Keeping Secrets: Religious Duty vs. Professional Obligation

Alex Kozinski & Leslie A. Hakala*

The ethical dilemma is almost a cliché. What should a lawyer do when he knows that his (perhaps dead) client committed the crime for which an innocent man is about to be executed? What if the client has evidence that proves the condemned man innocent but implicates no one, and yet the client adamantly refuses to get involved? If the lawyer reveals what he knows, he violates his ethical obligations to his client and risks disciplinary action. If he remains silent, an innocent man will suffer. Though serious, this dilemma is by no means the only one confidentiality constraints impose on attorneys. What, for instance, should a lawyer do when he knows his client is recklessly releasing known carcinogens into a community's water system? Or, when a lawyer knows his client intends to defraud hundreds of victims of their retirement savings? What if the lawyer feels a religious obligation to tell?

The legal and professional repercussions of violating a client's confidence can be severe. The *ABA Standards for Imposing Lawyer Sanctions* call for suspension or disbarment when a lawyer "knowingly reveals information relating to representation of a client."[1] A lawyer who violates the ethical obligation of client confidentiality may be able to argue that his actions fell within one of the narrow exceptions to the rule requiring silence.[2] If the lawyer's actions do not fit within one of these exceptions, however, he is generally thought to be without a defense and out of luck–no matter how sincere or noble his motives.

---

* Circuit Judge and his former law clerk (who is now on to much better things). Our thanks to Rabbi Yitzchok Adlerstein, Professor Eugene Volokh and Dean Anthony Kronman for their many helpful comments and suggestions, and to Paul Derby for his research assistance.

1. JOHN S. DZIENKOWSKI, PROFESSIONAL RESPONSIBILITY STANDARDS, RULES & STATUTES 838 (1995-96 ed.) (quoting ABA Standards for Imposing Lawyer Sanctions).

Standard 4.21 states: "Disbarment is generally appropriate when a lawyer, with the intent to benefit the lawyer or another, knowingly reveals information relating to representation of a client not otherwise lawfully permitted to be disclosed, and this disclosure causes injury or potential injury to a client." *Id.*

Standard 4.22 states: "Suspension is generally appropriate when a lawyer knowingly reveals information relating to the representation of a client not otherwise lawfully permitted to be disclosed, and this disclosure causes injury or potential injury to a client." *Id.*

2. *See infra* notes 27-29 and accompanying text.

But the moral nature of the lawyer's dilemma suggests another defense. Perhaps the lawyer could argue that the strict mandate of confidentiality impermissibly burdened the free exercise of his religion by creating an unnecessary conflict between his professional obligations and his religious beliefs. With several important caveats, the lawyer could plausibly argue that this burden does not withstand strict scrutiny, excusing the lawyer from punishment under state bar proceedings. Specifically, in order to avail himself of this defense, the lawyer would have to give his clients timely[3] notice that he would violate the client's confidences when so compelled by his religion. Provided the lawyer did this, he may have a plausible argument that punishing him for obeying the dictates of his religion unacceptably burdens his right to religious freedom.[4]

In Part I, we quickly describe the potential tension between a lawyer's religious beliefs and professional confidentiality obligations–quickly, because it is such a familiar issue. Turning to the protections afforded the free exercise of religion in Part II, we consider whether the confidentiality constraints place an impermissible burden on a lawyer's exercise of religion, and whether the result would be different if the client signed a binding waiver of his right to confidentiality.

I. AN ATTORNEY'S RELIGIOUS AND PROFESSIONAL OBLIGATIONS REGARDING CLIENT CONFIDENTIALITY

Pointing out that a lawyer might be torn between his conscience and his professional obligations is hardly a novel observation.[5] Less obvious, perhaps, is the notion that observant lawyers could feel compelled by their religious convictions to reveal client confidences.

---

3. In other words, before confidences are discussed; *see also infra* note 70.

4. Broadly speaking, the question is whether the government has a compelling interest in conditioning the practice of law on the violation of one's religious duties. Suppose the State of California required lawyers to work on Saturdays. If the law were constitutional, the lawyering profession would immediately be off-limits to observant Jews. This is not just an issue for people who are already lawyers; it could also play a very significant role in the choice of professions for religious individuals. This in turn would adversely affects clients, say Hassidic Jews, who want to be represented by other members of their faith, and would gladly agree to go lawyerless on Saturdays. Thus, the State's rules may end up hurting the very clients they are designed to protect. We do not see that client confidentiality rules are much different.

5. *See* Bruce Green, *The Role of Personal Values in Professional Decisionmaking*, 11 GEO. J. LEGAL ETHICS 19 (1997) and sources cited therein.

In fact, some religions do require devotee lawyers to disclose client secrets in some situations; we offer Judaism and Christianity only as examples.[6]

There are at least three sources of Jewish law, or *Halacha,* that might require the disclosure of professional confidences. The first–and most important–is *Leviticus* 19:16, which says that "you shall not stand idly by the blood of your neighbor." Accordingly, a very early rabbinic text[7] prohibits an observant Jew from remaining silent when silence will cause harm to others, including harm to their property: "From where [can it be derived] that if you know of testimony [that is beneficial] to him, that you are not allowed to remain silent? It [the Torah] instructs 'You shall not stand idly by the blood of your friend.'" The great codifer Maimonides[8] accepts this ruling, adding, "They have already said that one who suppresses testimony is included in this admonition, since he sees the property of his friend about to be lost, and could return it by stating the truth." The modern *halachist* Rabbi Israel Meir Kagan, persuasively argues that Maimonides's directive is not limited to assisting another only through court proceedings, but applies more broadly.[9]

The biblical directive of *Deuteronomy* 22:1-3[10] to care for lost property and return it to its rightful owner also figures in this discussion. *Shulhan Arukh*[11] (The Code of Jewish Law) interprets this directive as imposing an obligation to safeguard the monetary interest of another. The apparent reasoning is that if the law demands that a stranger take steps to return lost property, it certainly requires taking

---

6. Even though they are discussed separately, the religious motivations of the two religions may overlap–it is, after all, the Judeo-Christian religious tradition.

7. *Sifra, Kedoshim* 4:8.

8. *Sefer HaMitzvot, Mitzvot Lo Ta'aseh,* 297.

9. *Sefer Hafetz Haim, Rechilut,* 9:1 n. 1. In typical Talmudic fashion, the rabbinic argument extends the literal terms of the Biblical command beyond threats to life, turning it into an affirmative obligation to assist another in the preservation of property. Whether this takes place in the court or without is irrelevant.

10. The passage states:

> You shall not see your brother's ox or his sheep go astray, and withhold your help from them; you shall take them back to your brother. And if he is not near you, or if you do not know him, you shall bring it home to your house, and it shall be with you until your brother seeks it; then you shall restore it to him. And so you shall do with his ass; so you shall do with his garment; so you shall do with any lost thing of your brother's, which he loses and you find; you may not withhold your help.

11. *Hoshen Mishpat,* 272:17 (compelling a bailee to salvage property that stands to lose all monetary value, despite lack of specific instruction by the bailor, and despite such proactive activity exceeding the customary contractual obligations of an unhired bailee.)

equivalent steps to ensure that no loss occurs in the first place. This may sometimes require a person to speak, where he would otherwise be entitled to remain silent. Maimonides's comments to the broad instruction to "love your neighbor as yourself,"[12] are also germane: "He is to speak in praise of his neighbor, and be careful of his neighbor's property as he is careful of his own property, and be as solicitous of his neighbor's honor as he is of his own."[13]

The third possible source of an obligation to disclose derives from the tremendous importance of the community in Jewish tradition. So writes contemporary Rabbi Alfred Cohen: "We consistently advocate that the ultimate good is that which benefits not only one, but the community, and particularly the Jewish people as a whole."[14] Rabbi Cohen also describes "the need to sacrifice the individual for the welfare of the community."[15] This suggests that a lawyer may not remain silent if he knows that a client is releasing potentially hazardous substances into a community's water supply, a situation where professional confidentiality rules prohibit disclosure. But this religious teaching can cut the other way. As Rabbi Cohen points out, a community also benefits from being able to consult lawyers in absolute confidence.[16] However, Moshe Halevi Spero responds to Rabbi Cohen's point, arguing:

> [I]t would be a definite detriment to society if persons believed that such privacy was generally deemed so absolute that they might conceivably carry out harmful intentions and escape justice under the protective cloak of a confidential relationship. It would appear far more important for citizens to understand that they can expect . . . a completely confidential relationship *so long as* they remain committed to certain basic

---

12. *Leviticus* 19:18 ("[18] You shall not take vengeance or bear any grudge against the sons of your own people, but you shall love your neighbor as yourself: I am the LORD."). *See also infra* pp. 5-6.

13. *Mishneh Torah, Mad'a*, 6:3; *see also* Lightman v. Flaum, QDS 52302915, reproduced at 11/24/98 N.Y.L.J. 29 (col. 4) (rabbi felt compelled to disclose that woman had not observed purification laws).

14. Alfred S. Cohen, *Privacy: A Jewish Perspective*, 1 J. HALACHA & CONTEMP. SOC'Y 53, 57 (1981).

15. Alfred S. Cohen, *On Maintaining a Professional Confidence*, 7 J. HALACHA & CONTEMP. SOC'Y 73, 83 (1984).

16. *Id.* at 85.

ethical constraints.[17]

These complicated considerations clearly do not yield a simple disclosure rule applicable in all situations.[18] Yet it is entirely possible that an observant Jewish lawyer would feel religiously compelled in some circumstances to reveal his client's confidences.[19]

A Christian lawyer may face the same problem. *Leviticus* and *Deuteronomy*, books of the Old Testament, are also holy scripture for Christians, so the first two sources of Jewish law apply equally to Christians.[20] Similarly, there are many passages in both the Old and New Testaments that emphasize the crucial importance of justice. *Deuteronomy* 16:20 decrees, "Justice, and only justice, you shall follow, that you may live and inherit the land which the Lord your God gives you." *Psalm* 37:28 reveals that "the Lord loves justice." *Proverb* 21:3 instructs, "To do righteousness and justice is more acceptable to the Lord than sacrifice." *Matthew* 23:23 describes Jesus condemning the scribes and Pharisees for neglecting the law and justice in favor of collecting revenue. Thus, a lawyer could feel religiously compelled to see justice done, even if he were required to violate his client's confidences to achieve that end. The obligation would be particularly strong where the injustice in question involves a violation of a religiously imposed obligation, such as causing death or physical harm to innocent parties.

Christian notions of love might also require disclosure. According to *John* 15:13, Jesus said, "Greater love has no man than this, that a man lay down his life for his friends." Teachings such as this suggest that devout Christians must save others, even at great personal sacrifice. By extension, a lawyer should be willing to suffer the professional consequences of saving an innocent man. In *Luke*

---

17. MOSHE H. SPERO, HANDBOOK OF PSYCHOTHERAPY AND JEWISH ETHICS 134 (1986).

18. For an extensive discussion of these issues, see Beth Din of America, *Confidentiality and Rabbinic Counseling: An Overview of Halakhic and Legal Issues* (on file with authors).

19. The point here is not to prove beyond dispute that these religions require disclosure, but rather to establish that a pious lawyer could credibly have such religious beliefs. Professor Levinson has identified this problem, and suggested in passing the possibility of a "free exercise" defense. *See* Sanford Levinson, *Identifying the Jewish Lawyer: Reflections on the Construction of Professional Identity*, 14 CARDOZO L. REV. 1577, 1610-11 (1993).

20. Strictly speaking, the Old Testament applies to Christians only as modified by the New Testament. However, on this point, the New Testament is consistent with–and therefore reinforces–the Old Testament's teachings.

6:31, Jesus instructed, "As you wish that men would do to you, do so to them." This could be read as suggesting that you have an obligation to save others from erroneous conviction or to notify them of a potentially contaminated water supply, just as you would hope others would do the same for you.

Of course, these scriptures can instead be interpreted as requiring silence–laying down your life for your client, preserving secrets as you would wish your lawyer to do. The former interpretation seems more likely, given the Biblical importance of righteousness. But, so long as a Christian lawyer could credibly claim that religious reasons caused him to disclose his client's secrets, other possible interpretations of the scriptures are beside the point. As the Supreme Court has written, "Courts are not arbiters of scriptural interpretation."[21] Moreover, under free exercise law, the only question is what *this* claimant believes, not the beliefs of his broader religious community. Indeed, the Supreme Court has plainly held that one may claim the protections of the Free Exercise Clause even if one is not "responding to the claims of a particular religious organization," so long as one is following a sincerely held personal religious belief.[22] The important thing is that both Jewish and Christian lawyers–and possibly lawyers of other religions–Moslems, Hindus, Buddhists, Native Americans, Tutus, to name just a few–might sincerely feel that the free exercise of their religions requires them to violate the rule regarding client confidences.

And, just what is that rule? The current guideline for attorney behavior with respect to client confidences, *ABA Model Rule of Professional Conduct* 1.6, states that in general "[a] lawyer shall not reveal information relating to representation of a client unless the client consents after consultation."[23] Comments following the *Model*

---

21. Thomas v. Review Bd., 450 U.S. 707, 716 (1981); *see also infra* notes 57-59 and accompanying text.

22. Frazee v. Illinois Dep't of Employment Sec., 489 U.S. 829 (1989).

23. Under the Model Rules:

> (a) A lawyer shall not reveal information 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 paragraph (b).
>
> (b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:
>
> (1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or
>
> (2) to establish a claim or defense on behalf of the lawyer in a controversy between the

Rules explain that the obligation to preserve confidences is essential to facilitating a full understanding of the facts in a case and also to encourage people to seek early legal representation, thereby reducing the likelihood that laws will be broken.[24] Thus, the obligation is to be taken very seriously, and continues even after the lawyer-client relationship ends;[25] exceptions are few.[26]

The most relevant exception appears in Model Rule 1.6(b)(1).[27] A lawyer may–but is not obligated to–reveal confidences upon learning that the client intends future criminal conduct that is likely to cause imminent substantial bodily harm or death.[28] Notably, this exception applies only to *criminal* conduct. Consequently, a lawyer may not reveal that his client has negligently manufactured a toy allowing children to choke on small pieces. Furthermore, the exception speaks solely in terms of preventing substantial bodily harm or death. Lawyers may not disclose information relating to a client's plans to burn down a warehouse full of art treasures for the insurance money or to cheat widows out of their dead husbands' life insurance

---

> 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.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1995).

24. *Id.* cmt. 2, 3.

25. *Id.* cmt. 21. *But see* EDWARD LAZARUS, CLOSED CHAMBERS (1998) (arguing that law clerk's duty of confidentiality continues only for the duration of the clerkship).

26. By contrast, the attorney-client privilege is only a rule of evidence and applies in a much narrower range of situations:

> The attorney-client privilege applies in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6, cmt. 6 (1995). *See also* Harry I. Subin, *The Lawyer as Superego: Disclosure of Client Confidences to Prevent Harm*, 70 Iowa L. Rev. 1091, 1098 (1985); Richard A. McKinney, Comment, *Proposed Model Rule 1.6: Its Effect on a Lawyer's Moral and Ethical Decisions with Regard to Attorney-Client Confidentiality*, 35 BAYLOR L. REV. 561, 566 (1983).

27. Another exception permits an attorney to breach his client's confidences to the extent necessary to defend himself against charges of misconduct or of complicity with the client's misconduct. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(2); cmt. 17, 18 (1995). The lawyer may also reveal confidential information to the extent necessary to prove services rendered in an action to recover legal fees. *See id.* cmt. 18. Unless the lawyer is ordered to violate his obligations by a court of competent jurisdiction, or is so instructed by another statute, there are no other exceptions to the ethical obligation to maintain client confidentiality. The narrow range of exceptions to the confidentiality requirement has been sharply criticized. *See e.g.*, Subin, *supra* note 26; Fred C. Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 351 (1989); Kenneth F. Krach, Comment, *The Client-Fraud Dilemma: A Need for Consensus*, 46 MD. L. REV. 436 (1987). A discussion of these critiques is beyond the scope of this piece.

28. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(1) (1995).

policies. Finally, the exception addresses only the client's conduct, not a third party's. If, in the course of providing his client with legal advice, the client tells the lawyer that someone else intends to commit any of a multitude of heinous acts, and that lawyer reveals the information to prevent the crime, he is not protected by Model Rule 1.6(b)(1).[29]

The *Model Rules* do not unambiguously require lawyers to tell clients the precise scope of the confidentiality guarantee. However, Model Rule 1.4(b) dictates, "A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." As clients must make informed decisions regarding how much information to disclose to lawyers, this provision arguably requires lawyers to offer some explanation of client confidentiality and its exceptions.[30] Several scholars have called for more direct and active discussion of client confidentiality at the outset of any legal representation.[31] Regardless of whether or not a lawyer does in fact engage potential clients in such a conversation, however, Model Rule 1.6 is in full force.

The professional consequences of breaching client confidentiality can be grave.[32] To a lawyer who has invested years in a legal education and who has a family depending on the income from his law practice, the prospect of disbarment is a significant disincentive to breaching client confidences. Even suspension has serious ramifications for one's professional reputation and prospects for career advancement.[33]

Each state enacts its own laws guiding the professional

---

29. For instance, suppose Austin's mother told her lawyer in confidence that Austin was planning to commit armed robbery tomorrow. By telling the police, the lawyer violates Model Rule 1.6 and does not fall within the exception. Furthermore, Austin's mother would quite likely complain about the breach that led to the arrest of her darling boy.

30. *See* Lee A. Pizzimenti, *The Lawyer's Duty to Warn Clients About Limits on Confidentiality*, 39 CATH. U. L. REV. 441 (1990) (arguing that failure to provide opportunity for informed consent should provide basis for discipline).

31. *See, e.g., id.*; Roy M. Sobelson, *Lawyers, Clients and Assurances of Confidentiality: Lawyers Talking Without Speaking, Clients Hearing Without Listening*, 1 GEO. J. LEGAL ETHICS 703 (1988).

32. *See supra* note 1 and accompanying text. For an excellent discussion of the lawyer's ethical dilemna, see Stephen Gillers, *The Man in the Middle*, AM. LAW. 80-81 (May 1999).

33. On a personal level, impermissibly revealing a client confidence—and thereby violating professional obligations—may impose a cost on an attorney who feels torn between his obligations. *See* Brian R. Hood, Note, *The Attorney-Client Privilege and a Revised Rule 1.6: Permitting Limited Disclosure After the Death of the Client*, 7 GEO. J. LEGAL ETHICS 741, 742 (1994). For a discussion of the rule's impact on an attorney's moral integrity, see Krach, *supra* note 27, at 451.

conduct of its lawyers; as a result, the actual rules governing client confidentiality vary from state to state. Some states implement Model Rule 1.6 essentially verbatim, others create broader exceptions allowing greater disclosure. For instance, some states require lawyers to disclose information necessary to prevent clients from committing serious violent crimes.[34] Others permit lawyers to reveal information necessary to prevent clients from committing criminal acts likely to result in substantial harm to financial interests or property.[35] The District of Columbia allows disclosure "to prevent a criminal act that the lawyer reasonably believes is likely to result in death or substantial bodily harm absent disclosure of the client's secrets,"[36] suggesting that the criminal act need not be contemplated by the client himself. These examples–by no means comprehensive–illustrate the diversity of state law. But even states with very broad disclosure provisions do not relieve lawyers of all dilemmas. None allows an attorney to reveal information proving a third party defendant innocent. Thus, every lawyer potentially faces a conflict between following Model Rule 1.6 (or the state equivalent) and following his religious convictions.[37]

For the lawyer who chooses the latter path, protections accorded the free exercise of religion may provide a defense.

II. THE FREE EXERCISE OF RELIGION

To be valid, each state's laws–such as the rules regarding client confidentiality–must comply with both the First Amendment to the United States Constitution[38] and the religious liberty provision of that state's constitution.[39] Therefore, if the confidentiality rules

---

34. Such as Arizona, Connecticut, Illinois, Nevada, North Dakota and Texas. *See* STEPHEN GILLERS & ROY D. SIMON, JR., REGULATION OF LAWYERS: STATUTES AND STANDARDS 75 (1996).

35. Such as Alaska, Maryland, New Hampshire, New Mexico and Pennsylvania. *See id.* at 74.

36. *Id.* at 75.

37. In order to keep things simple, we use Model Rule 1.6 as the general rule regarding client confidentiality.

38. The First Amendment to the United States Constitution, which dictates that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . . ." was made applicable to the states through the Fourteenth Amendment. *See* GEOFFREY STONE ET AL., CONSTITUTIONAL LAW 1460-61 (2d ed. 1991).

39. Each of the fifty states has constitutional provisions protecting the free exercise of religion. *See* ALA. CONST. art. I, § 3; ALASKA CONST. art. I, § 4; ARIZ. CONST. art. II, § 12; ARK. CONST. art. I, § 4; CAL. CONST. art. I, § 4; COLO. CONST. art. II, § 4; CONN. CONST. art. I, § 3; DEL. CONST. art. I, § 1; FLA. CONST. art. I, § 3; GA. CONST. art. I, § 1; HAW. CONST. art. I, § 4; IDAHO CONST. art. XXI, § 19; ILL. CONST. art. I, § 3; IND. CONST. art. I, § 3; IOWA CONST. art. I, § 3; KAN. CONST. Bill of Rights, § 7; KY. CONST. art. I, §§

conflict with either, they are invalid and the religious lawyer may not be punished for violating them.

It turns out that the First Amendment does not give the religious lawyer facing disciplinary action much comfort. In *Employment Division v. Smith*,[40] the Supreme Court announced the "neutral law test," writing, "[I]f prohibiting the exercise of religion . . . is not the object of [the challenged statute] but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended."[41] The plurality went on to hold "that the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'"[42] A straightforward application of this test indicates that the First Amendment offers little protection for a lawyer who has breached a client confidence for religious reasons. A "valid and neutral law of general applicability" that "proscribes" the revelation of client confidences that a lawyer's religion "prescribes" does not violate the lawyer's constitutional rights.[43]

Justice Scalia, writing the plurality in *Smith*, explained that prior decisions applying stricter scrutiny to religious burdens "involved not the Free Exercise Clause alone, but the Free Exercise

---

1,5; LA. CONST. art. I, § 8; ME. CONST. art. I, § 3; MD. CONST. Declaration of Rights, art. 36; MASS. CONST. pt. I, art. II; MICH. CONST. art. I, § 4; MINN. CONST. art. I, § 16; MISS. CONST. art. III, § 18; MO. CONST. art. I, § 5; MONT. CONST. art. II, § 5; NEB. CONST. art. I, § 4; NEV. CONST. art. I, § 4; N.H. CONST. pt. I, art. V; N.J. CONST. art. I, ¶ 3; N.M. CONST. art. II, § 11; N.Y. CONST. art. I, § 3; N.C. CONST. art. I, § 13; N.D. CONST. art. I, § 3; OHIO CONST. art. I, § 7; OKLA. CONST. art. II, § 5; OR. CONST. art. I, §§ 2-3; PA. CONST. art. I, § 3; R.I. CONST. art. I, § 3; S.C. CONST. art. I, § 2; S.D. CONST. art. VI, § 3; TENN. CONST. art. I, § 3; TEX. CONST. art. I, § 6; UTAH CONST. art. I, § 4; VT. CONST. ch. I, art. III; VA. CONST. art. I, § 16; WASH. CONST. art. I, § 11; W. VA. CONST. art. III, § 15; WIS. CONST. art. I, § 18; WYO. CONST. art. I, § 18.

40. 494 U.S. 872 (1990) (upholding application of neutral law prohibiting religiously motivated peyote use by government employees).

41. *Id.* at 878.

42. *Id.* at 879 (quoting United States v. Lee, 445 U.S. 252, 263 n.3 (1982) (Stevens, J., concurring)).

43. Congress passed the Religious Freedom Restoration Act of 1993 (RFRA), 42 U.S.C. §§ 2000bb to 2000bb-4 (1994) "to overturn the decision of the United States Supreme Court" in *Smith*, and "to restore the compelling interest test as set forth in *Sherbert v. Verner*." 42 U.S.C. § 2000bb(b)(1). *See also Sherbert v. Verner*, 374 U.S. 398 (1963), which required unemployment benefits for a claimant who, due to religious beliefs, refused to work on Saturday, is embraced by many as the high point for religious freedom. However, in *City of Boerne v. Flores*, 521 U.S. 507 (1997), the Supreme Court struck down RFRA as applied to state law on federalism grounds. Although RFRA still applies federally–and thus may offer strict scrutiny religious protection to lawyers practicing in federal jurisdictions such as Washington, D.C., Guam and various other island territories–it cannot invalidate state laws, including state laws regulating the professional conduct of lawyers.

Clause in conjunction with other constitutional protections, such as freedom of speech."[44] Perhaps, then, our religious lawyer could prevail in federal court under this "hybrid situation" by combining a free exercise claim with a free speech claim–after all, the confidentiality rules prohibit lawyers from saying certain things. There are two problems with seeking refuge in this "hybrid situation": First, the Supreme Court has never explained exactly how the hybrid situation works in practice–or what requirements a claimant must meet to show a First Amendment violation–and lower courts fracture on the question.[45]

More problematic, our lawyer faces an uphill battle in making out his free speech claim. In *Gentile v. State Bar of Nevada*,[46] the Supreme Court ruled that "[l]awyers are officers of the court and, as such, may legitimately be subject to ethical precepts that keep them from engaging in what otherwise might be constitutionally protected speech. This does not mean, of course, that lawyers forfeit their First Amendment rights, only that a less demanding standard applies."[47] In *Gentile*, the Court decided that a rule of professional conduct that restricted what an attorney could say about a pending case did not violate the attorney's free speech rights. In making this determination, the Court applied a "less demanding standard," and asked only whether the rule furthered substantial state interests and was narrowly tailored to achieve those objectives.[48] The Court noted that the other ways to prevent the lawyer's speech from affecting the outcome of the judicial proceeding imposed costs on the judicial system, that the state had a substantial interest in preventing those costs, and that the rule was narrowly tailored to those interests. This holding–that a rule is narrowly tailored whenever it avoids the cost of doing something another way–means, in essence, that a lawyer's free speech rights may

---

44. *Smith*, 494 U.S. at 881.

45. *See* William L. Esser IV, Note, *Religious Hybrids in the Lower Courts: Free Exercise Plus or Constitutional Smoke Screen?*, 74 NOTRE DAME L. REV. 211 (1998). The Ninth Circuit has recently breathed new life into the "hybrid situation" theory. *See* Thomas v. Anchorage Equal Rights Comm'n, 165 F.3d 692, 705 (9th Cir. 1999) (holding that one invoking the hybrid exception need not prove a separate constitutional violation, but only make a "colorable claim" to that effect), petition for rehearing/suggestion for rehearing en banc filed Mar. 2, 1999.

46. 501 U.S. 1030 (1991).

47. *Id.* at 1081-82 (O'Connor, J., concurring).

48. *Id.* at 1075-76.

be restricted whenever doing so furthers a substantial state interest.[49] Preserving client confidences serves substantial state interests such as improving the quality of legal advice clients receive. Thus, a lawyer is unlikely to succeed in arguing that Model Rule 1.6 violates his free speech rights, making his hybrid situation claim weak, especially in circuits that require the existence of an independently viable claim.[50] All told, the United States Constitution is unlikely to shield our religious lawyer.

Many state constitutions, however, do provide greater protection for religious freedom than the First Amendment, by preserving the "compelling interest test":[51] government may

---

49. *Gentile* suggests that perhaps a lawyer's other First Amendment rights—such as the right to religious freedom—are subject to a "less demanding standard." To our knowledge, no case has considered this, but it does not really matter. Federally, it is hard to see how a lawyer's free exercise rights could be subject to a standard less demanding than the neutral law test put forth in *Smith*. And, the Supreme Court in *Gentile* applied federal constitutional law; its holding does not bind state courts applying state constitutional protections.

50. *See, e.g.*, EEOC v. Catholic Univ. of Am., 83 F.3d 455, 467 (D.C. Cir. 1996) (requiring independently viable claim); Brown v. Hot, Sexy & Safer Prods., 68 F.3d 525, 539 (1st Cir. 1995) (same); *but see* Thomas, 165 F.3d at 705 (requiring only a colorable claim of an independent constitutional violation).

51. *See, e.g.*, Swanner v. Anchorage Equal Rights Comm'n., 874 P.2d 274 (Alaska 1994) (Alaska); Brunelle v. Lynn Pub. Sch., No. CIV.A. 95-1312A, 1997 WL 785595 (Mass. Super. Dec. 17, 1997) (Massachusetts); McCready v. Hoffius, 586 N.W.2d 723 (Mich. 1998) (Michigan); Kirt v. Humphrey, No. C1-96-2614, 1997 WL 561249 (Minn. Ct. App. Sept. 9, 1997) (Minnesota); Basich v. Board of Pensions, 540 N.W.2d 82 (Minn. Ct. App. 1996) (same); Palmer v. Palmer, 545 N.W.2d 751 (Neb. 1996) (Nebraska); State v. Bontrager, 683 N.E.2d 126 (Ohio Ct. App. 1996) (Ohio); Horen v. Commonwealth, 479 S.E.2d 553 (Va. Ct. App. 1997) (Virginia); Hunt v. Hunt, 648 A.2d 843 (Vt. 1994) (Vermont); Munns v. Martin, 930 P.2d 318 (Wash. 1997) (en banc) (Washington); First United Methodist Church v. Hearing Examiner, 916 P.2d 374 (Wash. 1996) (en banc) (same); State v. Balzer, 954 P.2d 931 (Wash. Ct. App. 1998) (same).

A few states have been reluctant to decide whether their free exercise clauses provide broader protections than the Free Exercise Clause of the U.S. Constitution. *See, e.g.*, Korean Buddhist Dae Won Sa Temple v. Sullivan, 953 P.2d 1315, 1345 n.31 (Haw. 1998) (noting that "[b]ecause *Smith*'s prohibitory rule denying any application of free exercise analysis to laws of general application does not apply in this case, we need not and do not reach the question whether there is such a rule under the Hawaii Constitution"); Miller v. McMahon, 684 N.Y.S.2d 368, 370 (N.Y. App. Div. 1998) (recognizing that New York has not yet decided whether the scope of N.Y. constitution, article 1, section 3 "is coextensive with the Free Exercise Clause of the First Amendment of the U.S. Constitution").

Other states have decided that their free exercise clauses provide no greater protection than the Free Exercise Clause of the U.S. Constitution. *See, e.g.*, Smith v. Fair Employment & Hous. Comm'n., 913 P.2d 909, 929 (Cal. 1996) (noting that although the meaning of the California religion clause is not dependent upon the meaning of the federal constitution, California has historically given a meaning to its free exercise clause similar to the Court's holding in *Smith*); East Bay Local Dev. Corp. v. State, 81 Cal. Rptr. 2d 908, 919 (Cal. Ct. App. 1999) (holding that California is not required to provide greater protection for religious freedom than the federal constitution); State v. Miller, 538 N.W.2d 573, 576 (Wis. Ct. App. 1995) (holding that the scope of the state religion clause should be determined in light of the Supreme Court cases interpreting the Free Exercise Clause).

Finally, at least one state has decided that its free exercise clause textually provides less protection than the Free Exercise Clause of the U.S. Constitution. *See, e.g.*, South Jersey Catholic Sch. Teachers Org. v. St. Teresa of the Infant Jesus Church Elementary Sch., 696 A.2d 709, 715 (N.J. 1997) ("[B]ecause our

substantially burden an individual's exercise of religion only if the application of the burden to that person both furthers a compelling governmental interest and is the least restrictive means of furthering that interest. In order to raise a colorable claim or defense based on religious freedom under this test, our hypothetical lawyer must first establish that his belief is (1) sincerely held, (2) religiously motivated, and (3) substantially burdened by the government's rule.[52] Then, the government must demonstrate that the rule is (4) narrowly tailored to (5) further a compelling governmental interest. In practice, these two are reversed, because one must find a compelling interest before determining whether the rule is narrowly tailored to it.[53]

The first two requirements–that the belief be sincerely held and religiously motivated–are closely related, though not interchangeable. With respect to sincerity, the Supreme Court held in *United States v. Seeger*[54] that the threshold question is one of fact. Thus, a jury (or judge) would have to determine as a matter of fact whether or not the lawyer sincerely held the belief that led him to breach client confidences.[55] We assume there would be an affirmative finding, because

---

State Religion Clause is literally less pervasive than the First Amendment, our discussions of the Religion Clauses will be limited to the federal provisions.") (citations omitted).

52. States often use slightly different language to describe the same test. *See, e.g., Swanner*, 874 P.2d at 281, where the court held:

> In *Frank v. State*, we adopted the *Sherbert* test to determine whether the Free Exercise Clause of the Alaska Constitution requires an exemption to a facially neutral law. We held that to invoke a religious exemption, three requirements must be met: (1) a religion is involved, (2) the conduct in question is religiously based, and (3) the claimant is sincere in his/her religious belief.

Id. (citation omitted). *See also McCready*, 586 N.W.2d at 729 (utilizing the above-outlined five-pronged test to analyze the Civil Rights Act under the Free Exercise Clause of the Michigan Constitution); Hill-Murray Fed'n of Teachers v. Hill-Murray High Sch., 487 N.W.2d 857, 865 (Minn. 1992) (arguing that in deciding whether a government action violates the Minnesota Freedom of Conscience Clause, courts consider whether (1) the religious "belief is sincerely held," (2) the state action "burdens the exercise of religious beliefs," (3) the state's interest is compelling, and (4) the state action "uses the least restrictive means").

53. *See, e.g., Brunelle*, 1997 WL 785595, at *7 ("If such a burden [on free exercise] exists, it can only be upheld utilizing the 'balancing test that the Supreme Court has established under the free exercise of religion clause in *Wisconsin v. Yoder*.' Such a balancing test requires the existence of the compelling state interest that is achieved by a least restrictive means.") (citations omitted).

54. 380 U.S. 163, 185 (1965).

55. For instance, in *United States v. Rasheed*, 663 F.2d 843 (9th Cir. 1981), the defendants were charged with defrauding parishioners through a pyramid scheme in which the profits were to come from God. The jury found that the defendants "lacked a sincere religious belief in certain aspects of the 'Dare to be Rich' program." *Id.* at 848. In affirming the verdict of mail fraud, Judge Wallace noted that fraudulent activity does not gain protection by being performed in the name of religion. *Id.* at 849.

otherwise no legitimate free exercise claim would be raised.[56]

The issue of whether the belief is religiously motivated is not much more complicated. The Court in *Seeger* also wrote that the claim of the defendant "that his belief is an essential part of a religious faith must be given great weight. . . . The validity of what he believes cannot be questioned."[57] In more recent cases the Court concluded that "the guarantee of free exercise is not limited to beliefs which are shared by all of the members of a religious sect"[58] or to beliefs shared by any established religious sect.[59] Since the religious motivations discussed above are not bizarre or even particularly unusual, this requirement should pose no problem for the lawyer who is genuinely motivated by religious conviction.

The final question to ask in connection with the lawyer's religious belief is whether or not the governmental rule (here, the strict confidentiality mandate) substantially burdens that belief. Within the case law, there is no clear standard of what constitutes a substantial burden.[60] However, Professor Douglas Laycock–one of the drafters of Religious Freedom Restoration Act and an expert on religious freedom–explains that the statutorily prohibited conduct need not be *compelled* by religion.[61] He writes, "religious exercise is substantially

---

56. Although it is difficult to clearly distinguish sincere beliefs from those that are insincere, courts have provided some guidance. *See* State v. Bontrager, 683 N.E.2d 126, 128 (Ohio Ct. App. 1996) ("The test to ascertain the sincerity of defendant's religious beliefs is whether 'a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God.' Although this is an encompassing definition, satisfaction requires more than a personal or philosophical belief.") (quoting United States v. Seeger, 380 U.S. 163, 166 (1965) (citation omitted)).

57. *Seeger*, 380 U.S. at 184.

58. Thomas v. Review Bd., 450 U.S. 707, 715-16 (1981). *Cf.* Strock v. Pressnell, 527 N.E.2d 1235 (Ohio 1988); Wisconsin v. Kasuboski, 275 N.W.2d 101 (Wis. 1978).

59. Frazee v. Illinois Dep't of Employment Sec., 489 U.S. 829 (1989).

60. *See, e.g.*, Kirt v. Humphrey, No. C1-96-2614, 1997 WL 561249, at *5 (Minn. Ct. App. Sept. 9, 1997) (finding that Minnesota statute regulating sale and purchase of motor vehicles on Sunday did not substantially burden religious practice or belief, but merely made it more expensive to observe certain religious practices); Palmer v. Palmer, 545 N.W.2d 751, 755 (Neb. 1996) ("A burden upon religion exists where the state, or agent thereof, 'conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs. . . .'") (quoting Thomas v. Review Bd., 450 U.S. 707, 717-18 (1981)); *Bontrager*, 683 N.E.2d at 130 (finding that hunter-orange clothing requirement for fifteen-day deer gun-hunting season did not place substantial burden on Amish religious practices); Ballweg v. Crowder Contracting Co., 440 S.E.2d 613, 616-17 (Va. 1994) (holding that a substantial burden is imposed where state action compels a party to affirm a belief they do not hold, discriminates on the basis of religious beliefs, inhibits dissemination of particular religious beliefs, or compels a party to forgo their religious practices), *cited in* Horen v. Commonwealth, 479 S.E.2d 553, 558 (Va. Ct. App. 1997).

61. *See* Douglas Laycock, *RFRA, Congress, and the Ratchet*, 56 MONT. L. REV. 145, 151 (1995).

burdened if . . . religiously motivated conduct is burdened, penalized or discouraged."[62] This apparently reasonable definition clearly encompasses the burden faced by a confidence-breaching lawyer. As noted above, the religiously motivated conduct–disclosure–is explicitly penalized and therefore strongly discouraged. The lawyer's religious claim having surmounted all the preliminary hurdles, the focus now shifts to the rule prohibiting disclosure and the government's asserted compelling interest.

There is no generally agreed-upon definition of a compelling interest.[63] The Supreme Court has on occasion referred to "interests of the highest order" and "paramount interests."[64] In fact, the Court has only found compelling interests in the free exercise context three times: racial equality in education, collection of tax revenue, and national defense.[65] The stringency of the standard derives from its origins as an exception to an absolute constitutional prohibition.[66] Nonetheless, we believe there is a compelling interest in not allowing lawyers to surprise their clients by violating their confidences. Presumably, clients have confided their secrets in lawyers with the understanding that those secrets will be kept. While it is true that Model Rule 1.6 does create some exceptions to that confidence, clients can and should take those exceptions into account.[67] In contrast, a client would be entirely surprised if his lawyer suddenly announced a religious compulsion to disclose his secrets, depriving the client of the ability to decide what private information becomes public and thus depriving him of his individual autonomy. Surely preserving

62. *Id.* at 152.

63. *See, e.g.*, State v. Hershberger, 462 N.W.2d 393, 397 (Minn. 1990) (holding that under the Minnesota Freedom of Conscience Clause, only governmental interests in "peace or safety" are sufficiently compelling to excuse state imposition on religious freedom); Peterson v. Peterson, 474 N.W.2d 862, 871 (Neb. 1991) (holding that a court may not restrict parents' right to control the religious upbringing of their children absent proof that particular religious practices "pose an immediate and substantial threat to children's well-being"); *Horen*, 479 S.E.2d at 559-60 (finding protection of wild birds not sufficiently compelling absent evidence that animals were endangered or threatened).

64. Douglas Laycock & Oliver S. Thomas, *Interpreting the Religious Freedom Restoration Act*, 73 TEX. L. REV. 209, 224-25 (1994).

65. *See id.* at 226. Until *Smith*, the Court used the compelling interest test to evaluate claims under the First Amendment.

66. *See id.* at 226-27.

67. *See supra* text accompanying notes 27-29.

client expectations is a matter of basic fairness.[68]

But is Model Rule 1.6 the least restrictive means of achieving this compelling interest?[69] What if the state instead required a religious lawyer to warn his potential client at the outset that he may violate confidences? One can easily imagine a *hypothetical* Rule 1.6(c):

> A lawyer who feels that his religious obligations may require him to disclose a client's confidential information shall notify clients of this fact at the outset of initial consultations. After explaining in detail the sorts of information that might be disclosed and under what circumstances, the lawyer shall obtain from all potential clients a written waiver of paragraph (a). Only after such a waiver is signed shall the lawyer allow the client to divulge any potentially confidential information. Absent a signed waiver, the full confidentiality constraints of paragraph (a) apply.

A signed waiver would certainly solve the problem of disturbing a client's expectations regarding confidentiality, and would be a less restrictive means of furthering that compelling interest.[70]

Even with a waiver, however, there is still a compelling interest in assuring clients that they can get competent legal advice without fearing public disclosure of their secrets. Recognizing that lawyers are indispensable in coping with our complex legal system, the Sixth Amendment guarantees criminal defendants a right to effective assistance of counsel; in civil matters, although the right to counsel is not constitutionally guaranteed, it is protected. Lawyers typically can only provide the best legal advice if they are fully informed regarding the situation, and legally unsophisticated clients may not know

---

68. The legitimate expectation of privacy has played a central role in determining the scope of Fourth Amendment protections. *See e.g.*, Veronia Sch. Dist. v. Acton, 515 U.S. 646, 653 (1995); Minnesota v. Dickerson, 508 U.S. 366, 375 (1993).

69. *See* Horen v. Commonwealth, 479 S.E.2d 553, 559-60 (Va. Ct. App. 1997) (finding criminal penalties for possession of wild bird feathers and parts not least restrictive means given variety of other permit and penalty schemes that did not burden bona fide religious use of owl feathers).

70. A lawyer who had a religious epiphany while representing a client could seek a waiver from his client allowing him to disclose future confidences, but it would improperly upset the client's expectations to allow the newly religious lawyer to reveal past confidences without permission.

whether a particular fact is important in evaluating their legal options. Accordingly, the effectiveness of legal representation often depends on whether clients feel free to confide in the lawyer, and most people assume that clients will not communicate freely with their attorneys without confidentiality guarantees.[71] Therefore, there is a compelling interest in not allowing *all* lawyers to avoid the constraints of confidentiality by seeking advance waivers, in order to guarantee individuals reasonable and autonomous participation in the legal system.[72]

But, in considering whether confidentiality rules further a compelling state interest, the question is not whether there is a compelling interest in allowing clients to obtain confidential legal advice, but rather whether there is a compelling interest in refusing religious lawyers an exception from the current Model Rule 1.6.[73] In making this determination, the likely number of such claims must be taken into consideration, though not mere "speculation about what might be or could be or what if everybody converted to these religions."[74] Absent evidence that the exception will overwhelm the general confidentiality rule, lawyers who believe that their religious convictions may impose an obligation to violate their clients' confidences and who obtain a waiver from their clients at the outset of representation should not be bound by current Model Rule 1.6.

Does a client have the capacity to freely waive his right to confidentiality before confiding anything? That is, do we as a society believe that clients can fully appreciate the risks of signing an *ex ante* waiver of confidentiality, so that we will hold them to that agreement? There are not many cases directly addressing the point, but the answer seems to be yes. Model Rule 1.6(a) allows a lawyer to reveal his client's confidences if the client gives permission after confiding. A waiver is really just a means of acquiring the client's consent *ex ante*. Of course, when a client gives his lawyer post hoc permission to

---

71. *Cf.* Zacharias, *supra* note 27 (investigating question empirically and concluding that liberalized disclosure rules would not significantly impact most clients).

72. *See* Mary C. Daly, *To Betray Once? To Betray Twice?: Reflections on Confidentiality, a Guilty Client, an Innocent Condemned Man, and an Ethics-Seeking Defense Counsel*, 29 LOY. L.A. L. REV. 1611, 1623-24 (1996); Hood, *supra* note 33, at 748; Krach, *supra* note 27, at 445-46.

73. *See* Laycock, *supra* note 61, at 148, Laycock & Thomas, *supra* note 64, at 222.

74. *See* Laycock, *supra* note 61, at 149; *see also* Frazee v. Illinois Dep't of Employment Sec., 489 U.S. 829, 835 (1989) (recognizing religious claim of Christian who refused to work on Sundays will not cause "a mass movement away from Sunday employ").

disclose a confidence, he knows exactly what the lawyer will say and the foreseeable consequences of that disclosure. The same is not necessarily true of an *ex ante* waiver–the client might not appreciate the full consequences of waiving his right to confidentiality. Therefore, it is appropriate to require a lawyer seeking a waiver to be very explicit about the types of risks involved, such as public embarrassment, criminal liability, civil sanctions, etc.

Importantly, the client is not ceding all his rights to keep information private. He can either stay with the religious lawyer and not tell him certain facts, or he can seek another lawyer who does not have this particular religious conviction. Moreover, clients can waive other rules designed for their own protection. For instance, in *Alcocer v. Superior Court*,[75] a defendant knowingly and willingly waived his right to be represented by an attorney who had no conflict of interest. The appellate court upheld this waiver even though the trial court wished to disallow it. In language that is strikingly applicable to our question, the court wrote:

> The choice [of counsel] is up to the defendant, provided he is fully informed of his rights, and knowingly and intelligently waives them. A right that is imposed, as compared to a right that is chosen, is an impoverished right. A right derives its significance and vitality from its being chosen. . . . [A] defendant is the master of his own fate; it is he, rather than the government, who decides who shall act as his counsel.[76]

The court then goes on to discuss the requirements for a knowing and truly voluntary waiver.[77] So, by extension, if a client knowingly and voluntarily chooses to waive his rights to confidentiality before telling his secrets, there is no reason not to allow that waiver–and hold the

---

75. 206 Cal. App. 3d 951 (1988). Someone who agrees to be represented by a lawyer with conflicts might want that particular lawyer precisely because of those conflicts; for instance, it is easy to imagine that several members of the same family might want the same lawyer to prepare their wills. Similarly, someone might agree to be represented by a lawyer who (for religious reasons) will not keep secrets precisely because he wants a lawyer with those religious beliefs. For instance, a member of the Hassadic Jewish community might strongly prefer to be represented by a fellow Hassadic Jew.

76. *Id.* at 956-57.

77. *Id.* at 961-62.

client to it.

One scholar argues against allowing lawyers and clients to bargain for levels of confidentiality, claiming: "Sophisticated clients and those with the most to hide would insist on strict confidentiality. The most unethical lawyers would be quickest to agree. . . . [Thus,] allowing bargaining . . . might also reduce the possibility that a moral lawyer would persuade the client to 'do the right thing.'"[78] This is purely a policy argument, however, and the possible persuasive value of moral lawyers would likely not rise to the level of a compelling interest necessary to burden a lawyer's religious practice. Furthermore, the risk of this lawyerly race to the bottom is necessarily rather low in our case, where–by hypothesis–we have lawyers with sincere religious convictions. On the other hand, unscrupulous lawyers might pretend to have such beliefs to enjoy the benefits of our proposed rule–and to wield power over unsuspecting clients by threatening to divulge their secrets. This may well be a legitimate objection; courts–and especially clients–would be well advised to carefully evaluate the sincerity of a lawyer's professed religious beliefs.

All of which leads directly to the question: if our hypothetically pious lawyer gives his client notice at the outset of representation of his religious inclinations, and the client gives his informed consent, is there still a compelling interest in not allowing that lawyer to reveal his client's confidences? We believe not; the interest in client autonomy and privacy is preserved by the notice requirement, and the other justifications for the strict rules regarding client confidences do not rise to the level of compelling interest.

The first major justification for confidentiality is that it encourages open communication between lawyers and clients, leading to better legal advice and representation.[79] Improved legal representation is, on its own merits, a good thing. Not only does it benefit the individual client, it also benefits society as a whole by facilitating

---

78. Fred Zacharias, *Rethinking Confidentiality II: Is Confidentiality Constitutional?*, 75 IOWA L. REV. 601, 648 (1990) (considering whether Model Rule 1.6 impinges on lawyers' free speech rights).

79. *See, e.g.*, George W. Overton, *Some Queries for the Quarrelsome*, CBA REC., Sept. 1993, at 35; McKinney, *supra* note 26, at 566. Some even claim that effective representation is impossible without it. *See* Joshua T. Friedman, Note, *The Sixth Amendment, Attorney-Client Relationship and Government Intrusions: Who Bears the Unbearable Burden of Proving Prejudice?*, 40 WASH. U. J. URB. & CONTEMP. L. 109, 121-22 (1991). But, this is far, far from settled. *See* Zacharias, *supra* note 27.

compliance with laws,[80] or at least it soothes our collective conscience when the guilty are convicted after a vigorous defense. Finally, superior legal representation theoretically increases the accuracy of trials.[81] These are all certainly fine arguments for confidentiality, assuming of course that confidentiality guarantees really do have the desired effects.[82] But, Model Rule 1.6(b)(2) calls our commitment to these justifications into question by permitting lawyers to violate confidences to the extent necessary to defend themselves against their client and to collect their fees. By creating an exception for litigation where the lawyer's nonreligious private interests are at stake, the government forfeits any right based on hopes for optimal legal representation to deny religious exceptions. As Professor Michael Paulsen writes,

> [A] Government policy goal cannot properly be considered "compelling" . . . where that goal is not pursued uniformly with respect to all, or very nearly all, analogous situations of nonreligious private conduct in which the goal is implicated. If the Government pursues a goal selectively or partially, that goal is not so unqualifiedly compelling as to override a . . . claim of religious exemption. If the goal is subordinated to other policy interests, it must be subordinated to the free exercise of religion as well.[83]

The other major justification for client confidentiality is that it vindicates two constitutional protections, the Fifth Amendment privilege against self-incrimination[84] and the Sixth Amendment right

---

80. Note, *Attorney-Client and Work Product Protection in a Utilitarian World: An Argument for Recomparison*, 108 HARV. L. REV. 1697, 1699 (1995) ("Optimal legal advice benefits not only the client, but also society, because sound advice conduces to 'compliance with the ever growing and increasingly complex body of public law.'") (citations omitted). *See also* Krach, *supra* note 27, at 446.

81. *See* Note, *supra* note 80, at 1699, Zacharias, *supra* note 27, at 358. *But see* MARCIA CLARK, WITHOUT A DOUBT (1997).

82. *See* Zacharias, *supra* note 27 (empirically studying effects of confidentiality rules).

83. Michael S. Paulsen, *A RFRA Runs Through It: Religious Freedom and the U.S. Code*, 56 MONT. L. REV. 249, 254 (1995). *Cf.* Church of Lukumi Babalu Aye v. City of Hialeah, 508 U.S. 520, 543 (1993) ("The ordinances are underinclusive for those ends. They fail to prohibit nonreligious conduct that endangers these interests in a similar or greater degree than [the protected conduct] does.").

84. U.S. CONST. amend. V ("No person shall be . . . compelled in any criminal case to be a witness against himself . . . .").

to counsel.[85] Although separate, the two arguments rely on each other for vitality. Regarding the Fifth Amendment claim, as one scholar explains, "The attorney-client privilege can be justified as necessary to give substance to the constitutional right against self-incrimination in criminal proceedings."[86] The basic idea is that a criminal defendant elects to have a lawyer to represent him, that the lawyer cannot represent him effectively without knowing all the facts, and that it is unfair if the lawyer turns around and reveals information incriminating to–yet told to him by–the defendant. This analysis of course rests on the core assumption that legal representation is somehow special. It is unfortunate, but not constitutionally impermissible, for a close personal friend of the defendant to record and reveal information told him in confidence. The Sixth Amendment protects this special role of lawyer, granting criminal defendants to the right to effective assistance of counsel. One commentator gives a particularly helpful summary of the problem:

> The United States Supreme Court has characterized the sixth amendment's guarantee of assistance of counsel in all criminal prosecutions as a right fundamental to liberty and justice. The underlying justification for the right to counsel is the presumed inability of a defendant to make informed choices about the preparation and conduct of her defense. Communication between the defendant and counsel must remain confidential for the right to counsel to have any meaning. If the government can obtain damaging information from counsel, defendants will not confide in their lawyers. The predictable result would be to undermine the quality of the legal representation guaranteed by the sixth amendment.[87]

Obviously, preserving constitutional rights serves important interests,

---

85. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defence.").

86. J. Kevin Quinn et al., *Resisting the Individualistic Flavor of Opposition to Model Rule 3.3*, 8 GEO. J. LEGAL ETHICS 901, 921 (1995).

87. Friedman, *supra* note 79, at 109-10.

but does it provide a compelling interest in denying religious lawyers an exception from Model Rule 1.6?

In a word, no. The Sixth Amendment guarantees a right to effective representation, not a right to a particular (religious) lawyer.[88] So long as every defendant has access to an attorney who *will* hold his secrets inviolate, there is no reason not to exempt certain other lawyers from this requirement.[89] As for the Fifth Amendment privilege against self-incrimination, it can be waived by defendants who choose to testify.[90] Similarly, it could be waived by defendants who choose to be represented by religious lawyers who disclose their practices. So long as the waiver is knowing and truly voluntary (i.e., criminal defendants know that they have the right to a "nonreligious" lawyer who will comply with Model Rule 1.6(a)-(b)), it should be respected. So, there is no compelling constitutional interest in disallowing a religious exemption to Model Rule 1.6.

Other justifications for strict rules protecting client confidences are even less compelling. First, some argue that the requirements set up effective default rules, so parties do not need to negotiate.[91] Default rules are indeed cheaper–when they reflect what the parties would bargain for. But the very fact that a religious lawyer notifies potential clients of his proclivities and asks for a signed waiver indicates that Model Rule 1.6 is not the default rule he desires. In any event, surely mere abstract notions of economic efficiency do not qualify as "paramount" "interests of the highest order." Some claim that lawyers themselves benefit from bright-line constraints on their discretion. "It is far simpler to apply a broad rule of confidentiality than face each decision on a factual basis."[92] Even if this were true,[93] relieving some lawyers of psychologically difficult tasks is not a compelling reason to inflict substantial burdens on other religious

---

88. *See* Subin, *supra* note 26, at 1130.

89. This analysis depends on the assumption that there will be other nonreligious lawyers around who will not seek a religious exemption. Therefore, it may not be appropriate to engage "religious" lawyers as public defenders and require indigent defendants to accept them as counsel.

90. *See e.g.*, Boykin v. Alabama, 395 U.S. 238 (1969) (concluding defendant can waive privilege against self-incrimination).

91. *See* Daly, *supra* note 72, at 1612 ("[P]rofessional rules enhance the lawyer-client relationship precisely because they restrain a lawyer's discretion. In their absence, clients would have to inventory a lawyer's value system before every engagement.").

92. Shelly S. Watson, *Keeping Secrets that Harm Others: Medical Standards Illuminate Lawyer's Dilemma*, 71 NEB. L. REV. 1123, 1130 (1992).

93. *Cf.* McKinney, *supra* note 26, at 576-80 (arguing that lawyers should have discretion).

lawyers. Furthermore, some justify Model Rule 1.6 on the grounds that it is easier for a lawyer to earn money if his client is not in prison.[94] This justification is facially uncompelling; suffice it to say that even those who identify this financial justification write, "This self-serving rationale is not a legitimate reason for continuing broad confidentiality rules."[95] Some proponents of the confidentiality rules point to their historical pedigree,[96] but history and tradition themselves cannot be compelling interests. Finally, some assert that confidentiality rules protect the sacred attorney-client relationship.[97] Even in the abstract, it is not clear that protecting that relationship in and of itself amounts to a compelling interest. However, when one–or perhaps both[98]–of the parties wants an exception, it seems particularly odd to force such a relationship. In any event, none of these justifications provides a compelling reason to deny the religious lawyer an exemption from Model Rule 1.6.

All of this leads to the conclusion that there is no compelling interest in substantially burdening the religious beliefs of the lawyer who adequately notifies his clients of his religious practices at the outset of representation. Therefore, under some states' constitutions, Model Rule 1.6 could be invalid as applied to such religious lawyers. These lawyers should not be disciplined for disclosing client confidence for religious reasons.

Two other matters deserve brief mention. One asks whether requiring the lawyer to give notice is itself a constitutional violation. Obviously, a lawyer who informs clients that their confidences are in jeopardy will lose some clients, and may even go out of business.[99] As unfortunate as this may be, the government is still justified in requiring the lawyer to fully disclose his practices. In many other circumstances, the government regulates consumer information, regardless of the impact on a business's financial viability. Admittedly, those regulations typically need not satisfy strict scrutiny. But even if the

---

94. *See* Watson, *supra* note 92, at 1130; Zacharias, *supra* note 27, at 359.

95. Watson, *supra* note 92, at 1130.

96. *See* McKinney, *supra* note 26, at 564-65.

97. *See e.g.*, Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060 (1976).

98. A client who shares the lawyer's religious beliefs may want the lawyer to be able to disclose confidences as the lawyer sees fit. *See supra* note 4.

99. *See* Cohen, *supra* note 14, at 82; Cohen, *supra* note 15, at 78.

notice requirement itself does burden an individual's sincerely held religious beliefs (unlikely as that may be), it qualifies as the least restrictive means to furthering the compelling government interest in protecting clients' reasonable expectations and informed decisions in the legal system.[100] The other point to keep in mind is that the government should not enjoy any greater privileges to *compel* testimony from religious lawyers. Clients who choose religious lawyers to represent them assume the risk that their lawyer's beliefs will lead to the disclosure of their confidences. They do not assume the risk that the government will exploit their lawyer's beliefs. There is absolutely no reason for the standard justifications for client confidentiality not to apply vis-a-vis the government simply because the lawyer has certain religious convictions.

The forgoing analysis indicates that with notice, religious obligations should be permitted to trump professional duties. More important, it strongly suggests that there is a serious problem when "ethical" rules mandate patently unethical results–such as the execution of an innocent man. In considering what sort of professional duties should be required, most agree that some sort of cost-benefit analysis is appropriate. As one scholar writes: "The . . . privilege therefore exists to enhance the client's ability to secure meaningful representation and helpful legal advice. In balancing the costs and benefits of using the privilege to achieve this goal, . . . advantages must be weighed against the full cost of the privilege."[101] The problem may be that current attempts to balance costs and benefits of confidentiality consider the effects on clients and society as a whole,[102] but fail to consider the (religious) costs to attorneys and to those who may want to become attorneys but are deterred from doing so by the fear that they would have to violate their religious convictions. The protections accorded to the free exercise of religion may help resolve this tension between professional and religious obligations.

---

100. *See* discussion in text accompanying notes 67-69.

101. *Attorney-Client Privilege*, 98 HARV. L. REV. 1501, 1507 (1985). *See also* Deborah S. Bartel, *Drawing Negative Inferences Upon a Claim of the Attorney-Client Privilege*, 60 BROOK. L. REV. 1355, 1365-66 (1995).

102. *Attorney-Client Privilege*, *supra* note 101, offers a good example.