on grounds of public policy, legislation provides that specified kinds of promises or other terms are unenforceable.”). The Restatement advocates a balancing test for courts to employ when weighing public policy against enforcement of contract terms. Not all policies are equally significant: “A court should be particularly alert to th[e] possibility [that the policy is insubstantial] in the case of minor administrative regulations or local ordinances that may not be indicative of the general welfare.” *Id.* cmt. c. Accordingly, ethical rules—which are promulgated under a court’s

substantive terms of contracts for public policy reasons. Voluntariness is also implicated in the criminal defense context.¹⁸⁶ Criminal defendants are often incarcerated while awaiting trial and face the additional prospect of incarceration if convicted. The threat of incarceration hinders the client's ability to give voluntary informed consent¹⁸⁷ and justifies courts' exercise of the supervisory power to limit defendants' ability to give such consent.¹⁸⁸

D. Evidentiary Hurdles and Strickland

A final counterargument to be addressed is that regardless of the rule adopted, lack of enforcement will leave clients without a remedy. Few remedies exist for clients whose lawyers violate Rule 1.8(d). Clients who bring ineffective assistance of counsel claims must overcome the two-prong test set forth in *Strickland v. Washington*.¹⁸⁹ Under *Strickland*, a defendant must show that (1) counsel's representation was so deficient as to fall below an objective standard of reasonableness; and (2) counsel's deficient performance actually prejudiced the defense.¹⁹⁰ Although courts universally condemn lawyers who profit

supervisory power—may receive less weight in the balancing process than statutes passed by a democratically elected legislature.

¹⁸⁶ Medical experimentation provides a useful analogy, see Dinerstein, *supra* note 14, at 529–34 (evaluating application of medical consent doctrine to lawyers), because it raises issues of voluntariness layered on top of informed consent. See, e.g., *Kaimowitz v. Mich. Dep't of Mental Health*, 1 Mental Disability L. Rep. (ABA) 147 (Mich. Cir. Ct. July 10, 1973). *Kaimowitz* considered the question “whether legally adequate consent could be obtained from adults involuntarily confined in the state mental health system for experimental or innovative procedures on the brain to ameliorate behavior, and, if it could be, whether the State should allow such experimentation on human subjects to proceed.” *Id.* at 147. The remarkable opinion applied the ten principles developed in the Nuremberg Judgment to the case at bar, holding that informed consent was not possible on the facts. *Id.* at 149–53. While defense lawyer tell-alls cannot fairly be compared to experimental brain surgery, *Kaimowitz* illustrates the point that courts may, and do, recognize limits on informed consent.

¹⁸⁷ *Cf. id.* at 150 (“Although an involuntarily detained mental patient may have a sufficient I.Q. to comprehend his circumstances . . . the very nature of his incarceration diminishes the capacity to consent . . .”).

¹⁸⁸ Given the inverse relationship between incarceration and voluntariness, this Note leaves open the question whether the proposed rule should apply to civil defendants.

¹⁸⁹ 466 U.S. 668 (1984).

¹⁹⁰ *Id.* at 687. For a discussion of *Strickland*, see Brent Coverdale, Comment, *Cuyler versus Strickland: The Proper Standard for Self-Interested Conflicts of Interest*, 47 U. KAN. L. REV. 209, 217–19 (1998). The high bar set for defendants by *Strickland* is perhaps most obvious in the “sleeping lawyer” cases, in which courts have upheld convictions despite the fact that defense counsel slept through portions of the trial. See Jeffrey Levinson, Note, *Don't Let Sleeping Lawyers Lie: Raising the Standard for Effective Assistance of Counsel*, 38 AM. CRIM. L. REV. 147, 147–51 (2001) (describing “sleeping lawyer” cases and arguing inappropriateness of *Strickland* standard in penalty phase of capital crime cases).

from clients' misfortunes,¹⁹¹ they also reject a per se rule of ineffectiveness premised solely on the existence of literary rights contracts.¹⁹² As a result, it is near impossible for defendants to satisfy the *Strickland* standard and show ineffective assistance of counsel on such facts.¹⁹³

Courts should not rely on an alignment of lawyers' and clients' interests to safeguard defendants' rights. Yet problems of proof defeat many defendants' attacks on counsel's loyalty. Unfortunately, a rule of ethics cannot force courts to adopt a per se rule of ineffectiveness based on conflicts of interest or to view those claims more favorably. Proposed Rule 1.8(d) thus leaves criminal defendants as they are: without a remedy.

Ethical rules cannot change the *Strickland* standard, but they can and should communicate professional ideals and best practices.¹⁹⁴ Both the current and proposed rules are examples of bright-line rules rather than standards of conduct. The proposed waiting period communicates the ideal of conflict-free representation. A bright-line rule that bars publication for a fixed period is easier to follow than a standard advising lawyers to avoid conflicts of interest; it also makes violations easier to detect. The public nature of the breach contemplated here—publication of the client's story—increases the likelihood of detection as compared to ethical breaches that require difficult inquiries into confidential communications.

CONCLUSION

This Note has examined rules of professional responsibility from a defendant-client's perspective. The proposed revisions attempt to

¹⁹¹ See, e.g., *United States v. Hearst*, 638 F.2d 1190, 1198 (9th Cir. 1980) (“[Counsel]’s decision to enter into a book contract during the course of the trial was most unfortunate. Potential and actual conflicts of interest always bring disrepute upon the bar, the court, and the law.”); *Wojtowicz v. United States*, 550 F.2d 786, 793 (2d Cir. 1977) (“[W]e do not regard the practice as worthy of emulation.”). The sale of movie rights in *Wojtowicz* resulted in the Academy Award-winning film *Dog Day Afternoon*. *Wojtowicz*, 550 F.2d at 787. See generally *DOG DAY AFTERNOON* (Artists Entm’t Complex 1975).

¹⁹² See *Dumond v. State*, 743 S.W.2d 779, 785 (Ark. 1988) (collecting cases).

¹⁹³ See, e.g., *United States v. Marrera*, 768 F.2d 201, 208 (7th Cir. 1985) (“[C]ounsel’s ethical breach is separate from the evidentiary and legal fallout before the jury, but this is not a proceeding to discipline counsel. Even if it were, we would not discipline counsel by freeing his client.”); *Stafford v. State*, 669 P.2d 285, 296 (Okla. Crim. App. 1983) (“This issue presents a matter of great ethical and judicial concern. . . . It is, however, for the Bar to determine the necessity of any disciplinary action”), *vacated*, 467 U.S. 1212 (1984), *remanded to* 697 P.2d 165 (Okla. Crim. App. 1985) (affirming previous holding since defendant failed to satisfy new *Strickland* standard).

¹⁹⁴ See *Gentile v. State Bar*, 501 U.S. 1030, 1058 (1991) (opinion of Kennedy, J.) (suggesting that “constraints of professional responsibility” will safeguard neutrality of criminal justice system).

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correct the balance between the client's and the lawyer's interests in the representation. By imposing a waiting period, the proposed rules would minimize both adverse legal consequences stemming from the conflict between the lawyer's interest in a publishable story and the client's interest in zealous representation. The interpersonal relationship between client and lawyer affects both the client's subjective impressions of the lawyer and the case's result. By promoting greater trust and openness between a criminal defendant and her lawyer, the proposed rule changes would facilitate more effective representation and more just outcomes.

