

EXAMPLE OF STUDENT OUTLINE

Problem 4 Outline

I. *ABA Model Rules of Professional Conduct, Rule 1.6*

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

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

(1) to prevent reasonably certain death or substantial bodily harm; (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services; (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services; (4) to secure legal advice about the lawyer's compliance with these Rules; (5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or (6) to comply with other law or a court order.

- a. The rules do not *require* disclosure if a client tells an attorney he was going to commit perjury. Rather, such disclosure is required only if the perjury is likely to result in imminent death or substantial bodily harm. Also, the Comments suggest that the attorney should only disclose enough information to prevent the crime.
- b. The narrowness of the rule suggests that the authors think the free flow of information between an attorney and client is even more important than preventing or disclosing some potential criminal acts.

II. *California Rules of Professional Conduct, Rule 3-100*

(A) A member shall not reveal information protected from disclosure by Business and Professions Code section 6068, subdivision (e)(1) without the informed consent of the client, or as provided in paragraph (B) of this rule.

(B) A member may, but is not required to, reveal confidential information relating to the representation of a client to the extent that the member reasonably believes the disclosure is necessary to prevent a criminal act that the member reasonably believes is likely to result in death of, or substantial bodily harm to, an individual.

- a. *Avoiding a chilling effect on the lawyer-client relationship.* The rule's flexible approach to the lawyer's informing a client of his or her ability or decision to reveal confidential information recognizes that informing a client about limits on confidentiality may have a chilling effect on client communication. Clients who



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think there is even a small chance that what they tell their lawyer may not be confidential, many clients may be hesitant to tell the lawyer certain things.

III. ***How to Explain Confidentiality?* Clark D. Cunningham, 9 Clinical Law Review, 579-621 (Spring 2003)**

- a. The article goes through a number of different analyses of why informing clients about exceptions to the duty of confidentiality is important and offers several suggestions on exactly why a lawyer should tell his/her client during the initial meeting.
 - i. One of the more detailed descriptions suggested was the following: "You should know that I work for you and that I consider it very important to keep your confidences. The attorney-client privilege essentially means that I cannot be forced to disclose information about discussions we have. For example, judges sometimes can order lawyers to disclose information, but they can't make me tell them about whether you committed the crime. You should know about some limits to the privilege, however. If I learn that you will lie or have lied on the witness stand, I must report that. I am also allowed to report if you tell me you are going to commit a crime. I may also report limited information to defend against claims made against me or to collect my fee, but I am allowed to report only that information necessary to meet those goals. For example, if we fight about my fee, I might be able to show my billing records, but I couldn't just reveal all the things I know about you. Although there are times I may feel it is necessary to report information, I want to remind you that I take the privilege very seriously and would never lightly decide to share information."
- b. The article also describes two authors who take a strong position against saying anything to clients about the exceptions to confidentiality found in the Model Rules. They term such an explanation a "lawyer-client Miranda warning."
 - i. "[S]uch a warning is going to impede, if not wholly frustrate, the already difficult task of establishing a relationship of trust and confidence with the client. ... The question in the client's mind is "Can I really trust you?" And the client will not be reassured by a lawyer who invites full disclosure and at the same time cautions the client about the possible betrayal of his confidences. ... The lawyer who gives a Miranda warning is not the client's champion against a hostile world; on the contrary, she presents herself at the outset as an agent of that hostile world. ... [I]t is important to recognize that the frightened and confused client who is given a lawyer-client Miranda warning may well be innocent. As Professor Stephen A. Saltzburg has observed, "Good persons (or persons with good claims) may shrink from the attorney who gives Miranda warnings as quickly as bad persons (or persons with bad claims)." Note too that the lawyer-client Miranda warning must be given before any serious lawyer-client



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discussions can begin - that is, before the lawyer can possibly make an informed judgment about the client's guilt or innocence."

- IV. ***Rethinking Confidentiality***, Fred C. Zacharias, 74 Iowa L. Rev. 351, 382-86 (1989) → Anecdotal evidence and studies suggest that client trust in lawyers, *not* a lawyer's disclosure about confidentiality and its limits, is what determines the level of client candor.
- V. ***The Lawyer's Duty to Warn Clients About Limits on Confidentiality***, 29 Catholic U. L. Rev. 441, 478 (1990) → "[A] policy of not disclosing limits on confidences, if intentional, goes beyond the isolated incident that will not encourage others to lie. Rather, it reflects an ongoing practice of deception."
- VI. ***NY Times, Oct. 14, 1933, at Al, Jeffrey Schmalz, "Lawyer Granted Right to Conceal Client's Identity"*** Alan Dershowitz's comments in a NY Times article seem to indicate that lawyers should inform clients of relevant confidentiality exceptions, although it does not speak to the level of detail. → "But Prof. Alan M. Dershowitz of Harvard Law School, who teaches ethics in the law, supported the ruling, saying, 'Think about the reasons for confidentiality: you want people to come to lawyers for help. When a client walks through the door, he assumes he's coming to you in confidence,' he continued. 'That means his name, his appearance, his fingerprints. If the judge had ruled the other way, I'd have to say to clients: 'Don't give me your name. Wear a mask. Don't leave fingerprints in my office.' "

VII. The False Testimony Example

- a. ***California Rules of Professional Conduct, Rule 3-210*** → "A member shall not advise the violation of any law, rule, or ruling or a tribunal unless the member believes in good faith that such law, rule, or ruling is invalid."
- i. By allowing a client to testify falsely, is the lawyer "advising" the violation of a law prohibiting perjury?
- b. ***People v. Pike, 58 Cal.2d 70 (1962)*** → Counsel may not knowingly allow witness to testify falsely, whether he be criminal defendant or otherwise.
- i. Business & Professions Code § 6068: Duties as an attorney. It is the duty of an attorney: ... (c) To counsel or maintain such actions, proceedings or defenses only as appear to him legal or just, except the defense of a person charged with a public offense;
- ii. But, Court noted that "a person can only be said to 'allow' that which he has the power to prevent."



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iii. Analysis → Case seems to indicate that lawyer can't allow his client to commit perjury on the stand; however, the case does not indicate what the lawyer should do.—e.g., alert judge, withdraw from case?

c. *In Re Branch*, 70 Cal.2d 200 (1969) → An attorney who attempts to benefit his client through the use of perjured testimony may be subject to criminal prosecution

Confidentiality Concerns

A. The lawyers would have clearly had a duty to disclose confidential information if their client in fact testified to what they knew was a lie. Rule 1.6(b)(6), ABA Model Rules of Professional Conduct. So, the question is whether the client and the attorneys would have been better off if they had informed the client in advance that they would not be able to let him lie.

B. Zacharias, Fred C., *The Preemployment Ethical Role of Lawyers: Are Lawyers Really Fiduciaries?*, 49 Wm. & Mary L. Rev. 569. If an initial consultation is seen either as an arm's-length transaction, the lawyer may not want a client to see him as the client's ally yet. Instead, the lawyer may want to create professional detachment and more clearly explain appropriate situations where revealing information is necessary. If, on the other hand, the initial consultation is seen as trust-building, the lawyer will assure clients of confidentiality and make it clear that the lawyer is the client's confidant and ally.

(1) The arm's-length distinction is important. A lawyer who is in the position where he needs to compete for business will have an incentive to gain trust over full disclosure of the exceptions to his confidentiality obligation. On the other hand, as in some of our clinics, clients will have the choice either to accept our representation or to have no representation whatsoever. One way of looking at this is that we have the freedom to discuss the exceptions IF they lead to more effective advocacy.

The Clinic Should Leave Disclosure of Confidentiality Exceptions to the Lawyer's Discretion

A. Dodek, Adam M., *Comparative Confidentiality: Lessons from Canada*, 20 J. Legal Prof. 51. The existing Rules of Professional Conduct favor lawyers' interests over clients' interests. For example, the self-defense exception allows a lawyer to divulge information if future conflicts arise between lawyer and client. Dodek notes that this exception frustrates the purpose of confidentiality by encouraging clients to withhold information.

(1) If mentioning this exception is going to frustrate the quality of the lawyer's representation of the client, it is admittedly paternalistic yet possible that the client is better off not knowing of the exception, especially when the client is going to engage the lawyer's services regardless.



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(2) Dodek also notes with respect to the future crime exception that the current rules are not narrowly tailored to promote society's interests or protect human life. As our class first class role play indicated (where the opposing party had a life-threatening brain aneurism but didn't know), lawyers are not always obligated by the Rules to disclose confidences in order to save lives, when they are not necessary to prevent the client from committing a crime. ABA Model Rule 1.6(b)(2).

B. Disclosure of confidentiality exceptions in initial consultation meetings can hinder effective representation by inhibiting communication by the client. In some factually specific cases, such as perhaps criminal defense, a lawyer may feel that it is necessary in advance to tell a client that the lawyer cannot allow the client to lie. It should not be the primary concern of lawyers to respect clients' autonomy with respect to making an informed choice as to whether they would like to tell the lawyer of future plans to commit crimes (whether violent crimes or perjury). Instead, we should allow each lawyer to use the discretion provided by the Rules and decide for himself whether to disclose confidentiality exceptions depending on the client and the case.



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