Confidentiality Under the Washington Rules of Professional Conduct

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The principle of confidentiality is fundamental to the lawyer-client relationship. It is based on a fiduciary duty of the lawyer as an agent of the client to hold the client's confidences inviolate. The principle is given effect through the attorney-client privilege of the law of evidence and the rule of confidentiality established in professional ethics. The adoption of the Washington Rules of Professional Conduct (RPC)\(^1\) placed new limits on the lawyer's ability to reveal client confidences and secrets.\(^2\) The most significant changes from the prior ethical rules, the Code of Professional Responsibility (CPR),\(^3\) affect the lawyer's duty of confidentiality in situations where the client has committed or intends to commit a fraud on a tribunal or a third person.\(^4\) The new rules also give more discretion to the lawyer concerning the exceptions to the confidentiality rule\(^5\) and recognize that in criminal cases the ethical duties of the lawyer may be superseded by the constitutional rights of the defendant.\(^6\)

The RPC as adopted in Washington differ from the Model Rules\(^7\) of the American Bar Association which served as a basis for the RPC. Particularly in the area of confidentiality, the Washington RPC contain several important changes to the Model Rules that maintain many of the features of the duty of confidentiality as it existed under the CPR\(^8\) and restrict disclosures pursuant to other ethical duties under the Model Rules.\(^9\) The RPC,

\(^2\) For example, the rules relating to client fraud committed upon a tribunal or another person have changed. See RPC Rule 3.3; see also infra notes 69-74 and accompanying text.
\(^4\) See infra notes 69-74 and accompanying text.
\(^5\) Under the RPC, the lawyer may reveal client confidences or secrets to the extent the lawyer believes necessary within the listed exceptions. See infra text accompanying note 37.
\(^6\) RPC Rule 3.3(g). See infra notes 77-110 and accompanying text.
\(^7\) American Bar Association MODEL RULES OF PROFESSIONAL CONDUcT (Model Rules) (1983). The Model Rules were adopted by the House of Delegates of the ABA on Aug. 2, 1983. The Washington Supreme Court adopted a slightly altered version of the Model Rules and did not adopt the official comment to the Model Rules (comment). The comment, however, is still instructive of the general ethical responsibilities of lawyers, is indicative of the intent of the drafters of the Model Rules, and adds insight to the interpretation of the RPC.
\(^8\) For example, the RPC retained the definitions of confidences and secrets as given in the CPR for application to the rule of confidentiality. The Model Rules contain a broader "any information" standard. See infra notes 26-30 and accompanying text. The RPC thus preserves a duty of confidentiality similar to that which existed in the CPR.
\(^9\) See infra notes 61-75 and accompanying text.
for example, retain the CPR definitions of the scope of the duty of confidentiality rather than the broader coverage of the Model Rules and preserve the future crime exception of the CPR that permits disclosure of the information necessary to prevent the client from committing any crime. The RPC also take a different view of the lawyer’s duty of candor to the tribunal than the Model Rules in restricting disclosures that are protected by the rule of confidentiality.

This Comment examines the lawyer’s duty of confidentiality under the RPC. This examination begins with a discussion of the general rule of confidentiality and its purposes. The duty of confidentiality, however, is not absolute, and the RPC provide several exceptions to the rule. Under Rule 1.6, for example, a lawyer may disclose those client confidences necessary to carry out the representation of the client, to collect his or her fees, to defend the lawyer in an action regarding the representation of the client, or upon court order. In addition, under the RPC, the lawyer may reveal client confidences to the extent necessary to prevent the client from committing any future crime. Controversy exists as to whether lawyers should be required to reveal client intentions to commit violent crimes. In cases where the client has the intention to commit a potentially violent crime on an identified victim, the lawyer may be subjected to tort liability for not disclosing the intentions of the client.

The lawyer’s duty of confidentiality under Rule 1.6 limits other ethical duties of the lawyer under the RPC. Rule 3.3, requiring a duty of candor toward the tribunal, is especially affected, and indeed a strong tension exists between the duty of confidentiality and the duty of candor. The RPC resolve this tension by not requiring disclosures under Rule 3.3 if the material is protected by Rule 1.6. The tension between the duties of candor and confidentiality is greatest in cases involving client perjury, especially in a criminal case where the constitutional rights of the defendant provide an additional limitation. Rule 3.3(g) recognizes that the constitutional rights of a criminal defendant may supersede the lawyer’s duties of candor.

10. See infra notes 25–30 and accompanying text.
11. See infra notes 38–40 and accompanying text.
12. See infra notes 61–75 and accompanying text.
14. RPC Rule 1.6(b)(1). See infra text accompanying notes 38–42.
15. See infra text accompanying notes 53–60.
16. See, e.g., RPC Rule 1.9 (relating to use of client confidences after representation); Rule 2.3 (concerning evaluations for use of third persons); Rule 3.3 (requiring candor toward the tribunal); Rule 4.1 (regarding the truthfulness of statements to others).
17. RPC Rule 3.3(a)(c). See infra text accompanying notes 61–75.
18. RPC Rule 3.3(g). See infra text accompanying notes 77–110.
these issues in *Nix v. Whiteside*. In *Whiteside*, the Court unanimously held that where counsel successfully dissuaded the defendant from committing perjury by threatening to withdraw, disclose the false testimony, and testify against the client, the defendant was not denied his constitutional right to effective assistance of counsel. The Court, however, split on the issues of whether a lawyer should be required to reveal client perjury and whether the Court should even enter the ethical fray of dealing with the “thorny” problem. The majority concluded that lawyers should reveal client perjury. Even with the *Whiteside* opinion, the problem of dealing with client perjury remains to be solved on the state level. The solution involves a balancing of the purposes of the confidentiality rule with the detriments of nondisclosure. Requiring disclosure, as the majority in *Whiteside* suggested, does not seem to infringe on the basic goals of the duty of confidentiality.

Generally, the duty of confidentiality under the RPC gives the lawyer discretion in determining whether and to what extent client confidences should be revealed under the various exceptions. This discretionary approach allows the lawyer to consider the nuances of each factual setting, and enables the person closest to the problem to work out a solution. The lawyer, however, must not hide behind this grant of discretion, but rather, the lawyer in using this discretion must conscientiously balance the effects of disclosure of client confidences upon the lawyer-client relationship with the societal need for disclosure of the confidential information. In some instances, the duty of confidentiality must yield to greater societal interests.

I. CONFIDENTIALITY UNDER RULE 1.6

A. The General Rule, Its Basis and Purposes

RPC Rule 1.6 states the general rule of confidentiality: a “lawyer shall not reveal confidences or secrets relating to representation of a client.”

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20. 106 S. Ct. at 999–1000.
21. *Id.* at 994–98, 1000. The Court split five-to-four.
22. *Id.* at 995–98 .
23. *Id.* at 994; *id.* at 1000 (Brennan, J., concurring); *id.* at 1006 (Blackmun, J., concurring). See infra note 110.
24. See infra notes 98–106 and accompanying text.
25. RPC Rule 1.6(a). Rule 1.6 in its entirety reads as follows:
(a) A lawyer shall not reveal confidences or secrets relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in section (b).
(b) A lawyer may reveal such confidences or secrets to the extent the lawyer reasonably believes
The rule simply restates the general duty of confidentiality as it existed under the CPR by adopting the CPR's definitions of a "confidence" and a "secret." A "confidence" is defined as that information protected by the attorney-client privilege. A "secret" is other information that the attorney gains in the professional relationship that the client has specifically requested not be disclosed or information that if disclosed would be embarrassing or detrimental to the client. This duty of confidentiality continues beyond the termination of the professional relationship.

The rule in Washington differs from the more expansive scope of Model Rule 1.6 which applies to all "information relating to representation of a client." Model Rule 1.6 imposes confidentiality on information relating to representation that is gained both before and after the establishment of the professional relationship. In addition, the Model Rule provision does not require the client to request that information be kept confidential nor the lawyer to speculate whether the information would be detrimental or embarrassing to the client. Thus, the RPC, in rejecting the coverage of the Model Rules, retained the limited scope of the duty of confidentiality as it existed under the CPR.

This narrower coverage of the RPC does not detract from the purpose of the general rule. The comment to Model Rule 1.6 recognizes that the main purpose of the confidentiality rule is to allow for "full development of the facts essential to proper representation of the client." The rule encourages the client to communicate frankly with the lawyer even as to facts that may be embarrassing or legally damaging. The client learns to trust the lawyer, and with such a relationship, the lawyer can counsel the client to rectify past wrongs and to forego future ones. Similarly, the rule also

necessary:
(1) To prevent the client from committing a crime; or
(2) 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, to respond to allegations in any proceeding concerning the lawyer's representation of the client, or pursuant to court order.

26. RPC Terminology "Confidence." The attorney-client privilege covers only communications from the client to the attorney made under the proper circumstances. For a discussion of the attorney-client privilege, see McCORMICK ON EVIDENCE §§ 88–95 (E. Cleary 3d ed. 1984).

27. RPC Terminology "Confidence."

28. Alpha Inv. Co. v. Tacoma, 13 Wn. App. 532, 534, 536 P.2d 674, 676 (1975). See also RPC Rule 1.9(b) (lawyer prohibited from using confidences or secrets to the disadvantage of a former client).

29. Model Rule 1.6(a).

30. The coverage of Model Rule 1.6 is not confined to information covered by the attorney-client privilege or gained in the professional relationship as under RPC Rule 1.6.

31. Model Rule 1.6 comment.
Confidentiality enhances the client's ability to make lawful and informed decisions. Usually, clients come to lawyers to ascertain their legal rights because professional advice is necessary to sift through the "maze of laws and regulations."32 Full development of the facts enables the lawyer to outline the full range of lawful choices available to the client. As a result, individual autonomy and liberty are enhanced and wrongful conduct is discouraged.33 Even with narrower coverage than the Model Rules, the RPC rule of confidentiality seems to equally facilitate these purposes.

B. The Exceptions to the Rule

RPC Rule 1.6 contains several exceptions to the general rule of confidentiality. First, the client can consent to disclosure after a consultation that is "reasonably sufficient to permit the client to appreciate the significance of the matter in question."34 Second, the lawyer is impliedly authorized to make such disclosures as are necessary to carry out the representation of the client.35 For example, a lawyer involved in litigation may admit to a fact that cannot properly be disputed, or a lawyer involved in a negotiation may disclose confidential information necessary to facilitate a satisfactory agreement.36

RPC Rule 1.6(b) contains other permissive exceptions to the general rule of confidentiality that give the lawyer the discretion to determine if and to what extent disclosure should be made. The rule allows lawyers to disclose client "confidences or secrets to the extent the lawyer reasonably believes necessary."37 The lawyer should only make such disclosures to the affected tribunal or other persons having a need to know and should make every effort to limit access to the information by arranging for protective orders or taking other appropriate actions. These discretionary exceptions basically apply to three situations: where the client intends to commit a crime, where the lawyer is involved in an action regarding the representation of the client, or where a court orders disclosure of the information.

The crime exception to the confidentiality rule is perhaps the most controversial aspect of the rule. Under the Washington RPC, a lawyer may disclose confidences or secrets to the extent necessary to "prevent the client

32. Model Rule 1.6 comment.
34. RPC Terminology "Consult."
35. RPC Rule 1.6(a).
36. Model Rule 1.6 comment.
37. RPC Rule 1.6(b). Rule 1.6(b) is quoted supra note 25.
from committing a crime.” Apparently, the exception applies to any future crime, including perjury. The Model Rules, on the other hand, allow disclosure of confidences only to prevent those future crimes “likely to result in imminent death or substantial bodily harm.” The controversy surrounding the crime exception concerns not only what crimes should be included in the exception, but also whether disclosure should be made mandatory in order to prevent the client from committing a violent crime. Disclosure of confidences may be mandatory under Rule 3.3(a)(2) in order to avoid assisting the client in future criminal or fraudulent acts. In addition, the possibility of the lawyer being held liable in tort to the victims of the client’s crime may require the lawyer to make certain disclosures.

A lawyer may reveal client confidences or secrets in order to establish a claim or defense in any proceeding concerning the lawyer’s representation of the client. This exception applies to controversies between the client and the lawyer including allegations of misrepresentation or malpractice and actions for nonpayment of fees. It also applies to charges brought in a professional disciplinary proceeding or a criminal charge or civil claim

38. RPC Rule 1.6(b)(1). For a discussion of the lawyer’s duty to reveal a client’s intention to commit a crime, see Comment, The Attorney’s Duty To Reveal A Client’s Intended Future Criminal Conduct, 1984 DUKE L.J. 582.

39. Model Rule 1.6(b)(1). This rule was perhaps the most controversial part of the Model Rules. See Walter, An Overview of the Model Rules of Professional Conduct, 24 WASHBURN L.J. 443, 456 (1985). The Discussion Draft had required a lawyer to disclose the information necessary to prevent death or serious bodily harm. See, id. at 454. The Revised Final Draft of Rule 1.6 allowed the lawyer to reveal future crimes that would result in serious bodily or financial harm and to reveal confidences in order to rectify the consequences of a client’s past criminal or fraudulent activities. MODEL RULES (Revised Final Draft, June 30, 1982) Rule 1.6. These earlier drafts attempted to broaden the exceptions to the confidentiality rule. Rule 1.6 as adopted is in fact more restrictive than the proposed changes in the drafts and more restrictive than the rule as it existed under the CPR, DR 4-101.

To many the standards proposed by the Discussion Draft were viewed as an attack on the adversary system, and represented a shift away from concern for clients toward a concern for third parties and society at large. Consequently many of the controversial provisions regarding disclosure were watered down in the process of debate and acceptance. The rules regarding these matters as ultimately adopted bore little resemblance to those originally proposed. Walter, supra, at 456. The narrowness of the Model Rules’ exceptions to the confidentiality rule has been widely criticized. See, e.g., Austern, Ethics, TRIAL, Aug. 1984, at 15. The criticism centers on the ABA’s apparent tolerance of some violence and deaths in the future by limiting the exception only to the crimes that result in imminent death or substantial bodily harm. In addition, the exclusion of crimes that cause only financial harm, even if thousands of people are involved, has drawn much fire. Id. The Model Rules evidence a return to antiquated views of the importance of lawyer-client confidences totally disregarding the costs to society.

40. See, e.g., Freedman, supra note 33, at 7–8; Walter, supra note 39, at 469.
41. See infra notes 67–68 and accompanying text.
42. See infra notes 53–60 and accompanying text.
43. RPC Rule 1.6(b)(2). See also State v. King, 24 Wn. App. 495, 505–06, 601 P.2d 982, 988–89 (1979) (lawyer could reveal confidential information in order to defend himself against a petition for ineffective assistance of counsel filed by his client).
against the lawyer based on any conduct in which the client was also involved. The lawyer need not withhold disclosure until formal proceedings are instituted but may respond to such charges as soon as the allegations are made.44

The last of the Rule 1.6 exceptions to the general rule of confidentiality is that a lawyer may reveal confidences or secrets of a client pursuant to a court order requiring such disclosure.45 The rule seems to require the lawyer to invoke the attorney-client privilege prior to any disclosure to which it is applicable in order to protect the client's confidences.46 If the court rules that the privilege is inapplicable, the lawyer may appeal. The lawyer, however, must comply with a final order of the court requiring disclosure of the information sought. In a recent case, Seventh Elect Church v. Rogers,47 the Washington Supreme Court stated that, in ordering such disclosures, "the trial court must balance the necessity of the disclosure against the effect such disclosure might have on the attorney-client relationship"48 both in general and in the particular case. In performing this balancing, the court must keep in mind the purposes of the confidentiality rule. In Seventh Elect Church, the court upheld the order of disclosure but conditionally vacated the contempt order provided the lawyer comply by answering the questions.49

The lawyer has two alternatives when ordered by a court to disclose information that the lawyer believes is covered by the privilege: obey the court order and disclose the information, or disobey and appeal the resulting sanctions to a higher court. Some authorities view the first alternative as unethical if the information is really privileged.50 This view, however,

44. Model Rule 1.6 comment:
The lawyer's right to respond arises when an assertion of such complicity has been made. Paragraph (b)(2) does not require the lawyer to await the commencement of an action or proceeding that charges such complicity, so that the defense may be established by responding directly to a third party who has made such an assertion. The right to defend, of course, applies where a proceeding has been commenced. Where practicable and not prejudicial to the lawyer's ability to establish the defense, the lawyer should advise the client of the third party's assertion and request that the client respond appropriately.

See also In re Friend, 411 F. Supp. 776 (S.D.N.Y. 1975) (privileged documents could be released to a grand jury since it would be senseless to require the lawyer to wait for the stigma of an indictment).

45. RPC Rule 1.6(b)(2). See also In re Kerr, 86 Wn. 2d 655, 662, 548 P.2d 297, 301 (1976).

46. Model Rule 1.6. See also State ex rel. Sowers v. Olwell, 64 Wn. 2d 828, 394 P.2d 681 (1964) (subpoena duces tecum found defective on its face for requiring the lawyer to reveal information protected by the attorney-client privilege).


48. Id. at 534-35, 688 P.2d at 511.

49. Id. at 536-37, 688 P.2d at 512.

50. See Dike v. Dike, 75 Wn. 2d 1, 15, 448 P.2d 490, 498 (1968); People v. Kor, 129 Cal. App. 2d 436, 447, 277 P.2d 94, 101 (1954) (Shinn, J., concurring) ("attorney should have chosen to go to jail and take his chances of release by a higher court").
seems at odds with the RPC, since such disclosure is explicitly permitted. As for fear of sanctions, the court in *Seventh Elect Church* held that when an attorney makes a good faith claim of privilege, the trial court should stay all sanctions pending appellate review of the issue.\(^{51}\) If the lawyer's claim of privilege is defensible by a good faith argument, then the lawyer should appeal the order before any disclosure is made.

All of these exceptions to the rule of confidentiality give discretion to the lawyer to determine if and to what extent disclosure should be made. In using this discretion, the lawyer simulates the balancing of the court in *Seventh Elect Church*. The lawyer must balance the need for disclosure against the harms disclosure will cause to the lawyer-client relationship in general and in the particular case. In performing this balancing, lawyers must avoid isolating themselves from the needs and interests of society or forgetting the duty they owe to society as well as to the client.\(^{52}\) Lawyers must shun the temptation to use the right of discretion as an excuse to avoid making difficult and sometimes costly decisions. A system of ethical rules that gives discretion to lawyers is the most desirable and effective system only if lawyers make conscientious decisions considering both their duty to the client and their duty to society.

C. Potential Tort Liability Limitation

A limitation on the rule of confidentiality is the potential for the lawyer who fails to disclose information necessary to prevent the client from committing a crime being held liable in tort to the victims of the client’s wrongdoing. The court in *Hawkins v. King County*\(^{53}\) recognized a common law duty to warn unsuspecting victims when “it appears beyond a reasonable doubt that the client has formed a firm intention to inflict serious personal injuries on an unknowing third person.”\(^{54}\) The court concluded

\(^{51}\) *Seventh Elect Church*, 102 Wn. 2d at 536, 688 P.2d at 512.

\(^{52}\) See generally Goldman, *Confidentiality, Rules, and Codes of Ethics*, CRIM. JUST. ETHICS, Summer/Fall 1984, at 8, 12-14 (moral rules should serve as the basis for lawyer's conduct instead of institutional guidelines such as the Model Rules). Lawyer-client confidentiality is vital to the fair administration of justice and to the lawyer's ability to deter the client from wrongful conduct. *See supra* notes 31–33 and accompanying text. Without a doubt, lawyers should faithfully maintain client confidences. The duty of confidentiality, however, should only go so far. The confidentiality rule recognizes that an absolute duty is not required in order to fulfill its purposes. Rather, Rule 1.6 creates permissible exceptions to the rule and gives lawyers the discretion to determine the use of the exceptions. While protecting client confidences to the point necessary to facilitate the purposes of the rule, lawyers should give consideration to moral values and the lawyer's duty to society in utilizing the discretion under the confidentiality rule. Lawyers draw society's fire by being too allegiant to their own profession while lacking a general social consciousness. A typical comment: "What happened, did you trade in your conscience when you took the bar?" Sonny Crockett, *Miami Vice*, Jan. 24, 1986, episode.


\(^{54}\) *Id.* at 344, 602 P.2d at 365.
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that in these types of cases the public interest of safety outweighed the values protected by the lawyer's duty of confidentiality. Even though the court held that no liability exists where the victims are aware of the danger, Hawkins indicated the courts' willingness to impose tort liability for a failure to disclose confidences under the future crime exception.

The most notable case that imposed tort liability for nondisclosure of confidences gained in a professional relationship is Tarasoff v. Regents of the University of California. In Tarasoff, the California Supreme Court held that a psychiatrist whose patient had confided his intention to kill a third person owed a duty to warn the victim of the client's intent. The court concluded that the public policy that favors protecting the confidentiality of the communications must yield to the extent disclosure is necessary to avert danger to others. The court stated, "the protective privilege ends where the public peril begins."

Although tort liability has not as yet been imposed on lawyers, the potential for liability does exist and serves to limit the general duty of confidentiality. For the dangerous client, the lawyer owes a duty to protect society by disclosing the information necessary to prevent the client from seriously injuring an unsuspecting victim. Ironically, potential tort liability and not the rules of professional ethics seem to compel this result.

II. CONFIDENTIALITY AND THE DUTY OF CANDOR

A. Rule 3.3: Candor Toward the Tribunal

RPC Rule 3.3 mandates that lawyers act with candor toward the tribunal. Rule 3.3 (a) prohibits a lawyer from knowingly doing the following: making a false statement of material fact to a tribunal, failing to disclose a material fact when necessary to avoid assisting the client in a criminal or fraudulent act, and offering evidence known to be false. Rules 3.3 (c) and (d) describe the lawyer's remedial duties when the lawyer has offered material inaccuracies.

55. Id.
56. For a discussion of the future crime exception, see supra notes 38-39 and accompanying text.
58. 551 P.2d at 345-46.
59. 551 P.2d at 347.
60. Id.
61. RPC Rule 3.3(a), entitled "Candor Toward The Tribunal," reads in part: A lawyer shall not knowingly:

(1) Make a false statement of material fact or law to a tribunal;
(2) Fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client unless such disclosure is prohibited by rule 1.6;

(4) Offer evidence that the lawyer knows to be false.
evidence and later comes to know of its falsity. Rule 3.3(g) recognizes that the constitutional rights of a criminal defendant may supersede the lawyer’s duties stated in the other provisions of the rule.

Under the RPC, the mandated disclosures of Rule 3.3(a) are qualified by the duty of confidentiality. Subsection (2) of Rule 3.3(a) requires disclosure of material facts necessary to avoid assisting the client in a criminal or fraudulent act “unless such disclosure is prohibited by rule 1.6.” The Model Rules, on the other hand, indicate that the duties of Model Rule 3.3(a) apply even though compliance requires disclosure of confidential information. The addition of the “unless” clause in the RPC indicates a view that lawyer-client confidentiality is more important to the system of justice than the duty of candor. This is in sharp contrast to the CPR that required the lawyer to reveal any client fraud to the affected tribunal and permitted the lawyer to reveals it to any affected third person. This dramatic change in the duty of confidentiality relieves the lawyer of the difficult duty of acting against the client’s interests. It does, however, allow the lawyer to be less responsible to the court and to society and makes the lawyer a silent accomplice to the client’s wrongdoing.

A careful reading of RPC Rules 1.6 and 3.3 reveals that the “unless” clause of Rule 3.3(a)(2) only prevents the disclosure of past actions that assist the client in a criminal or fraudulent act. The rules do not prevent the disclosure of the client’s future intended criminal conduct, including perjury, and indeed require the lawyer to reveal such information to the tribunal. Since Rule 1.6(b)(1) permits the lawyer to reveal client confidences and secrets to the extent necessary to prevent the client from

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62. RPC Rule 3.3(c) reads: “If the lawyer has offered material evidence and comes to know of its falsity, the lawyer shall promptly disclose this fact to the tribunal unless such disclosure is prohibited by rule 1.6.”

RPC Rule 3.3(d) reads:

If the lawyer has offered material evidence and comes to know of its falsity, and disclosure of this fact is prohibited by rule 1.6, the lawyer shall promptly make reasonable efforts to convince the client to consent to disclosure. If the client refuses to consent to disclosure, the lawyer may seek to withdraw from the representation in accordance with rule 1.15.

See infra text accompanying notes 69-75.

63. RPC Rule 3.3(g) reads: “Constitutional law defining the right to assistance of counsel in criminal cases may supersede the obligations stated in this rule.” See infra text accompanying notes 77-110.

64. RPC Rule 3.3(a)(2). This rule only exempts those disclosures that are prohibited by Rule 1.6. This reference to Rule 1.6 includes the whole of Rule 1.6 and not just 1.6(a). Therefore, the “unless” clause only exempts that information that is protected by Rule 1.6(a), a confidence or a secret, and that does not fall into one of the permissive exceptions under the rule. See supra notes 25-52 and accompanying text.

65. Model Rule 3.3(b): “The duties stated in [3.3(a)] . . . apply even if compliance requires disclosure of information otherwise protected by rule 1.6.”

66. CPR DR 7-102(B)(1). The position of the RPC is consistent with Freedman, supra note 33, at 7-8.
committing a crime, disclosure of such information is not prohibited by Rule 1.6. The "unless" clause of rule 3.3(a)(2), therefore, does not apply to future criminal acts of the client. The "unless" clause acts only to exclude the disclosure of confidential information that does not fall within any of the exceptions in Rule 1.6.

Rule 3.3 also describes the lawyer's remedial duties when the lawyer has unknowingly offered false evidence and later comes to know of its falsity. Under Rule 3.3(c), the lawyer must promptly disclose the falsity of the offered evidence to the tribunal "unless such disclosure is prohibited by rule 1.6." If the false evidence falls within the protection of Rule 1.6, then the lawyer must make reasonable efforts to gain the client's consent to disclosure. If the client refuses to consent, then the lawyer may seek to withdraw. In most situations, the lawyer's withdrawal will neither be allowed nor, if allowed, will it remedy the problem. The RPC fail to provide

67. See supra notes 38-40 and accompanying text.
68. RPC Rule 3.3(a)(2) requires disclosure of material facts when necessary to avoid assisting a criminal or fraudulent act of the client unless such disclosure is prohibited by Rule 1.6. See supra note 62. Under Rule 1.6(b)(1), a lawyer may reveal confidences in order to prevent the client from committing a crime. Therefore, a lawyer must reveal information that is necessary to avoid assisting a future criminal act of the client—e.g. client perjury. Without the benefit of a commentary to the RPC, it is not clear that the Washington Supreme Court intended this result.
69. A similar argument as was made in note 64, supra, can be made for the qualifying clause "unless such disclosure is prohibited by rule 1.6" in RPC Rule 3.3(c). Rule 1.6, however, does not permit disclosure of past crimes so the lawyer who discovers client perjury after the fact would not have to disclose that information under Rule 3.3(c).
70. RPC Rule 3.3(d).
71. Id. In order to withdraw, the lawyer must meet the requirements of Rule 1.15. Rule 1.15(a) requires a lawyer to withdraw if the representation will result in a violation of the RPC. A lawyer may withdraw if it can be done without material adverse effect on the interests of the client and if the client involves the lawyer in other criminal or fraudulent acts. However, a lawyer must continue representation when ordered to do so by a tribunal. RPC Rule 1.15.

Most of the problems to which Rule 3.3 applies do not occur until trial, at which time it is very difficult for the lawyer to withdraw. This is especially true in a criminal case. Withdrawal usually will not solve the problem anyway. The undisclosed fraud will simply be passed on to the next lawyer who may not discover the problem. Thus, withdrawal only serves to ease the profession's conscience by removing the lawyer who knows about the false evidence. The false evidence, however, remains and the fraud on the tribunal is perpetuated.

For example, in State v. Phelps, 24 Or. App. 329, 545 P.2d 901 (1976), the client's first attorney withdrew from the case after the client assured him that the perjured testimony would not be used at trial. The client retained a second attorney who, not knowing of the perjury, successfully used the false evidence to defend the case. It is not beyond belief that a client would simply shop around for an attorney who would assist in presenting the false evidence. See Wolfram, Client Perjury, 50 S. CAL. L. REV. 809, 856 (1977).

In Nix v. Whiteside, 106 S. Ct. 988, 996 (1986), the Supreme Court recognized that withdrawal of counsel at or near the time of trial gives rise to many difficult questions.
any further solution to the problem. Under the Model Rules, the lawyer, after attempting to gain the client’s consent and seeking to withdraw, is required to make disclosure to the court. Similarly, under the RPC, the lawyer’s next step should be to disclose the false evidence to the court and leave it to the court to determine what should be done. The lawyer should not be a party to deceiving the court and subverting the truth-finding process of the adversary system. The lawyer’s ethical duty to advance the client’s interests is limited by a prohibition on the use of false evidence. The duty of confidentiality should not be used as a shield that allows the use of false evidence. The issue becomes more complicated in a criminal trial, however, where the RPC recognize that the constitutional rights of the defendant may prevent such disclosure.

B. Constitutional Limitations in a Criminal Case: Nix v. Whiteside

RPC Rule 3.3(g) recognizes that the constitutional right of a criminal defendant to effective assistance of counsel may supersede the lawyer’s duties of candor toward the tribunal as stated in Rule 3.3. This issue has been intensely debated and lower courts have grappled with the problem reaching different results. Recently, the issue came before the United

72. Model Rule 3.3 comment.
73. The lawyer should take care to only disclose those confidences and secrets necessary to inform the tribunal of the falsity of the offered material evidence. The duty of confidentiality yields only enough to rectify the falsity in order to uphold the integrity of the administration of justice. See RPC Rule 1.6(b) (lawyer may reveal confidences “to the extent the lawyer reasonably believes necessary”).
74. This is the solution proposed by the comment to the Model Rules. Model Rule 3.3 comment. The court may order a mistrial, make a statement to the trier of fact or do nothing depending upon the magnitude of the false evidence. If the falsity involves the testimony of the client and the client controverts the lawyer’s statement to the tribunal, then a mistrial may be unavoidable as the lawyer and the client have become adverse to each other. An unscrupulous client may use this to obtain a series of mistrials and thereby avoid prosecution. The comment states, “a second such encounter could be construed as a deliberate abuse of the right to counsel and as such a waiver of the right to further representation.” Model Rule 3.3 comment.
75. RPC Rule 3.3(a) provides: “A lawyer shall not knowingly: (1) Make a false statement of material fact or law to a tribunal; . . . (4) Offer evidence that the lawyer knows to be false.”
76. RPC Rule 3.3(g). See infra notes 77–110 and accompanying text.
77. This constitutional limitation is recognized in the comment to Model Rule 3.3. In Washington, it is codified as RPC Rule 3.3(g).

In Lowery v. Cardwell, 575 F.2d 727 (9th Cir. 1978), the court held that an attorney’s motion to withdraw made abruptly during direct examination of the defendant in a bench trial amounted to an unequivocal announcement that the defendant was lying on the stand thereby depriving the defendant of the right to a fair trial. The defendant’s commission of perjury did not forfeit his right to a fair trial. The court concluded that counsel must maintain a posture somewhere between passive refusal to aid in the perjury and direct use of it, and counsel must behave in such a way as to avoid disclosing the quandary to
Confidentiality

States Supreme Court in *Nix v. Whiteside.* In *Whiteside,* the defendant sought federal habeas corpus relief from his Iowa murder conviction alleging ineffective assistance of counsel. The claim stemmed from an incident that occurred shortly before trial in which the defendant changed his story to bolster his self-defense claim. The defendant had repeatedly told counsel that he had not seen a gun in the victim's hand although he thought the victim had one. During the preparation for trial, the defendant told counsel for the first time that he had seen "something metallic" in the victim's hand. When counsel questioned the defendant, he replied, "If I don't say I saw a gun I'm dead." Counsel informed the defendant that such testimony would be perjury and if he testified in that manner counsel would advise the court of the perjury, seek to withdraw from representation, and testify against the defendant to impeach his testimony. The defendant subsequently testified at trial and admitted on cross examination that he had not seen a gun in the victim's hand. The jury convicted the defendant of second-degree murder. He brought a motion for a new trial on the grounds that he had been denied a fair trial by counsel's admonition not to say that he saw "something metallic." The motion was denied and the Iowa Supreme Court affirmed the conviction commending counsel for the ethical manner in which the case was handled.

The Eighth Circuit, on appeal of the federal habeas corpus action, held that defense counsel's threats to withdraw, inform the court of the perjury, and to testify against him denied the defendant the right to effective assistance of counsel and his right to testify in his own defense. The court held that counsel's actions impermissibly compromised his client's right to the fact finder. *Id.* at 731.

In *People v. Schultheis,* 638 P.2d 8 (Colo. 1981), the Colorado Supreme Court reversed a lower court's holding of ineffective assistance of counsel for counsel's refusal to present alibi witnesses that counsel believed would perjure themselves. The court found that counsel's belief was solidly based on an independent investigation and held that on the facts of this case the defendant suffered no loss of Sixth Amendment rights. The court offered guidance for similar situations: a lawyer may seek to withdraw but should not disclose the reasons, saying only that there was an irreconcilable conflict. For the lawyer's protection, a confidential record should be made of the disagreement. *Id.* at 14.

Even in civil cases, the courts' approach to client perjury has been varied. See, e.g., Committee on Professional Ethics v. Crary, 245 N.W.2d 298 (Iowa 1976) (attorney disbarred for failing to stop a deposition when it became clear that his client had lied and for failing to reveal the perjury); *In re Mallory,* 248 N.W.2d 43 (N.D. 1976) (attorney should remain silent and withdraw from the case if client commits perjury and refuses to correct it). 79. 106 S. Ct. 988 (1986).

80. *Id.* at 991.

81. *Id.* at 992.

82. *State v. Whiteside,* 272 N.W.2d 468 (Iowa 1978).

testify by conditioning continued confidentiality and representation on the client restricting his testimony, even though the court recognized that the right to testify does not include the right to commit perjury. The court held that counsel's actions amounted to ineffective assistance of counsel because counsel, as evidenced by his threat to testify against his client, had ceased to serve as a zealous advocate and had become a potential adversary. The court clarified that it was not deciding whether counsel had acted ethically, as this decision had been made by the Iowa Supreme Court, but it did conclude that a threat to testify is not authorized by the Model Rules.

The Supreme Court unanimously reversed the holdings of the Eighth Circuit, finding neither a violation of the right to effective assistance of counsel nor the right to testify. The Court, however, split five-to-four on the issue of whether the Court should comment on the ethical duty of the lawyer to reveal client perjury. Under the two-part test of Strickland v. Washington for establishing a claim of ineffective assistance of counsel, the Court held that counsel's actions resulted in neither serious attorney error nor prejudice and that counsel's conduct "fell within the wide range of professional responses to threatened client perjury acceptable under the Sixth Amendment." The Court recognized counsel's "overarching duty to advocate the defendant's cause," but held that this duty is surely limited to "legitimate, lawful conduct compatible with the very nature of a trial as a search for truth." The Court viewed the case as one in which the lawyer was successful in dissuading the client from committing perjury.

84. 744 F.2d at 1328-29.
85. Id. at 1329.
86. Id. at 1330-31.
87. 106 S. Ct. at 999-1000.
88. Id. at 994-1000. See infra text accompanying notes 98-110.
90. Under Strickland, the petitioner on a federal habeas corpus claim of ineffective assistance of counsel under the sixth amendment must show both that counsel's performance was deficient and that it prejudiced the defense of the case. Id. at 687. To show deficient attorney conduct "requires a showing that counsel made errors so serious that counsel was not functioning as 'counsel' guaranteed the defendant by the Sixth Amendment." Id. To show prejudice, petitioner must show "that counsel's errors were so serious as to deprive the defendant of a fair trial," id., so as to "undermine confidence in the outcome" of the trial. Id. at 694.
91. 106 S. Ct. at 994.
92. Id. (quoting Strickland, 466 U.S. at 688).
93. 106 S. Ct. at 994. After citing earlier versions of the ethical canons, the Court cited Model Rule 1.2(d) which prohibits a lawyer from counseling a client to engage, or assisting a client, in criminal or fraudulent conduct. 106 S. Ct. at 995. The Court continued, "[t]hese standards confirm that the legal profession has accepted that an attorney's ethical duty to advance the interests of his client is limited by an equally solemn duty to comply with the law and standards of professional conduct; it specifically ensures that the client may not use false evidence." Id.
94. Id. at 997.
As for the claim of a violation of the right to testify, the Court found no restriction on the defendant’s testimony at trial except that he was restrained from testifying falsely. The Court, while questioning the scope of the right to testify, held that “it is elementary that such a right does not extend to testifying falsely.” The Court repeatedly stated that lawyers can have no part in the presentation of false evidence and clients are not deprived of the assistance of counsel when lawyers refuse to present such evidence or seek to withdraw from the case.

The issue of whether the Court could attempt to resolve, under the facts of this case, the “thorny” problem of client perjury by requiring lawyers to reveal client perjury to the tribunal divided the Court. Chief Justice Burger, writing for the majority, endorsed the view of the Model Rules that if the client cannot be dissuaded from the perjurious testimony and testifies falsely, the rules require the lawyer to reveal the client perjury. Concerning the intention of the client to commit perjury, the majority recognized the inherent failings of the options of withdrawing or allowing the defendant to testify in a narrative form and concluded that the lawyer should disclose the intention to commit perjury if efforts to dissuade the client prove futile. Chief Justice Burger cited the amicus brief submitted by the American Bar Association as stating the position that “under no circumstances may a lawyer either advocate or passively tolerate a client’s giving false testimony.” This position is consistent with the view of trial

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95. Id.
96. Id. at 998.
97. The Court stated that for counsel to “take steps to persuade a criminal defendant to testify truthfully, or to withdraw, deprives the defendant of neither his right to counsel nor the right to testify truthfully.” Id.
98. Id. at 995–98. “Indeed, both the Model Code and the Model Rules do not merely authorize disclosure by counsel of client perjury; they require such disclosure.” Id. at 995 (emphasis in original). See DR 7-102(B)(1); Model Rule 3.3(a)(4) and comment (“Remedial Measures”).
99. 106 S. Ct. at 996. See infra note 71.
100. 106 S. Ct. at 996 n.6.
101. Id. at 998.
102. Id. at 996. “The suggestion sometimes made that ‘a lawyer must believe his client not judge him’ in no sense means a lawyer can honorably be a party to or in any way give aid to presenting known perjury.” Id. at 997. Similarly, the point is made that the lawyer never really knows the truth and does not know for certain when the client is committing perjury. This may be true in many instances where the facts of a case are unclear, and in those cases, the client is entitled to a presumption that the testimony is accurate. However, in circumstances such as Whiteside, the lawyer does know that the client is fabricating the testimony. In his concurrence in Whiteside, Justice Stevens wrote:

Justice Holmes taught us that a word is but the skin of a living thought. A “fact” may also have a life of its own. From the perspective of an appellate judge, after a case has been tried and the evidence has been sifted by another judge, a particular fact may be as clear and certain as a piece of crystal or a small diamond. A trial lawyer, however, must often deal with mixtures of sand and clay. Even a pebble that seems clear enough at first glance may take on a different hue in a handful
conduct as a search for truth. The majority recognized that while the duty of confidentiality covers the client’s admission of guilt, it does not protect the client’s announced plans to engage in future criminal conduct. Chief Justice Burger analogized the intention of a client to commit perjury with the intention of a client to bribe or threaten witnesses or members of the jury. In either case, the client cannot insist on counsel’s assistance or silence. In either case, “the responsibility of an ethical lawyer, as an officer of the court and a key component of a system of justice dedicated to a search for truth,” is to disclose the unlawful intentions of the client. “No system of justice worthy of the name can tolerate a lesser standard.”

The concurring opinions, while agreeing with the result that Whiteside suffered no denial of constitutional rights, refused to accept the majority’s blanket rule that defense counsel should reveal or threaten to reveal a client’s anticipated perjury to the court. Instead, the factors of each case should be considered in determining whether the lawyer’s response to the client’s intent to commit perjury denied the defendant of the right to assistance of counsel. Justice Blackmun wrote that lawyers who play the role of judge or jury in determining the facts “pose a danger of depriving their clients of the zealous and loyal advocacy required by the Sixth Amendment.” The concurrences also criticized the majority for going beyond the facts of this case in attempting to tell the states or lawyers in state courts how to behave. Justice Brennan called the majority’s opinion an “essay” and a “pure discourse without force of law.”

As we view this case, it appears perfectly clear that respondent intended to commit perjury, that his lawyer knew it, and that the lawyer had a duty—both to the court and to his client, for perjured testimony can ruin an otherwise meritorious case—to take extreme measures to prevent the perjury from occurring.

Our system of justice is based not on absolute truths, but rather on reasonable doubts. The lawyer need not wait for absolute certainty before concluding that the client’s story is false. If the lawyer knows beyond a reasonable doubt that the client has committed or intends to commit perjury, then the lawyer should take measures to prevent the use of false testimony including disclosure of the perjury to the court.

103. 106 S. Ct. at 994.
104. Id. at 998. See RPC Rule 1.6(b)(1).
105. 106 S. Ct. at 998.
106. Id.
107. Id. at 1006 (Blackmun, J., concurring); id. at 1007 (Stevens, J., concurring).
108. Id. at 1006 (Blackmun, J., concurring).
109. Id.
110. Id. at 1000 (Brennan, J., concurring). Justice Brennan wrote:

This Court has no constitutional authority to establish rules of ethical conduct for lawyers practicing in the state courts. Nor does the Court enjoy any statutory grant over legal ethics. . . .

Unfortunately, the Court seems unable to resist the temptation of sharing with the legal community its vision of ethical conduct. But let there be no mistake: the Court’s essay regarding
This criticism seems valid, as indeed each state does have the power to establish ethical rules outlining the conduct for its lawyers. As noted, Washington's RPC Rule 3.3, detailing the duty of candor toward the tribunal, differs from the Model Rule, and therefore, the conclusions of the majority in Whiteside may not be completely applicable. Whiteside did, however, indicate that at least five of the Justices felt that lawyers should reveal client perjury both past and future. This requirement is not inconsistent with the provisions of the RPC. Whiteside also provided one example of lawyer conduct that did not violate the constitutional right to effective assistance of counsel as it relates to the duty of candor under Rule 3.3(g).

C. Solutions to Client Perjury and Other Problems

As the opinions in Whiteside indicated, the problem of client perjury is troublesome and the solution difficult. The majority cited the three proposed solutions discussed in the comment to Model Rule 3.3. As what constitutes the correct response to a criminal client's suggestion that he will perjure himself is pure discourse without force of law. As Justice Blackmun observes, that issue is a thorny one, but it is not an issue presented by this case. Lawyers, judges, bar associations, students and others should understand that the problem has not now been “decided.”

Id.

Justice Blackmun wrote, “[i]t is for the States to decide how attorneys should conduct themselves in state criminal proceedings, and this court's responsibility extends only to ensuring that the restrictions a State enacts do not infringe a defendant's federal constitutional rights.” Id. at 1006 (Blackmun, J., concurring).

The majority did recognize that in examining lawyer conduct under the sixth amendment, courts must be careful not to constitutionalize particular standards thereby intruding into the states' authority to define and apply the professional standards for the lawyers that practice in their courts. Id. at 994.

111. See supra notes 64–66 and accompanying text.

112. The RPC seems to exclude the disclosure of client perjury where the falsity is not discovered until after the testimony is given. RPC Rule 3.3(d). See supra notes 70–71 and accompanying text. An argument can be made, however, that the RPC leave the issue unresolved and that lawyers should reveal offered client perjury. See supra notes 72–75 and accompanying text. As for the intention of the client to commit perjury at some point in the future, the RPC seem to be consistent with the Model Rules in requiring disclosure if the client cannot be dissuaded. See supra notes 67–68 and accompanying text.

113. See supra notes 98–106 and accompanying text.

114. See supra notes 67–75 and accompanying text.

115. Under the majority opinion in Whiteside, it may be hard to imagine a factual setting in which a lawyer, acting in compliance with the ethical rules, denies the client effective assistance of counsel under the federal Constitution. See supra notes 89–93 and accompanying text. But cf. United States ex rel. Wilcox v. Johnson, 555 F.2d 115 (3d Cir. 1977) (lawyer's threat to withdraw if the client took the stand caused the defendant not to testify at all and was held to be a violation of the sixth amendment). In light of Whiteside, RPC Rule 3.3(g), which recognizes that the right to assistance of counsel in criminal cases may supersede the lawyer's duties of candor, may not limit the other duties of Rule 3.3 at all.

Whiteside indicated, two of these proposals possess serious flaws.\textsuperscript{117} The first proposed solution allows the lawyer to take a passive role in permitting the defendant to testify in a narrative form without questioning from the lawyer. This proposal seems to compromise both competing principles by exempting the lawyer from disclosing the false evidence and by forcing the client to testify without assistance from counsel.\textsuperscript{118} Such narrative testimony seems to alert the trier of fact\textsuperscript{119} that the lawyer does not believe the client's testimony. The second proposal excuses the lawyer entirely from the duty to reveal false evidence in a criminal case if the perjury is that of the client.\textsuperscript{120} This option makes the lawyer a knowing instrument\textsuperscript{121} of perjury and seems to subvert the truth-finding process of our adversary system of justice. It also attempts to draw a thin line between allowing a lawyer to knowingly use a client's perjured testimony, although reluctantly, and a lawyer encouraging client perjury in order to bolster an otherwise weak case.

The third proposal, adopted by the majority in Whiteside, requires the lawyer to reveal the client's perjury if necessary after counsel has failed to dissuade the client from the perjury and the client is intent on testifying falsely.\textsuperscript{122} This proposal draws the line on the client's constitutional rights at the point where the client's conduct begins to implicate the lawyer in the commission of the perjury or the offering of false evidence. As Whiteside recognized, the accused has a right to the assistance of counsel, a right to testify, and a right to confidential communication with counsel but has no right to the assistance of counsel in committing perjury.\textsuperscript{123} After disclosure of the perjury or the intention to commit perjury to the tribunal, the most likely result is that the court should declare a mistrial, unless in the court's opinion the trial can continue without a loss of fairness to the accused.\textsuperscript{124}

The dishonest client who attempts perjury a second time may waive the

\textsuperscript{117} 106 S. Ct. at 996.
\textsuperscript{118} Model Rule 3.3 comment.
\textsuperscript{119} This is especially true in a bench trial. If the trier of fact, either judge or jury, notices a difference in the lawyer's manner in handling the client's testimony and concludes that the lawyer is not wholeheartedly crediting the client's testimony, then the trier of fact is tipped off to the client's perjury the same as if it had been explicitly notified. This proposed solution seems no more than a facial attempt to uphold the professional image of maintaining confidences while making an end run to maintain the lawyer's duty of candor to the tribunal. See Lowery v. Cardwell, 575 F.2d 727, 730 (9th Cir. 1978), discussed supra note 78.

\textsuperscript{120} This is the view supported by Professor Freedman. Freedman, supra note 116, at 1477–78. Professor Freedman considers the defendant's right to due process and effective assistance of counsel in an adversary system of justice more important than defense counsel's duty to the tribunal.

\textsuperscript{121} See supra note 102.
\textsuperscript{122} Model Rule 3.3 comment.
\textsuperscript{123} Id. See also Bress, Professional Ethics in Criminal Trials: A View of Defense Counsel's Responsibility, 64 Mich. L. Rev. 1493 (1966); Wolfram, supra note 71, at 863–66.
\textsuperscript{124} Model Rule 3.3 comment. See supra note 74.
right to further representation. This proposal seems to strike a fair balance between maintaining the underlying purpose of the duty of confidentiality and protecting society’s interest in the integrity of the criminal justice system.

In resolving the client perjury dilemma and other problems involving the rule of confidentiality, the solution must effectuate the purpose of the rule while protecting the interests of society. Again, the main purpose of the confidentiality rule is to facilitate “the full development of facts essential to a proper representation of the client.” A rule that requires disclosure of client confidences must be examined for its effect on the likelihood of the client to be frank and open with the lawyer. To illustrate, consider a rule that would require lawyers to disclose information necessary to prevent the client from committing a crime. In examining the effects of this rule on the lawyer-client relationship, this rule may prevent some client disclosures relating to an intention to commit future crimes, but it is not likely to restrict client disclosures pertaining to any past acts for which the lawyer’s services were originally sought. If a conscientious client came seeking advice pertaining to future conduct and was told that such conduct was illegal, that client would likely be dissuaded from the illegal conduct. Seemingly, a mandatory disclosure rule would only have a chilling effect on the disclosures of an unscrupulous client that intends to proceed with the intended action regardless of its illegality. Such persons, however, would rarely seek legal advice, and the overall effect, therefore, would be minimal. Once the effects of disclosure are determined, these effects are then balanced against the need for disclosure. In some cases, including client perjury, lawyers should be required to disclose client confidences to protect greater societal interests.

III. CONCLUSION

Confidentiality is essential to the proper workings of the adversary system of justice. The client must feel uninhibited in making disclosures to the lawyer so that a full development of the facts occurs and the lawyer is able to properly represent the client. Under the RPC as adopted in Washington, the general rule of confidentiality prohibits the lawyer from revealing client confidences or secrets relating to the representation of the client. The rule of confidentiality is not absolute, as Rule 1.6 contains many exceptions to the general rule. The client may consent to disclosure; the lawyer is impliedly authorized to make disclosures necessary to carrying out the

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125. Model Rule 3.3 comment.
126. See supra notes 31–33 and accompanying text.
127. Model Rule 1.6 comment.
representation; the lawyer may reveal the information necessary to prevent the client from committing a crime; the lawyer may make disclosures to establish a claim or a defense to allegations concerning the representation of the client; and the lawyer should disclose information pursuant to a court order.

The lawyer's duty of candor to the tribunal is a major area of conflict with the duty of confidentiality. RPC Rule 3.3(a) requires a lawyer to disclose material facts necessary to avoid assisting the client in a criminal or fraudulent act unless such disclosures are prohibited by Rule 1.6. This "unless" clause, not contained in the Model Rule, only excludes past acts of the client and does not exclude future acts from the disclosure requirement. Also under Rule 3.3, the lawyer must disclose the falsity of any offered evidence so long as such disclosure is not prohibited by Rule 1.6. If it is a prohibited disclosure, the lawyer may withdraw if that would resolve the problem. In instances when it would not resolve the problem, the lawyer should disclose the falsity to the tribunal. In a criminal case, however, the constitutional rights of the defendant may supersede the lawyer's duty of candor. In Whiteside, the Court indicated that counsel's threats to withdraw and reveal the perjury were not a denial of assistance of counsel. The majority also concluded that lawyers should disclose all client perjury to the court.

The rule of confidentiality in the RPC gives discretion to the lawyer whether to reveal client confidences. This discretionary system is preferable to a mandatory disclosure rule. In using this discretion, however, lawyers must balance the need for disclosure against the effects of such disclosure upon the lawyer-client relationship. Lawyers must perform this balancing conscious of their duties to the client and to society in order for the rules to be given proper effect. Similarly, in determining the proper solution to the client perjury problem and other conflicts with the rule of confidentiality, the courts, state bar associations, and lawyers should strive to effectuate the purposes of the confidentiality rule without totally sacrificing the integrity of the judicial process and other interests of society.

Stuart Watt