

## ON THE ABSURDITY OF MODEL RULE 1.9

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*Most lawyers understand they cannot disclose a former client's confidences or secrets. But ABA Model Rule 1.9—the rule of confidentiality adopted in nearly every state—actually prohibits an attorney from discussing, writing about, or otherwise disclosing any “information relating to the representation” of the former client. This class of protected information is so broad that it even includes public information (such as the former client's published appellate court decision) that is easily accessible by anyone on the Internet.*

*Rule 1.9 is an absurdly broad rule that perpetually bans attorney speech for all purposes and with regard to all information, including information in the public domain. The rule has no rational, underlying policy, and is not even rooted in clients' actual expectations regarding confidentiality. Rule 1.9 is also unsound in practice, producing some very bizarre and harmful results—often for the very clients the rule was supposedly designed to protect.*

*Instead, Rule 1.9 should be interpreted to permit an attorney to discuss, write about, or otherwise disclose publicly-available information relating to a former client's case, provided the attorney does not contradict the former client's position in that case. This new approach is theoretically sound, easy to apply, and fully aligned with former clients' actual expectations that their attorney remain loyal, not silent, with regard to public information. This approach also serves other important interests, including the public's need for critical commentary about the legal system and the individual attorney's right to free speech.*

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#### INTRODUCTION: MEET MODEL RULE 1.9

I recently considered writing a law review article about the legal issues in a former client's criminal case. The article would have discussed only public information from pleadings, trial-court transcripts, and the published appellate court decision. In addition to being public in nature, all of this information was (and is) easily accessible by anyone, free of cost, via the Internet. The article itself would have criticized police, prosecutors, judges, and the criminal justice system, and would have continued to advocate for the client's innocence.

Before the project even got off the ground, however, I vaguely recalled an ethical rule restricting an attorney's ability to discuss his or her cases—even after those cases ended. I talked about this issue with fellow members of the bar, but no one had heard of such a rule. The consensus was that, obviously, an attorney can discuss events that happened in open court, are part of a published court decision, or are otherwise part of the public record. And as long as the attorney does not disclose confidential client communications or other non-public information, a lawyer's First Amendment right of free speech would certainly trump any obscure rule that could possibly be buried in the voluminous ethics code.

Upon further investigation, however, I discovered my state's version of ABA Model Rule 1.9, dealing with an attorney's duty of confidentiality to former clients.<sup>1</sup> The *first* prong of the rule prohibits an attorney from *using*

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1. The ABA's Model Rules are non-binding unless adopted by a particular state. Forty-nine states have adopted the Model Rules, but often with some modification. Jan L. Jacobowitz & Kelly Rains Jesson, *Fidelity Diluted: Client Confidentiality Gives Way to the First Amendment & Social Media in*

“information relating to the representation” of the former client.<sup>2</sup> However, there are exceptions: an attorney may use information when such use would not be “to the disadvantage of the former client”; and an attorney may use information that is already “generally known.”<sup>3</sup> The *second* prong of the rule prohibits an attorney from *revealing* “information relating to the representation” of the former client; there are no exceptions listed under this prong.<sup>4</sup>

At first glance, this rule did not seem overly restrictive, and my colleagues’ unanimous conclusion appeared to be correct. For the sake of argument I assumed that the public documents I wanted to write about would constitute information relating to the representation. However, I certainly would not have to worry about part one of the rule that prohibits the *use* of that information, as my article would in no way work to the client’s disadvantage. Further, even if it somehow did (in a way that I simply could not imagine), I would only be discussing information that was already generally known, so I would easily satisfy that exception instead.

Neither would I have to worry about part two of the rule that prohibits the *revelation* of information. Using publicly available information to write a law review article is just that: using, rather than revealing, the information. In fact, it would be impossible to reveal what is already part of the public domain—especially in today’s electronic age where virtually anything can be accessed via the Internet. Additionally, I would not be revealing confidential client communications or other information that should be kept secret.<sup>5</sup> And in this case, as in most criminal cases, that type of secret information didn’t even exist.

But if a dozen years of practicing criminal law has taught me anything, it is that rules often don’t mean what they clearly say. And in this case, as Part II of this Article demonstrates, Rule 1.9 does not mean anything remotely close to what it says.

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Virginia State Bar, *ex rel.* Third District Committee v. Horace Frazier Hunter, 36 CAMPBELL L. REV. 75, 84 (2013).

2. MODEL RULES OF PROF’L CONDUCT r. 1.9(c)(1) (AM. BAR ASS’N 2011).

3. *Id.*

4. *Id.* r. 1.9(c)(2).

5. Rule 1.9 is an *ethics* rule that applies at all times. The rule of attorney-client privilege is an *evidentiary* rule that applies at trial and other court proceedings. Further, the ethics rule, “*unlike the evidentiary privilege, exists without regard to the nature or source of information or the fact that others share the knowledge.*” *In re Gonzalez*, 773 A.2d 1026, 1031 (D.C. 2001). The two rules are, however, related: client communications that fall within the attorney-client privilege would most certainly fall within the scope of Rule 1.9.

To begin, courts interpret Rule 1.9 so broadly that every conceivable piece of information—including information that was not provided *by* the client and is not even *about* the client—constitutes information relating to the representation, is therefore protected, and cannot be used or revealed.<sup>6</sup> Further, when a lawyer seeks to invoke one of the rule’s exceptions, courts routinely hold that the exceptions are not available for the lawyer’s contemplated use.<sup>7</sup> And even when the exceptions are technically available, they are of little value. For example, not even widespread public information that is easily accessible via the Internet is considered to be “generally known,”<sup>8</sup> and every imaginable use of the information is deemed to “disadvantage” the former client in some intangible way and is therefore prohibited.<sup>9</sup>

But Rule 1.9 goes much further than preventing the would-be attorney-author from writing a law review article.<sup>10</sup> In fact, all attorneys are affected by this incredibly broad rule on a near-daily basis. For example, the rule also prevents an attorney from presenting material at a continuing legal education seminar, engaging in “shoptalk” with colleagues, and even telling their family or friends what types of cases they have litigated.<sup>11</sup> Worse yet, Rule 1.9 is so far-reaching and irrational that an attorney who attempts to comply with it would, in some cases, necessarily violate other, conflicting ethics rules.<sup>12</sup>

The ethics rule of confidentiality wasn’t always this suffocating. Part II of this Article explains that, before Rule 1.9, the predecessor ethics rule sought to promote full communication between lawyer and client, and therefore protected a client’s “confidences and secrets” from disclosure.<sup>13</sup> But then, without justification, Rule 1.9 expanded the scope of this protected

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6. See *infra* Part I.A.

7. See *infra* Part I.B.

8. See *infra* Part I.C.

9. See *infra* Part I.D.

10. See David F. Chavkin, *Why Doesn’t Anyone Care About Confidentiality? (And, What Message Does That Send to New Lawyers?)*, 25 GEO. J. LEGAL ETHICS 239, 241 (2012) (discussing the ways “in which the obligation of confidentiality is violated” including, for example, writing “law review articles”).

11. See *id.* (discussing the rule’s prohibition on using information even for purposes of teaching “continuing education attendees,” discussing “war stories,” or engaging in “shoptalk” with colleagues, or simply discussing basic information about cases with family or friends).

12. See, e.g., *In re Sellers*, 669 So. 2d 1204, 1206 (La. 1996) (per curiam) (holding that compliance with the rule of confidentiality violated competing ethics Rule 4.1(b) that requires the disclosure of certain information to third parties); see also *infra* Part I.E.2.

13. MODEL CODE OF PROF’L RESPONSIBILITY DR 4-101 (AM. BAR ASS’N 1980).

information from “matters communicated in confidence by the client . . . to *all information* relating to the representation, *whatever its source*.”<sup>14</sup>

Rule 1.9’s incredibly far reach serves no legitimate purpose and, worse yet, is often harmful—sometimes even to the clients the rule is supposed to protect.<sup>15</sup> In light of this, Part III recommends reform of Rule 1.9 that is rooted in clients’ actual and reasonable expectations regarding confidentiality. In reality, a former client simply would not expect—and probably could never even imagine—that his or her attorney would be subjected to a perpetual gag-order with regard to *public information* (such as, for example, the client’s published appellate court case). Instead, what a former client would expect is that the attorney will keep the client’s *confidences* and *secrets*, and, when using or discussing publicly available information about the case, that the attorney remain loyal to the client’s interests.<sup>16</sup>

Given clients’ actual and reasonable expectations, Rule 1.9 should be reformed—or, rather, merely reinterpreted—to permit an attorney to use or disclose already-public information about a former client’s case, provided that such use or disclosure is consistent with, or at least neutral with regard to, the former client’s position in that case. This would permit, among other things, an attorney’s use of pleadings, transcripts, and appellate court decisions to write a law review article about the legal aspects of a former client’s case.<sup>17</sup>

This reinterpretation of Rule 1.9 also has the benefit of bringing order and structure to what is currently a chaotic, indecipherable, and unpredictable legal landscape. Equally important, Part IV demonstrates that this reinterpretation also satisfies other significant, but often overlooked interests. More specifically, allowing an attorney to discuss and write about public information from a former client’s case will enable effective continuing legal education for the profession,<sup>18</sup> will serve the public’s interest in critical commentary about our legal system and public officials,<sup>19</sup> and will restore the attorney’s First Amendment right of free political speech.<sup>20</sup>

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14. See MODEL RULES OF PROF’L CONDUCT r. 1.6 cmt. 3 (AM. BAR ASS’N 2011) (emphasis added) (discussing the scope of information protected under Rule 1.6, which relates to *current* clients but contains language identical to Rule 1.9).

15. See *infra* Parts I.E.1, I.E.3., and III.A.

16. See *infra* Part III.A.

17. See *infra* Part III.B.

18. See *infra* Part IV.A.

19. See *infra* Part IV.B.

20. See *infra* Part IV.C.

## I. THE DEVIL IN THE DETAILS

Model Rule 1.9 reads, in relevant part, as follows:

A lawyer who has formerly represented a client in a matter . . . shall not thereafter: (1) *use* information relating to the representation to the *disadvantage* of the former client except . . . when the information has become *generally known*; or (2) *reveal* information relating to the representation . . . .<sup>21</sup>

When attempting to decipher this rule, the order of the analysis is important. The first question is what, exactly, constitutes information relating to the representation? Then, if the information falls within this protected category, the attorney must decide whether the contemplated course of conduct—for example, writing a law review article—would use, or instead reveal, that protected information. This use-reveal distinction is potentially important. The use-prong of the rule—that is, the prong that prohibits an attorney’s use of the information—contains two exceptions. Conversely, the reveal-prong of the rule offers the attorney no exceptions; instead, it appears to be absolute.

Once the attorney understands whether the information relates to the representation, and whether it would be used or revealed, the attorney can then explore the rule’s two explicit exceptions. Is the information already generally known? If it is, then the attorney may use (but not reveal) it. And if the information is not generally known, would the contemplated use be to the disadvantage of the former client? If it would not be, then, once again, the attorney may use (but not reveal) it.

Finally, if these two explicit exceptions are not applicable to the contemplated use of the information, or if the attorney wishes to reveal (rather than use) the information, the attorney can then consider whether some of Rule 1.9’s other, implied exceptions can be used.

In answering these questions, it will often be helpful to look to Rule 1.6, its comments, its annotations, and the cases and other legal authorities that interpret it. Rule 1.6 is, in relevant part, identical to Rule 1.9, except that Rule 1.6 pertains to *current* clients rather than *former* clients.<sup>22</sup> In fact, court decisions often confuse Rules 1.6 and 1.9, or at least consider them to be

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21. MODEL RULES OF PROF’L CONDUCT r. 1.9(c)(1)–(2) (AM. BAR ASS’N 2011) (emphasis added).

22. See *id.* r. 1.6(a) (“A lawyer shall not reveal information relating to the representation of a client . . .”).

interchangeable, and the comments and annotations of each rule even cite the other.<sup>23</sup>

### A. Information Relating to the Representation

Rule 1.9 creates a class of protected information by prohibiting lawyers from using or revealing any information relating to the representation of their former clients.<sup>24</sup> When lawyers are asked what constitutes this class of protected information, most believe that it includes two things: first, privileged communications from the client; and second, other non-public information that, if revealed, would be harmful to the client.<sup>25</sup> However, in a scathing indictment of our system of legal education,<sup>26</sup> and of Rule 1.9 itself,<sup>27</sup> most lawyers would be wrong.

Contrary to what most lawyers intuitively and reasonably believe, information relating to the representation includes far more than confidential communications and other secret information learned during the course of the case. Instead, *all* information is considered protected, and an attorney is prohibited from using or revealing it, even when it does not come *from* the

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23. See, e.g., *Pallon v. Roggio*, No. 04-3625 (JAP), 06-1068 (FLW), 2006 U.S. Dist. LEXIS 59881, at \*22–23 (D. N.J. Aug. 23, 2006) (stating that Rule 1.9(c) is “an extension of” the duty of confidentiality in Rule 1.6).

24. MODEL RULES OF PROF’L CONDUCT r. 1.9(c) (AM. BAR ASS’N 2011) (“A lawyer who has formerly represented a client in a matter . . . shall not thereafter: (1) use information relating to the representation . . . ; or (2) reveal information relating to the representation . . .”).

25. See Edward W. Feldman, *Be Careful What You Reveal: Model Rule of Professional Conduct 1.6*, 38 LITIG., Summer/Fall 2012, at 33, 35 (“Most lawyers . . . know that they are not supposed to reveal privileged communications. They also understand, but in a vaguer way, that a client may have confidences or secrets that are not privileged but that a lawyer should not reveal.”).

26. See Carol Rice Andrews, *Highway 101: Lessons in Legal Ethics That We Can Learn on the Road*, 15 GEO. J. LEGAL ETHICS 95, 105 (2001) (“Lawyers . . . are ignorant of at least some of their professional obligations. . . . [T]he lawyer may never have learned the rule. . . . Law school courses in professional responsibility rarely cover every rule.”). I, for example, first learned of Rule 1.9 well into my legal career. Unfortunately, my law school ethics professor completely ignored the actual ethics rules by which we students would soon be governed, and instead focused on cases like *Annesley v. Anglesea*, an eighteenth century dispute litigated in William the Conqueror’s Court of Exchequer. See, e.g., 4 JOHN HENRY WIGMORE, A TREATISE ON THE SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW 3196, 3217 (1905) (quoting *Annesley v. Anglesea*, 17 How. St. Tr. 1225 (1743)). This so-called theoretical approach to legal education is no more theoretical, but far less useful, than learning an actual body of law.

27. See Andrews, *supra* note 26, at 108 (noting that Rule 1.9 “is unrealistic from the start, although the drafters may not have appreciated that fact when they wrote the rule”).

client,<sup>28</sup> and even when it is not *about* the client.<sup>29</sup> Rather, protected information can come from any source, including *public* sources,<sup>30</sup> and even includes public statements made in open court, facts asserted in publicly filed pleadings, and information contained in non-confidential discovery disclosures.<sup>31</sup>

More surprisingly, this class of protected information includes not only information that is public in nature but would take some effort to acquire (for example, by driving to the local courthouse), but also information that is widely and freely available on the Internet.<sup>32</sup> And the timing of the attorney's receipt of the information is also irrelevant. Facts acquired *before* the attorney's representation began, or even *after* it ended, are also considered protected and the attorney may not use or reveal them, provided the information somehow relates to the later, or earlier, representation.<sup>33</sup>

If a lawyer thinks that he or she has found information somehow *not* relating to the representation, and thereby falling outside of the rule's scope, the lawyer is probably wrong. Even information not related to the representation is protected, provided it could lead to the discovery of other information that *is* protected.<sup>34</sup> And finally, Rule 1.9 is so broad that it even prohibits an attorney from disclosing the most basic and publicly available

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28. See MODEL RULES OF PROF'L CONDUCT r. 1.6 cmt. 3 (AM. BAR ASS'N 2011) (emphasis added) (stating that the rule protects "not only . . . matters communicated in confidence by the client but also to *all* information relating to the representation, *whatever its source*").

29. See Feldman, *supra* note 25, at 35 (explaining that the rule protects all information, "regardless of whether the information is even specifically about the client at all").

30. See Foster Cobbs Arnold, *The "Public Record/Third Party Rule" of the Duty of Confidentiality: Situations in Which the Rule Arises and Attitudes Toward Its Application*, 23 J. LEGAL PROF. 399, 403 (1999) ("Courts . . . have consistently held that the duty of confidentiality is not nullified by the fact that information is part of the public record or by the fact that a third party is privy to it.").

31. See, e.g., *Pallon v. Roggio*, No. 04-3625 (JAP), 06-1068 (FLW), 2006 U.S. Dist. LEXIS 59881, at \*24 (D. N.J. Aug. 23, 2006) (noting that "[t]he content of form pleadings, interrogatories and other discovery materials" falls within the class of protected information).

32. See, e.g., *id.* (holding that even information that is "widely available to the public through the internet or another source" is not exempt from the class of protected information); Scott B. Garner, *Secrets in a Google World: Understanding the Differences Between the Attorney-Client Privilege and the Duty of Confidentiality*, 30 THE COMPUTER & INTERNET LAWYER, Oct. 2013, 1, 1 ("[A lawyer] may wrongly assume that once a fact loses its secretive status—for example, by appearing on the Internet—the lawyer no longer must protect the fact against disclosure.").

33. See RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 59 cmt. c (AM. LAW INST. 2000) ("Information acquired during the representation or before or after the representation is confidential so long as it . . . relates to the representation.").

34. See MODEL RULES OF PROF'L CONDUCT r. 1.6 annot. (AM. BAR ASS'N 2011) (stating that protected information includes "information that is not itself protected but may lead to the discovery of protected information by a third party").



piece of information of all: the fact that an attorney represented a particular client.<sup>35</sup>

This first step of the analysis, therefore, is usually a mere formality, as virtually every imaginable piece of information falls within Rule 1.9's protected class of information. The only information that falls outside of the protected class is not even *really* outside of it; rather, we just pretend that it is "to avoid complete absurdity."<sup>36</sup> For example, if a lawyer learned during the course of representing a client in litigation "that water boils at 100 degrees Celsius, it would not violate the rule to utter that fact in other contexts. . . . The fact that we are even considering such absurdities, however, illustrates the extraordinary breadth of the rule."<sup>37</sup>

### B. To Use or Reveal?

With virtually every piece of information falling within Rule 1.9's gravitational pull, the next step is to determine which part of Rule 1.9 will apply to the attorney's contemplated course of action (such as, for example, writing a law review article).

Rule 1.9 has two parts: one that prohibits the use of information; and a second that prohibits the revelation of information.<sup>38</sup> In some cases, the distinction between using and revealing is clear. For example, if I learn of a corporate client's agreement to buy another company's stock at a fixed price, and then quietly purchase a few shares of stock in that target company, I would be using (but not revealing) information relating to the representation. On the other hand, if someone asked me for a corporate client's address and I provide it to them, I would be revealing (but not using, in any meaningful sense of the word) information relating to the representation.<sup>39</sup>

In the first example, it appears that using secret information to purchase stock would not violate Rule 1.9 (although it probably violates securities laws). In the second example, however, revealing the corporate client's address—even when such public information is easily accessible by

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35. See *id.* ("Model Rule 1.6 prohibits the disclosure of a client's identity unless the client consents or the disclosure is impliedly authorized," for example, when filing court pleadings on behalf of the client).

36. Feldman, *supra* note 25, at 36.

37. *Id.*

38. See MODEL RULES OF PROF'L CONDUCT r. 1.9(c) (AM. BAR ASS'N 2011) ("A lawyer who has formerly represented a client in a matter . . . shall not thereafter: (1) use . . . ; or (2) reveal information relating to the representation . . .").

39. See RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 60 cmt. c(i) (AM. LAW INST. 2000) (discussing the distinction between use and "disclosure" which is similar to, or even synonymous with, revelation).

anyone—clearly violates the rule.<sup>40</sup> Although these two examples produce irrational results (which, in itself, is a red flag for an ethics rule), at least the way in which the underlying factual scenarios fit within the use and reveal prongs of the rule is clear. Other scenarios, however, do not fit so neatly into the artificial use-reveal dichotomy.

For example, when lawyers engage in so-called “shoptalk” about their cases, they are probably committing an ethical violation by revealing protected information.<sup>41</sup> But what if the purpose of revealing information to another lawyer is to get advice on a complicated legal issue? Does that transform the revelation of information into the use of information for the purpose of getting legal advice? Or is it both revelation and use? Most scenarios—including discussing a case to get legal advice, formally presenting at a continuing legal education seminar, or writing a law review article—seem to necessarily require the disclosure of some information; yet, more significantly, such scenarios seem to constitute the *use* of that information for a larger purpose.<sup>42</sup> So in these cases, must the attorney satisfy Rule 1.9’s use-prong, its reveal-prong, or both? And does it even matter?

The answer to the second question is yes, it appears that the distinction between use and revelation does matter. On the most basic level, these are two different parts of the rule, so we should at least begin with the assumption that the drafters were thinking clearly and were contemplating two distinct things. Additionally, the use-prong of the rule has two exceptions: one permitting use that is not to the client’s disadvantage; and one permitting use if the information is generally known. Conversely, the reveal-prong of the rule has no exceptions<sup>43</sup>—at least none that are explicitly stated.

But if information is generally known, wouldn’t an attorney be permitted not only to use it, but also to reveal it? Stated differently, how can an attorney

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40. Although the circumstances were aggravated, for a case where the lawyer was disciplined for disclosing a client’s address see, for example, *In re Goebel*, 703 N.E.2d 1045, 1048–49 (Ind. 1998) (per curiam). But even disclosing publicly available addresses can violate the rule. See Arnold, *supra* note 30, at 406 (“While addresses are readily available through directories and various other means, ethical committees have held that an attorney may not release the address of a client.”).

41. Even masking client identities or changing some facts of a case would likely still violate the rule. See Andrews, *supra* note 26, at 109 (noting that even if a lawyer “were to cloak her description through use of anonymous names or omission of details” the lawyer would still be violating the rule “because such discussions necessarily reveal some information relating to the representation”).

42. See, e.g., *Sealed Party v. Sealed Party*, No. H-04-2229, 2006 U.S. Dist. LEXIS 28392, at \*46–49 & n.36 (S.D. Tex. May 4, 2006) (rejecting the attorney’s argument that his issuance of a press release constituted the “use” of information, and instead defining “use” as “to put into service; employ”).

43. See *id.* at \*65 (holding that the Texas ethics rules and “the weight of authority limit the generally known exception to the ‘use’ of client confidences” and was “therefore irrelevant to the Client’s claim that the Attorney ‘revealed’ confidential information”).

possibly reveal information that is already generally known? The dictionary even defines reveal as “to make (something secret or hidden) publicly or *generally known*.”<sup>44</sup> So if information is already generally known, then by definition, it simply would not be possible to reveal it. Therefore, an attorney should be free to write about it, to discuss it, or even to idly gossip about it—all without violating the reveal-prong of the rule.

This seemingly inescapable conclusion, however, is probably wrong.<sup>45</sup> The more likely (though irrational) answer is that the word “reveal” takes on a meaning not provided by the rule, the dictionary, or even logic or reason. For example, the annotation to Rule 1.9(c) simply ignores the plain language of the rule and replaces the word “reveal” with “disclosure,” and then specifically states that disclosing even “generally known” information violates the rule.<sup>46</sup>

Similarly, some secondary sources have replaced the word “reveal” with “volunteering,”<sup>47</sup> which can be defined as “to say, tell, or communicate voluntarily.”<sup>48</sup> And court decisions can be just as irrational as the rule’s comment and the secondary sources. Even when an attorney uses information but clearly does not reveal it to anyone, courts have simply ignored the distinction and analyzed the attorney’s conduct under the more restrictive reveal-prong of the rule.<sup>49</sup> (Attorneys, however, are not afforded the reverse luxury of applying the use-prong whenever it suits their needs.)

Unfortunately, then, this use-versus-revelation issue cannot be resolved favorably with any level of certainty. Instead, what we know so far is this: first, nearly every imaginable piece of information will be considered to relate to the representation of a client, and is therefore protected under the rule; and second, most courses of action contemplated by the attorney (again, for example, writing a law review article) could be deemed to reveal, rather

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44. WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY 1009 (9th ed. 1990) (emphasis added) [hereinafter “WEBSTER’S”].

45. See Feldman, *supra* note 25, at 35 (“You might think that the word ‘reveal’ fences in the rule, but the fence, if it exists at all, is rickety.”).

46. See MODEL RULES OF PROF’L CONDUCT r. 1.9 annot. (AM. BAR ASS’N 2011) (“Rule 1.9(c)(2) prohibits any *disclosure* (as opposed to use) of former-client information . . . regardless of whether the information has become generally known.”).

47. See GEOFFREY C. HAZARD, JR. ET AL., THE LAW OF LAWYERING § 10.02 (4th ed. 2015) (“Rule 1.6 applies most insistently to prevent lawyers from *volunteering* information about a client (to anyone).”).

48. *Volunteer*, DICTIONARY.COM, <http://dictionary.reference.com/browse/volunteer?s=t> (last visited Oct. 28, 2015).

49. See, e.g., *In re Anonymous*, 654 N.E.2d 1128, 1129–30 (Ind. 1995) (per curiam) (providing example of a case where the lawyer used, but probably did not reveal information, yet was disciplined for both using and revealing it).

than merely use, the information, thus invoking the more restrictive reveal-prong of the rule.

But despite this ambiguity, the attorney must still explore the two exceptions to the use-prong of the rule; in some jurisdictions, these exceptions have (arguably) been expanded to apply to the reveal-prong as well.<sup>50</sup> To begin with, when is information considered to be generally known?

### C. Generally Known in the Information Age

In today's electronic age, "true secrets are becoming increasingly rare, and most people can learn just about anything with a few strokes on their keyboard."<sup>51</sup> Despite this, most courts have refused to include within the definition of "generally known" information that is publicly available<sup>52</sup> or even "*widely available* to the public through the internet . . . ."<sup>53</sup> In rejecting such a realistic and workable formulation, courts often define generally known information in vague terminology, such as information "within the basic understanding and knowledge of the public."<sup>54</sup>

This attempt at a definition raises several questions for the attorney who wishes to use information relating to the representation of a client. Consider this common example: an attorney appeals a criminal defendant's state-court conviction and wins. After reversing the conviction, the state appellate court publishes its decision. Then, the attorney wants to "use"<sup>55</sup> the trial and

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50. *State v. Mancilla*, No. A06-581, 2007 Minn. App. LEXIS 717, at \*6 (Minn. Ct. App. July 17, 2007).

51. *Garner*, *supra* note 32, at 3.

52. *See Sealed Party v. Sealed Party*, No. H-04-2229, 2006 U.S. Dist. LEXIS 28392, at \*65 n.51 (S.D. Tex. May 4, 2006) (conceding that there is "some support for both parties' positions" regarding whether "generally known" includes information in the public record).

53. *Pallon v. Roggio*, No. 04-3625 (JAP), 06-1068 (FLW), 2006 U.S. Dist. LEXIS 59881, at \*24 (D. N.J. Aug. 23, 2006) (emphasis added). Other courts have also held that generally known information does not include publicly available information. *See, e.g., La. Crisis Assistance Ctr. v. Marzano-Lesnevich*, 827 F. Supp. 2d 668, 686 (E.D. La. 2011) ("[M]any courts have concluded that an attorney breaches his ethical duties by disclosing even information which is a matter of public record."); *see also Iowa Supreme Court Attorney Disciplinary Bd. v. Marzen*, 779 N.W.2d 757, 766 (Iowa 2010) (holding that the disclosure of publicly available information constitutes a breach of confidentiality); *In re Harman*, 628 N.W.2d 351, 361 (Wis. 2001) (disclosure of information previously filed in a court case constitutes a breach of confidentiality); *In re Anonymous*, 654 N.E.2d at 1129 (disciplining a lawyer for using information that was "readily available from public sources and not confidential in nature").

54. *Pallon*, 2006 U.S. Dist. LEXIS 59881, at \*24.

55. Whether presenting at a conference constitutes the use or revelation of information is probably unclear in most jurisdictions. *See supra* Part I.B.

appellate court proceedings—which clearly would be information relating to the representation—to lecture at a continuing legal education seminar.

In this example, there is no possible way that the information would be within the basic understanding and knowledge of the public, even if we could define the public as the narrower subset of literate adults. Nor would the information be within the basic understanding and knowledge of the even narrower subset of all lawyers, or even the very narrow subset of all criminal defense lawyers. But shouldn't the public, for purposes of this analysis, be narrowed to the relevant target audience of the attorney's use or disclosure?<sup>56</sup> And in this case, wouldn't that be criminal defense lawyers practicing in the attorney's state?

But even assuming we were permitted to narrow the definition of the public to attorneys based on practice area and geographic region, how would we determine what is within their basic understanding? Must the knowledge be universal within that group? And if not, what percentage of the group would have to be aware of the published case before it is considered to be within their basic understanding? And how could the would-be attorney-presenter possibly go about determining all of this? These questions demonstrate that both in theory and practice, it is impossible for an attorney to satisfy the exception, and the rule therefore amounts to an absolute ban on speech.

Some states deal with this and similar situations by simply dodging the issue,<sup>57</sup> but others have taken this seriously and faced the problem head on. Alaska's lawyer disciplinary authority, for example, addressed this issue of continuing legal education and made an exception to the rule of confidentiality, concluding that the legal profession must "educate new lawyers [and] circulate information about important developments in the law . . . . Literal application of [these rules] would ban these valuable routes of intra-professional communication."<sup>58</sup>

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56. See RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 59 cmt. d (AM. LAW INST. 2000) (contemplating that whether something is "generally known" is determined by looking at "the relevant sector of the public").

57. See, e.g., *Marzano-Lesnevich*, 827 F. Supp. 2d at 686 ("[I]t is unnecessary to determine whether the disclosure of publicly available [sic] information would constitute a breach of . . . confidentiality . . . ."); *Sealed Party*, 2006 U.S. Dist. LEXIS 28392 at \*65 n.51 ("Thus, the Court does not decide whether the information in the public record was 'generally known.'").

58. See Arnold, *supra* note 30, at 409–10 (quoting Alaska Bar Ass'n Ethics Comm., Op. 95; discussing Alaska's exception to Rules 1.6 and 1.9 for the purpose of providing continuing legal education); see also RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 60 cmt. h (AM. LAW INST. 2000) ("When no material risk to a client is entailed, a lawyer may disclose information . . . for purposes of providing professional assistance to other lawyers, whether informally . . . or more formally, as in continuing-legal-education lectures.").

But the fact that a disciplinary authority had to make a special and explicit exception for attorneys to present material at continuing legal education seminars demonstrates two things: first, in states where no such explicit exception exists, attorneys could very well be disciplined for such behavior; and second, Rule 1.9 has spun out of control and is now far too counterproductive to justify its continued use. In fact, other authorities have gone even further than Alaska, and some have even run in the opposite direction of Rule 1.9's mandates.

For example, one secondary source, the Restatement of Law Governing Lawyers, defines generally known by the real and measurable standard of *what is knowable* by an interested person, rather than the impossible-to-measure standard of *what is known* by the public. "Information contained in books or records in public libraries, public-record depositories such as government offices, or in publicly accessible electronic-data storage is generally known if the particular information is obtainable through publicly available indexes and similar methods of access."<sup>59</sup> Conversely, "[i]nformation is not generally known when a person interested in knowing the information could obtain it only by means of special knowledge or substantial difficulty or expense."<sup>60</sup>

Some states have defined generally known similarly, and have gone even further by extending this exception to Rule 1.9's reveal-prong as well as its use-prong. That is, if information is publicly available, it is considered generally known, and an attorney may use it *or* reveal it (or, stated differently, it would be impossible to reveal it because it is already generally known). For example, a Minnesota court held that a defense lawyer may disclose a former client's convictions to a jury to impeach that former client when testifying against a current client. The reason, the court held, is that the former client's convictions "were matters of public record and, therefore, fall within the generally-known-information exception to rule 1.9(c)."<sup>61</sup>

Arguably, this Minnesota court analyzed the disclosure of the former client's convictions as *using* information to impeach the former client, rather than *revealing* information to the jury. (This is the type of absurd linguistic dance that plagues Rule 1.9.) However, if that is true, then virtually every disclosure—other than pure idle gossip—would be analyzed under the use-prong, and the attorney could invoke the generally-known exception, which in Minnesota is essentially a public-records exception. And some other courts

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59. RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 59 cmt. d (AM. LAW INST. 2000).

60. *Id.*

61. State v. Mancilla, No. A06-581, 2007 Minn. App. LEXIS 717, at \*6 (Minn. Ct. App. July 17, 2007).

have agreed, holding, for example, that “disclosure” of a document “filed in the public record” does not violate Rule 1.9,<sup>62</sup> and “disclosure” of a fact that is “a matter of public record” similarly does not violate the rule.<sup>63</sup>

But favorable secondary sources such as the Restatement are not binding, and the states with pro-lawyer decisions are in the minority. Further, some of these cases, such as the Minnesota case, are unpublished and may have limited value; others, even when published, could arguably be limited to identical or near-identical factual scenarios as those found in the cases. Therefore, in most situations, what constitutes generally known information and whether that exception applies is, much like the use-versus-revelation issue, unclear at best. But another explicit exception, at least for the use if not the revelation of information, remains: the disadvantaged-client test.

#### *D. The Disadvantaged Client?*

Rule 1.9 states that an attorney may use (but not reveal) information, provided such use does not disadvantage the former client. Returning to my contemplated law review article about my former client’s criminal case, it is difficult to imagine how the use of the public information—assuming, of course, that writing an article constitutes *using* rather than *revealing* information—could possibly work to the client’s disadvantage. However, many authorities have defined the word disadvantage incredibly broadly, which in turn severely limits the applicability of this exception.

For example, in the context of a criminal case, even when an attorney wins an acquittal for the client, the attorney’s post-trial discussion of that case—even when done in a pro-client light—is often considered to work to the client’s disadvantage. The reasoning by these authorities, though unsound, is that even though the client (not the attorney) allegedly committed the underlying conduct leading to the criminal charge, and even though the government (again, not the attorney) wrongfully charged the client, the attorney’s discussion of the case that he or she just won could embarrass the client, thus causing the disadvantage.<sup>64</sup>

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62. *In re Sellers*, 669 So. 2d 1204, 1206 (La. 1996) (per curiam).

63. *In re Lim*, 210 S.W.3d 199, 201–02 (Mo. 2007) (en banc).

64. *See, e.g., Harris v. Baltimore Sun Co.*, 625 A.2d 941, 947 n.3 (Md. Ct. App. 1993) (quoting RESTATEMENT OF THE LAW GOVERNING LAWYERS § 111 (AM. LAW INST., Tentative Draft No. 3, 1990) (“[A]dverse effects include . . . personal embarrassment . . . .”); *Hunter v. Virginia State Bar*, 744 S.E.2d 611, 614, 619 (Va. 2013) (describing state bar finding that attorney’s blog post about client’s trial win “would be embarrassing”; this discipline was reversed due to state bar’s unconstitutional application of Virginia’s ethics rule).

Some courts, however, have behaved more rationally and have expanded the scope of this exception. First, some courts have held that an attorney's discussion of public information could disadvantage a client during a *pending* case; however, discussing public information about a *concluded* case, even if potentially embarrassing for the client, does not constitute an ethics violation.<sup>65</sup> And second, even though Rule 1.9 specifically states that this exception applies only to the use (and not revelation) of information, some courts have seen the absurdity of this approach and seem to have expanded the exception to an attorney's revelation of information as well.<sup>66</sup>

Once again, however, these pro-attorney interpretations are not the norm and, even in the relevant jurisdictions, could still be distinguishable based on the particular facts of a case. But although Rule 1.9's two explicit exceptions are not promising, there are arguably other, implied exceptions to the rule.

### *E. Other Exceptions and Safe Havens*

Complying with the rule of confidentiality would be so impractical (if not impossible) that many attorneys—assuming they are even aware of the rule in the first place—simply choose to ignore it.<sup>67</sup> And probably every attorney who is aware of the rule would, if promised anonymity, admit to having violated it often. But are these attorneys really violating the rule? Or are they just relying on other, implied exceptions to the rule—commonsense exceptions that simply *must* be there?

#### 1. Advocating for Clients

Once again, Rule 1.6, relating to *current* clients, is identical to Rule 1.9's prohibition on the revelation of information, and is often useful for our analysis.<sup>68</sup> In the context of current clients then, consider an example of a

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65. See *Hunter*, 744 S.E.2d at 619 (“It is settled that attorney speech about public information from cases is protected by the First Amendment, but it may be regulated if it poses a substantial likelihood of materially prejudicing a *pending* case.”).

66. See, e.g., *Harris*, 625 A.2d at 947 (permitting the revelation of information unless there is “the potential for some harm to the client’s interest”); Arnold, *supra* note 30, at 409 (discussing Alaska’s approach of permitting use and disclosure of public information upon conducting “a harm-based analysis”).

67. See *Andrews*, *supra* note 26, at 108–09 (“Model Rule 1.6 . . . remains an overly broad dictate that does not reflect the realities of law practice. . . . [M]any lawyers do not appreciate that the rule is this broad . . . but even lawyers who fully appreciate the breadth of their duty nevertheless often choose to violate the rule.”); Feldman, *supra* note 25, at 39 (“So tight a muzzle comes at a cost. A reasonable amount of ‘shop talk’ should be permitted . . . . Individual lawyers will need to make their own decisions about how much information they feel comfortable ‘revealing’ about their cases.”).

68. MODEL RULES OF PROF’L CONDUCT r. 1.6(a) (AM. BAR ASS’N 2011) (“A lawyer shall not reveal information relating to the representation of a client . . .”).



criminal defense lawyer whose client accepts a plea offer and then proceeds to sentencing.

At the sentencing hearing, the judge wishes to consider the client's criminal history, which is, of course, a matter of public record. Today, the judge could quickly obtain this information in the electronic court records; in the pre-electronic era the judge could have obtained it by looking at the prosecutor's file or simply asking the prosecutor. But when the judge instead chooses to ask the defense lawyer for this public information, what should the lawyer do? Should he tell the judge that, because the client's criminal record relates to the representation, he cannot cooperate with the judge's request? Or should he disclose this already-public information that the judge is going to hear about anyway, and then advocate for his client by minimizing its significance for purposes of sentencing?

According to the California State Bar in an older (but still hotly debated) ethics opinion, if the defense lawyer answers the judge's question and discloses the client's criminal record, the lawyer would be violating the ethics rule of confidentiality.<sup>69</sup> So what is the bar's recommendation to the defense lawyer? Bizarrely, the lawyer is to remain silent or, at most, tell the judge to do his own research and find the client's criminal record himself.<sup>70</sup>

While either of the bar's recommended courses of action would immunize the attorney from an ethics violation—at least with regard to the confidentiality rule but probably *not* with regard to the competent-representation rule—such obstructive tactics would actually work to the client's disadvantage. Agitating and creating unnecessary work for the busy (and soon-to-be short-tempered) trial judge who is about to sentence the client benefits no one. So in this case, complying with the rule of confidentiality would actually accomplish the opposite of its stated purpose of protecting the client.

Professorial-like hypotheticals aside however, the point for the attorney is that even formally advocating for a client in court—or informally advocating for a former client in a law review article or at a continuing legal education seminar—might not be enough to escape the suffocating rule of confidentiality.

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69. See Garner, *supra* note 32, at 2 (discussing the California State Bar Standing Committee on Professional Responsibility and Conduct's Formal Opinion No. 1986-87 (1986)); Arnold, *supra* note 30, at 407-08 (same).

70. See Arnold, *supra* note 30, at 408 ("The Commission held that the attorney is advised to remain silent when asked by the court whether a prior conviction exists. The farthest an attorney should go . . . is to request that the court pursue other means of the obtaining information about the defendant's prior conviction.").

## 2. Complying with Other Ethics Rules

It is one thing for an attorney to follow a ridiculous and counterproductive interpretation of an ethics rule because a lawyer disciplinary authority instructs him to do so—even when doing so comes at the client’s expense. But what is an attorney to do when Rule 1.9 conflicts with other ethics rules? When two ethics rules conflict, the absurdly broad scope of Rule 1.9 ensures that attorneys must violate at least one of them—the only decision is which one. The annotation to the Model Rules comforts us that this doesn’t happen often;<sup>71</sup> yet, aside from being inaccurate, such a hollow assurance is small consolation for the attorney facing disciplinary proceedings.

Consider, for example, the attorney whose adversary in a case commits misconduct. The non-offending attorney is required, in many situations, to report that misconduct to disciplinary authorities under Rule 8.3.<sup>72</sup> However, when he does so, he may be violating Rule 1.9. In Pennsylvania, a lawyer did, in fact, report his adversary’s misconduct, but only after the misconduct became public and appeared in the presiding judge’s opinion in the case. Yet when the non-offending attorney reported the now-public ethics violation, he was disciplined for disclosing information relating to the representation.<sup>73</sup>

On the other hand, when ethics rules clash, some authorities want attorneys to take Rule 1.9 seriously, but not too seriously. In Louisiana, for example, a lawyer was found to have violated a different ethics rule—Rule 4.1 requiring the disclosure of material facts—for *not* disclosing information relating to the representation of the client. The court’s reasoning: the document that the attorney supposedly should have disclosed “was filed in the public record” and therefore was not protected by the confidentiality rule.<sup>74</sup> This, of course, is irreconcilable with the widely accepted view that confidential information even includes “information received from the client or any other source, *even public sources . . .*”<sup>75</sup>

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71. MODEL RULES OF PROF’L CONDUCT r. 1.6 annot. (AM. BAR ASS’N 2011) (“Other ethics rules, however, affirmatively require disclosure [of information relating to the representation]. Most do so only when the disclosure would not violate Rule 1.6 . . . but some . . . require disclosure of information even if it is otherwise protected by Rule 1.6.”).

72. *See id.* r. 8.3(a) (“A lawyer who knows that another lawyer has committed a violation . . . shall inform the appropriate professional authority.”).

73. *See id.* r. 1.6 annot. (discussing Pa. Ethics Op. 2009–10 (2009)).

74. *In re Sellers*, 669 So. 2d 1204, 1206 (La. 1996) (per curiam).

75. MODEL RULES OF PROF’L CONDUCT r. 1.6 annot. (AM. BAR ASS’N 2011) (emphasis added).

Assuming an attorney is aware of these and other conflicting ethics rules,<sup>76</sup> this Hobson's choice between the rule to follow and the one to violate will simply result in an attorney minimizing the chances of being caught—hardly the behavior that a well drafted code of professional conduct would encourage.

### 3. Using the Hypothetical

Amazingly, “a lawyer would commit a disciplinary violation by telling an unassociated lawyer in casual conversation the identity of a firm client, even if mention of the client's identity creates no possible risk of harm.”<sup>77</sup> But what if the attorney uses a hypothetical example when discussing the substantive aspect of the case? That way, the lawyer could obtain the needed legal consultation, or train other lawyers at a continuing legal education seminar, or simply discuss his or her cases—all without disclosing the client's identity.

Unfortunately, a lawyer may not “talk about her client or her client's matter even if she were to *cloak her description* through use of anonymous names or omission of details because such discussions necessarily reveal some information relating to the representation.”<sup>78</sup> Much like the situation of the criminal defense lawyer being muzzled at his client's sentencing hearing, this interpretation of the rule also works to the detriment of clients: the inexperienced lawyer is prohibited from consulting with and “getting advice from others, including ethical advice” regarding his or her cases.<sup>79</sup>

But the comment to Rule 1.6 states that such hypothetical examples are permitted, “so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.”<sup>80</sup> The problem is that this would-be exception is rendered useless by the technological environment in which we live. For example, if a criminal defense lawyer wants to discuss the nuances of a self-defense claim for an upcoming battery trial, it would be impossible to prevent the listener, if he or

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76. Another ethics rule that can conflict with the rule of confidentiality is Model Rule 3.3 (candor to the tribunal).

77. See RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 60 cmt. c(i) (AM. LAW INST. 2000) (interpreting, but disagreeing with, the Model Rules regarding confidentiality).

78. Andrews, *supra* note 26, at 109 (emphasis added).

79. *Id.* But see MODEL RULES OF PROF'L CONDUCT r. 1.6(b)(4) (AM. BAR ASS'N 2011) (“A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary . . . to secure legal advice about the lawyer's compliance with these Rules . . .”). Ironically, then, the Rules create an exception to the Rules, at the client's expense, in order for lawyers to decipher the Rules and then, hopefully, comply with the Rules.

80. MODEL RULES OF PROF'L CONDUCT r. 1.6 cmt. 4 (AM. BAR ASS'N 2011).

she were so inclined, from ascertaining the identity of the client or the situation involved. That is, although the revealed information might not be considered protected information as it has been altered for purposes of the hypothetical, it “may lead to the discovery of protected information . . . .”<sup>81</sup>

How can such a hypothetical example lead to the discovery of protected information? Even assuming the listener doesn’t take the time to observe the lawyer in open and public court to uncover the protected information, the information is even more easily obtained via the Internet. The listener could simply use a free, public database to obtain a list of the lawyer’s open (or even closed) cases, including the defendants’ names and their charges.<sup>82</sup> In today’s electronic information age, hypothetical examples will *necessarily* reveal information that could easily lead an interested party to protected information, including the identity of the client and the case in which the client is or was involved.

#### 4. Obtaining Informed Consent

Some commentators assert that an attorney can, in fact, discuss public information about his or her cases—after obtaining informed consent from the client.<sup>83</sup> Interestingly, Rule 1.6 permits the revelation of a *current* client’s information after obtaining such informed consent,<sup>84</sup> but Rule 1.9 does not do the same for *former* clients.<sup>85</sup> Arguably, however, Rule 1.9’s language that a former client’s information may not be revealed “except as these Rules would permit or require with respect to a *client*,” probably incorporates Rule 1.6’s informed-consent exception.<sup>86</sup>

One problem with obtaining informed consent, however, is that such consent “requires an understanding [by the former client] of the risks and

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81. See *id.* r. 1.6 annot. (discussing ABA Formal Ethics Op. 98-411 (1998)) (holding that the use of hypotheticals can violate the rule of confidentiality).

82. In Wisconsin, for example, there are no secrets. Any lawyer’s open case load, and even closed cases, can be accessed near-instantaneously with a few keystrokes on the Wisconsin Court System’s Circuit Court Access Program, or C-CAP. WISCONSIN COURT SYSTEM CIRCUIT COURT ACCESS, <http://wcca.wicourts.gov/index.xsl> (last visited Nov. 2, 2015).

83. See, e.g., MODEL RULES OF PROF’L CONDUCT r. 1.6 annot. (AM. BAR ASS’N 2011) (explaining that a lawyer should not reveal public information about a client without obtaining informed consent).

84. See *id.* r. 1.6(a) (“A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent . . .”).

85. See *id.* r. 1.9(c) (“A lawyer who has formerly represented a client in a matter . . . shall not thereafter . . . (2) reveal information relating to the representation . . .”).

86. *Id.* r. 1.9(c)(2) (emphasis added).

benefits attendant upon disclosure.”<sup>87</sup> But this high standard does not fit well with an attorney’s revelation of information, which is prohibited even when there is no risk to the client.<sup>88</sup> And if there is no identifiable risk of harm in revealing the information (which will usually be the case), then there would be no risks for the client to understand. And without this understanding, a client cannot give informed consent under the rule.

Similarly, neither is there likely to be any benefit for the client. Instead, the disclosure of the information will usually benefit the attorney, the legal profession, or members of the general public. And with no identifiable benefit for the client, there would be nothing to understand or to weigh against the (also nonexistent) risk. Once again, informed consent is not possible.

By way of analogy, the informed consent doctrine—with its focus on risks and benefits—is the proverbial square peg. And Rule 1.9—with its blanket prohibition on revelation even when no risks or benefits exist—is the proverbial round hole. The two are incompatible on a fundamental level.

A second problem with the informed consent doctrine is that the drafters of the Model Rules have a very placid and even naïve view of the legal profession. The drafters envision a world where clients come to an attorney for advice, and “[b]ased upon experience, lawyers know that almost all clients follow the advice given,”<sup>89</sup> and everyone goes home happy. The reality, however, is that law is a contentious business. Not only do we operate within an adversarial system, but clients are often adversarial with their own attorneys.<sup>90</sup>

With regard to obtaining client consent then, the often-tense nature of the lawyer-client relationship means that clients have no incentive to give the consent. With the lawyer and client often being at odds over some issue—for example, which trial strategy to employ, which witnesses to call, or even how much the client owes for fees or expenses—it would be the unusual case that a client would give the lawyer a right or advantage without demanding something in return. And even if the client did give consent, they could later

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87. *Id.* r. 1.6(a) annot.

88. See RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 60 cmt. c(i) (AM. LAW INST. 2000) (emphasis added) (“[A] lawyer would commit a disciplinary violation by telling an unassociated lawyer in casual conversation the identity of a firm client, even if mention of the client’s identity *creates no possible risk of harm.*”).

89. MODEL RULES OF PROF’L CONDUCT r. 1.6 cmt. 2 (AM. BAR ASS’N 2011).

90. See, e.g., Allan W. Vestal, *Former Client Censorship of Academic Scholarship*, 43 SYRACUSE L. REV. 1247, 1247 (1992) (discussing a former corporate client’s attempt “to censor and suppress a law review article”).

deny that they did so,<sup>91</sup> claim that the attorney coerced them to do so,<sup>92</sup> or claim that the attorney did not satisfy the impossible standard of *informed* consent before using or revealing the information.

This would-be exception then, probably offers the least promise of all the potential exceptions. Worse yet, our entire legal analysis has, thus far, led to dead ends and dark corners at every turn. And this raises an interesting (and relevant) question: how did the legal profession manage to do this to itself?

## II. EVOLUTION: FROM *SECRETS* TO *INFORMATION*

It is now painfully clear that Rule 1.9 is “both unsound in principle and impracticable in practice.”<sup>93</sup> Most attorneys aren’t even aware of the rule, and when confronted with it, many simply do not believe it to be true or even possible.<sup>94</sup> And those attorneys who do understand the rule often intentionally violate it.<sup>95</sup> These reactions to Rule 1.9 are largely explained by the absence of any rational, underlying policy for the rule’s bizarre prohibition on the use or disclosure of even public information.

But the ethics rules regarding confidential information weren’t always absurd.<sup>96</sup> The ABA Code of Professional Responsibility (the predecessor to the Model Rules) stated that there are three policy concerns driving a rule of confidentiality: (1) it “encourages laymen to seek early legal assistance”; (2) it encourages the client to “feel free to discuss whatever he wishes with his lawyer”; and (3) it allows the lawyer to “be fully informed of all the facts of

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91. Some states require the informed consent to be in writing. *See, e.g.*, WIS. SUP. CT. R. 20:1.9 cmt. (“The Wisconsin Supreme Court Rule differs from the Model Rule in requiring informed consent to be confirmed in a writing ‘signed by the client.’”). But this has its advantages and disadvantages for the attorney. One advantage is that, aside from a later claim of coercion, at least there would be a document proving that the client did, in fact, consent. But one disadvantage is that asking for a signature might prevent the client from giving consent in the first place. A formal, written document would probably raise clients’ suspicions that they are being asked to give away something very valuable—especially when no client would ever imagine that their attorney would need their consent to discuss the public aspects of the attorney’s own case.

92. *See* Chavkin, *supra* note 10, at 264 (discussing how some clients, such as pro bono clients, may feel coerced into giving the consent).

93. Hannibal B. Johnson, *The Propriety of Post-Representation Public Communication Defining the Contours of Lawyer-Client Confidentiality in the Information Age*, 22 J. LEGAL PROF. 85, 85 (1998).

94. *See* Feldman, *supra* note 25, at 35 (“Your initial reaction to this might be similar to mine: The Model Rule can’t possibly mean what it says.”).

95. *See* Andrews, *supra* note 26, at 109 (“[E]ven lawyers who fully appreciate the breadth of their duty nevertheless often choose to violate the rule.”); *see also* Chavkin, *supra* note 10, at 239 (“[C]lient confidentiality is breached on a daily basis by nearly every lawyer without much conscious thought (or guilt).”).

96. For a history of the rules governing confidentiality, *see* Chavkin, *supra* note 10, at 242–55.

the matter he is handling in order for his client to obtain the full advantage of our legal system.”<sup>97</sup> In light of these policy concerns, the ABA Code prohibited an attorney from revealing or using the “*confidences* and *secrets* of a client.”<sup>98</sup> This predecessor rule was much narrower on its face, and in its interpretation, than today’s Rule 1.9, which protects even widely and publicly available information.<sup>99</sup>

Curiously, however, today’s much broader Model Rules repeat, nearly verbatim, the three identical policy concerns as its justification: (1) “[t]he client is thereby encouraged to seek legal assistance”; (2) the client is encouraged “to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter”; and (3) the lawyer gains access to “this information to represent the client effectively . . . .”<sup>100</sup> Yet despite these three unchanging policy concerns, Rule 1.9 made the dramatic leap from protecting a client’s confidences and secrets to protecting all information, whatever its source, including public information.

But protecting all information, rather than confidences and secrets, does nothing to advance the three underlying and unchanging policy concerns. To demonstrate this, consider the second and third policy concerns: encouraging clients to speak fully and frankly with their lawyers to allow for the best possible representation.

It is true that a client might hesitate to tell a lawyer confidential or secret information if the lawyer could freely repeat it. But why would a client hesitate to tell a lawyer confidential or secret information if, after the case ended, the ethics rules allowed the lawyer to use or disclose information that was contained in publicly-filed pleadings, stated in open and public court, or included in a published appellate court decision? There is simply no connection between the policy concerns allegedly driving the rule and the rule itself. The lawyer’s ability to discuss *public* information, after a case ends, would in no way affect a client’s willingness to tell the lawyer *confidential* or *secret* information during the representation.<sup>101</sup>

There is an even weaker connection—if that is even possible—between the first policy concern of encouraging clients to hire lawyers and Rule 1.9’s prohibition on a lawyer’s disclosure of public information after the case ends.

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97. MODEL CODE OF PROF’L RESPONSIBILITY EC 4-1 (AM. BAR ASS’N 1980).

98. *Id.* DR 4-101 (emphasis added).

99. This is not to say that Model Code was without controversy. *See, e.g.*, Vestal, *supra* note 90, at 1261 (“The definition of the term ‘secret,’ however, is troublesome.”).

100. MODEL RULES OF PROF’L CONDUCT r. 1.6 cmt. 2 (AM. BAR ASS’N 2011).

101. *See* Johnson, *supra* note 93, at 93–94 (“It makes sense to preserve inviolate direct lawyer-client (‘privileged’) communications from public disclosure . . . . [But] there seems to be far less justification for protecting merely ‘confidential’ (as opposed to ‘privileged’) information in the face of significant, if not compelling, legal and public policy considerations.”).

For example, if our hypothetical client decides to represent himself instead of using a lawyer, then everything that was asserted in pleadings, said in the courtroom, or published in a court's decision is public information and can be discussed by absolutely anyone (including the lawyer he did not hire). Given this, it makes absolutely no sense that a would-be client might not hire a lawyer because, after the case is concluded, the lawyer might discuss public information about the case—something the lawyer, and everyone else, could do anyway if the client had represented himself.

It is obvious that protecting client communications and secrets (under the ABA Code) made sense and was well aligned with the three underlying policy objectives. But the leap to protecting all information regardless of its source or nature (under the Model Rules) is nonsensical and serves no legitimate objective. So, once again, how did the legal profession manage to do this to itself? There are at least two possible explanations for why nearly all of the states have blindly followed the ABA down this path.

One explanation is the increasingly anti-lawyer stance of our state bar associations, which have become far less concerned with benefiting their members—especially when membership is compulsory and attorneys have no choice but to pay their yearly dues<sup>102</sup>—and far more concerned with allegedly protecting the public.<sup>103</sup> “Sharks have to keep moving in order to breathe. Like the shark, the State Bar has to keep coming up with new ideas to protect the public in order to breathe politically.”<sup>104</sup> And many of those new ideas come at the expense of the membership, and are “based on the notion that any measure[] that increases the onerousness of the discipline system . . . enhances public protection.”<sup>105</sup>

Alternatively, another explanation—one that is more palatable to the states and their bar associations—is that attorneys wanted clarity of what, under the old Model Code, constituted a confidence or a secret.<sup>106</sup> And in

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102. See Mauricio R. Hernandez, *That Time of Year Again . . . Rendering to Caesar His Annual Bar Dues*, IRREVERENT LAWYER (Jan. 10, 2010), <https://lawmrh.wordpress.com/2010/01/10/that-time-of-year-again-rendering-to-caesar-his-annual-bar-dues/> (discussing mandatory annual bar dues).

103. See Johnson, *supra* note 93, at 86 (“By most accounts, lawyers in America labor under severe image problems. . . . Serious movement for anything perceived as enhanced ‘lawyer rights’ . . . will likely meet with resistance, if not hostility, from the general public.”).

104. David Cameron Carr, *The Great Public Protection Perpetual Motion Machine*, KAFKAESQ (Jan. 11, 2014), <http://kafkaesq.com/2014/01/11/the-great-public-protection-perpetual-motion-machine/> (citation omitted).

105. *Id.*

106. See Andrews, *supra* note 26, at 110 (“The *Model Code* duty, however, had some gaps. It required lawyers to speculate as to whether client information was detrimental . . . .”); see also Chavkin, *supra* note 10, at 247 (quoting Robert J. Kutak, Enrichment Series, *Model Rules of Professional Conduct: Why Do We Need Them?*, 36 OKLA. L. REV. 311, 311 1983) (“[L]awyers found the *Code* unhelpful in resolving ‘the real-life dilemmas that arise in the daily practice of law.’”) (citation omitted).



response, the rule makers simply adopted Rule 1.9 which expanded the class of protected information to include *all* information, thus removing the ambiguity. If this was, in fact, the reason for the change, then the lesson for attorneys is clear: be careful what you wish for.

### III. LEGAL REFORM

#### A. Clients' Actual Expectations

A rule of confidentiality must be rooted in clients' expectations that, first, actually exist, and second, are reasonable. And the expectation that an attorney be subjected to a perpetual gag-order with regard to publicly available information—even when disclosure poses no risk of harm to the client—would be unreasonable if it were not fictional. That is, no former client would ever have such an expectation. Instead, this idea of a never-ending ban on speech with regard to public information is purely the product of the rule makers' imaginations.<sup>107</sup> Rather, what former clients actually expect is that attorneys will keep their *confidences* and *secrets* and, when using or disclosing *public* information, will continue to be loyal to, or at least not contradict, the former client's position.<sup>108</sup>

To demonstrate this, consider once again the sentencing-hearing example from earlier in this Article. When the judge asks the defense attorney for the client's criminal record, Rule 1.9 (or, more precisely, the identically worded portion of Rule 1.6) commands that the attorney remain silent or tell the judge to find the public information himself.<sup>109</sup> For reasons discussed earlier, such a course of action would not benefit the client—instead, it would work to the client's disadvantage—and no competent lawyer would practice law so recklessly, even when the rule requires it.<sup>110</sup>

What the client would actually want in this situation is for the attorney to disclose the prior conviction because it is public information and, as a

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107. See Chavkin, *supra* note 10, at 253 (describing how the rule makers "assumed that clients initially expect that all information relating to the representation will be protected").

108. See Jacobowitz & Jesson, *supra* note 1, at 85 (citations omitted) ("The view of the attorney as champion has long historical precedent. Courts, scholars, and boards of professional responsibility speak of the lawyer's duty of 'single allegiance,' 'absolute loyalty,' and 'undivided fidelity' to the client.").

109. See Garner, *supra* note 32, at 2 (explaining that attorneys may not disclose embarrassing or detrimental information gained through the attorney-client relationship without consent); see also Arnold, *supra* note 30, at 407–08.

110. See Andrews, *supra* note 26, at 111 ("Critical thinking, of course, is an essential characteristic of the ethical lawyer, and lawyers should not blindly follow rules, especially flawed rules. Ethical defiance of rules can have its proper place.").

practical matter, the judge is going to find the information anyway by looking on the Internet or asking the prosecutor. The client would then want the defense attorney to do what he was hired to do: advocate for the client by minimizing the significance of the prior conviction for sentencing purposes.<sup>111</sup>

The same rationale also applies after the representation ends. Assume, for example, that after a defendant is acquitted at a criminal trial a news reporter asks the defense attorney questions about the now-former client's case. The former client would not want the attorney to remain silent, or say "no comment," and then walk away. Instead, the former client would want the lawyer to answer the questions, even if briefly, by citing relevant, public information from the trial and continuing to assert the client's innocence.

Even in cases where an attorney discloses public information on his or her own and not in response to a direct question—for example, when writing a law review article or presenting at a continuing legal education seminar—this simply would not violate a former client's actual expectation of confidentiality, for two reasons.

First, once again, the information is already in the public domain, and former clients only expect that their confidences and secrets be kept. Few would ever even imagine that they could prevent their former attorneys from talking about what happened in open and public court, in the attorneys' own cases. Rather, our Supreme Court stated nearly seventy years ago that "[w]hat transpires in the court room is public property."<sup>112</sup> This principle is not just lofty judicial jargon; rather, it is a basic and intuitively-understood reality—especially in today's multimedia information age.

And second, the principles of public property aside, the next two sections demonstrate that an attorney's use or disclosure of such information is not likely to cause any tangible harm, or even embarrassment, to the former client.<sup>113</sup>

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111. Criminal defense lawyers routinely do this by emphasizing the lapse of time from the prior conviction to the current hearing, the nature and classification of the prior conviction, the mitigating factors surrounding the prior conviction, the dissimilarity between the prior conviction and the crime to which the client is currently pleading, and a host of other factors.

112. *Craig v. Harney*, 331 U.S. 367, 374 (1947).

113. Considering potential harm to the former client is a common feature of many secondary sources, as well as many commentators' recommendations for reform. *See, e.g.*, Johnson, *supra* note 93, at 98 (arguing that attorneys should be permitted to disclose non-privileged information relating to the representation after considering, among other factors, "[t]he potentiality, extent, and nature of the harm to the former client which may result from the disclosure").

### B. The New Rule

In light of former clients' actual (rather than fictional) expectations regarding confidentiality, the solution to Rule 1.9 does not even require rewriting the rule.<sup>114</sup> Instead, we need only do what some courts have already done. First, for the use-prong of the rule, the definition of generally known information must include information that is publicly available or was disclosed in a public forum.<sup>115</sup> This focus on what is *knowable* by an interested person—rather than what is supposedly *known* by an undefined (and in some sense fictional) general public<sup>116</sup>—is also workable and theoretically sound in today's electronic age of easily accessible information.

And second, for the reveal-prong of the rule, the definition of reveal must be its dictionary definition—that is, “to make (something secret or hidden) publicly or *generally known*”<sup>117</sup>—rather than the fabricated definitions currently in use by many legal authorities. Then, it follows that if information is *already* generally known (which includes information that is publicly available or has been disclosed in a public forum), it has *already* been revealed, and an attorney's disclosure of such information cannot violate the reveal-prong of the rule. This essentially eliminates the highly artificial and unworkable distinction between the use and revelation of generally known information, and is also consistent with client expectations.

Third, while an attorney would be permitted both to use and disclose public information relating to the representation, this would be subject to the very intuitive condition that such use or disclosure must be consistent with, or at least neutral with regard to, the former client's position in the case.<sup>118</sup>

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114. While this Article has, thus far, drawn on Rule 1.6 and its related materials, the Article's recommendation for reform is limited to Rule 1.9, duties to *former* clients. *See id.* at 95 (“Once the lawyer-client relationship no longer exists, [concerns about confidentiality] become considerably less substantial.”).

115. *See, e.g.,* State v. Mancilla, No. A06-581, 2007 Minn. App. LEXIS 717, at \*6 (Minn. Ct. App. July 17, 2007) (permitting attorney's disclosure of former client's convictions because convictions “were matters of public record and, therefore, fall within the generally-known-information exception to rule 1.9(c)”); *In re Sellers*, 669 So. 2d 1204, 1206 (La. 1996) (per curiam) (holding that the disclosure of public information does not violate the rule of confidentiality); *In re Lim*, 210 S.W.3d 199, 201–02 (Mo. 2007) (en banc) (same); *see also* Part IV.C. *infra* (regarding attorney free speech).

116. *See* RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 59 cmt. d (AM. LAW INST. 2000) (“Confidential client information does not include information that is generally known.”); *see also* Johnson, *supra* note 93, at 98 (arguing that use or disclosure of a former client's information that “may become generally known from an alternative source” should be within the attorney's discretion).

117. *See* WEBSTER'S, *supra* note 44, at 1009 (emphasis added).

118. *See* Chavkin, *supra* note 10, at 265 (recommending reform to permit disclosure “to further representational goals of the client”). *But see* Vestal, *supra* note 90, at 1286 (criticizing the position that, under the old Model Code, an attorney “owes a continuing duty of loyalty to the client” after the case

(The exception, of course, would be when the former client takes an adversarial position against the attorney.)<sup>119</sup> This third part of the proposed rule actually closes a surprising gap in Rule 1.9's coverage: despite the rule makers' irrational obsession with preventing an attorney from disclosing public information, they ignore clients' actual expectation that their attorneys remain loyal, not silent.

By way of example, if an attorney represented a client in an immigration matter, the rule proposed in this Article would prevent the attorney from later taking the *opposite* position and asserting that the particular client is *not* deserving of the applied-for immigration benefits.<sup>120</sup> (This duty of loyalty is, of course, limited. The attorney would still be allowed, for example, to express his opinion on immigration law generally, even if done in support of future legal reform that would have been unfavorable to the former client's case.)

Similarly, if an attorney represented a client in a criminal trial where the client pleaded not guilty, the proposed rule would prevent the attorney from later taking the *opposite* position and asserting that the client was, in fact, guilty.<sup>121</sup> (However, the attorney would still be permitted, for example, to engage in political speech about criminal law or criminal justice generally, even if such personal views are anti-defense or tough-on-crime in nature.)

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ends). Continuing loyalty could, in some circumstances, be an unworkable standard, especially when the lawyer being silenced worked within a firm, and the firm (but not the individual lawyer) represented the former client. Currently, Rule 1.9(c) imputes this representation to the individual lawyer. This situation, although beyond the scope of this Article, makes a compelling case for an *even narrower*—that is, pro-attorney—rule of confidentiality, which includes dramatically *limiting* the scope of what constitutes “information relating to the representation.” See Jacobowitz & Jesson, *supra* note 1, at 87 (“The notes to Virginia’s [confidentiality] rule indicate that the ABA’s language that incorporates ‘all information relating to the representation’ was rejected as being too broad.”); see also Johnson, *supra* note 93, at 96 (arguing for a distinction between truly privileged client communications and other information relating to the representation).

119. Numerous exceptions for such situations are already found within the existing Model Rules. See, e.g., MODEL RULES OF PROF’L CONDUCT r. 1.6(b)(5) (AM. BAR ASS’N 2011) (permitting lawyers to reveal information “to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client . . .”). Although beyond the scope of this Article, such adversarial situations should include fee disputes, ineffective assistance of counsel claims, bar complaints, other formal or informal complaints or criticism, and legal malpractice actions.

120. See *In re Lim*, 210 S.W.3d at 201–02 (permitting attorney, under Rule 1.9, to actively harm former client because attorney’s statement was merely *based on* information relating to the representation, rather than being *actual* information).

121. The rule proposed in this Article would, for example, prevent an attorney who won an acquittal from later saying that “there is no doubt that she was shoplifting,” or that the former client “tested positive for cocaine.” See Jacobowitz & Jesson, *supra* note 1, at 91 (discussing *Hunter v. Virginia State Bar*, 744 S.E.2d 611 (Va. 2013), which held that an attorney’s statements about their former client were protected free speech).

This proposed rule is far better tailored to former clients' actual and reasonable expectations that their attorneys keep their confidences and secrets and, when using or disclosing public information, remain loyal or at least neutral with regard to the former client's position in the case.

### C. Attorney Discretion

Commentators that oppose an attorney's use of public information often refer to examples—such as writing a book, blog post, or law review article—where the mere reference to the former client's case, even in a pro-client light, will cause the client embarrassment. This embarrassment, in turn, is said to constitute a type of disadvantage for the former client. But these examples are not realistic, as an attorney's use of already-public information is unlikely to create a new audience for that information. Rather, the audience either will already exist, or will never exist.

For example, with regard to writing a commercial book, no publisher would print the book unless the former client's case has already captured the public's attention; further, it is unlikely that anyone would read the book unless they already had an interest in the public information contained in it. And in such a case, the former client would only benefit from, or at worst be unaffected by, the attorney's pro-client or client-neutral use of the public information.

Similarly, with regard to writing a blog post about a former client's case, some commentators fear that such an on-line posting could go beyond embarrassment and even be harmful if “a future employer conducts a Google search of this individual . . . .”<sup>122</sup> But this, too, is unrealistic for three interrelated reasons.

First, a potential employer—or potential landlord, or potential social companion, for that matter—would be conducting the Google search because they are looking specifically for information about the former client. Second, because the former client's case is public information, the Google search would likely produce numerous *other* websites that already contain that same information; the attorney's blog post would only provide a pro-client, or at least client-neutral, account of this already-public information. And third, even the least sophisticated employer (or landlord) would also consult the state's free on-line court records or law-enforcement records to obtain the same information.<sup>123</sup> Even potential social companions would do the same;

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122. *Id.* at 93.

123. *See, e.g.,* WISCONSIN COURT SYSTEM CIRCUIT COURT ACCESS, <http://wcca.wicourts.gov/index.xsl> (last visited Nov. 2, 2015) (displaying public court records online);

for example, few people in Wisconsin would agree to a social engagement without first “C-CAPing” their would-be date.<sup>124</sup>

Conversely, with regard to writing a law review article or presenting at a continuing legal education seminar, that audience’s interest is in the legal principles and not in the former client as an individual.<sup>125</sup> The readers or attendees would not care about the client’s personal information or even identity. In this case, the interested audience is not preexisting, as it is in the case of book-readers or web-surfers; rather, the audience simply will never exist.

It is true, however, that there are no absolutes. For example, it is possible that a would-be employer (or landlord or social companion) could stumble upon an attorney’s blog post about a former client, but would never have learned of the information any other way. And another possible scenario offered by anti-reformists is this: under the interpretation proposed in this Article, nothing would prevent an attorney from tracking down a former client in a social setting and, for example, announcing to the client’s peers that the client was charged with a crime and the attorney won an acquittal for him. It is also true that this type of behavior could embarrass the former client. Hypotheticals like this appear to be of great concern to those who prefer Rule 1.9’s wide-sweeping, never-ending ban on lawyer speech.

But these risks, while possible, should not drive our interpretation of Rule 1.9. Instead, the solution lies in *attorney discretion*. It is important to remember that, although our nation’s law schools are deeply flawed,<sup>126</sup> attorneys are still arguably trained, and certainly licensed, professionals. And as professionals, they routinely make judgment calls and exercise discretion in countless contexts.

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WIS. DEPT. JUSTICE, <http://www.doj.state.wi.us/dles/cib/cib-frequently-asked-questions> (last visited Nov. 2, 2015) (exhibiting criminal records online); *Inmate Search*, KENOSHA CTY. SHERIFF’S DEP’T, [http://kccjs.org/jail/inmate\\_search/inmate\\_search.html](http://kccjs.org/jail/inmate_search/inmate_search.html) (last visited Nov. 2, 2015). Numerous national databases also exist, including mugshots.com, which asks: “what good are public records that no one sees?” *About Us*, MUGSHOTS.COM, <http://mugshots.com/about.html> (last visited Nov. 2, 2015).

124. C-CAPing is slang for using the state’s Circuit Court Access Program (C-CAP) to uncover a person’s criminal history (including criminal charges, convictions, dismissals, and acquittals) within seconds and without cost.

125. See Chavkin, *supra* note 10, at 266 (recommending reform to permit disclosure for purposes of “law review articles” and “continuing legal education programs,” among other purposes); see also Vestal, *supra* note 90, at 1249 (recommending reform to permit disclosure for purposes of academic scholarship); RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 60 cmt. h (AM. LAW INST. 2000) (permitting disclosure for purposes of “educational conversations among lawyers, or more formally, as in continuing-legal-education lectures,” among other purposes).

126. See *infra* Part IV.A.

For example, returning for a final time to California's sentencing-hearing hypothetical, when the judge asks the defense attorney for the client's criminal history, the attorney will exercise judgment and discretion. If the client's prior conviction is recent, is in-state, and the attorney confirmed it to be in the court's on-line records, then he will disclose it. But if the conviction pre-dates the electronic era, is out-of-state, and the attorney only learned about it through the client, then the attorney will consider the facts and circumstances of the case and may respond differently.<sup>127</sup>

The point is that attorneys are nearly always exercising judgment and discretion in numerous contexts. It therefore seems unreasonable and even obsessive to allow unlikely, post-representation possibilities—for example, a would-be employer reading an attorney's blog post (but no other on-line information) about the former client—to drive the rule. It is simply bad policy to adopt such an incredibly wide-sweeping speech prohibition that treats attorneys more like probationers or parolees than professionals.

Instead, attorneys should be trusted, as they are every day in nearly every other context, to exercise some professional judgment about what to say and when and where to say it.<sup>128</sup> In fact, as the next section explains, this more reasonable, less smothering approach to attorney speech is not only preferable, but probably even required.

#### IV. OTHER LEGITIMATE INTERESTS

In addition to satisfying clients' actual expectations—rather than the fictional expectations created by the rule drafters—the interpretation proposed in this Article also satisfies other important interests. (It would not be accurate to label these as competing interests, as they would rarely compete or conflict with clients' actual interests.) While a detailed analysis of these other interests is beyond the scope of this Article, they deserve brief mention before concluding.

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127. See *supra* Part I.E.2. In this situation, the prior conviction would be non-public (perhaps for everyone, but certainly for the interested party: the judge). In such a situation, *not* disclosing the information *arguably* runs afoul of other ethics rules, including candor to the tribunal. Conversely, the attorney may be duty-bound to keep the information *confidential*, especially if it was communicated to the attorney by the client in confidence. Finally, numerous strategic and pragmatic concerns also come into play in this situation. These issues, however, are beyond the scope of this Article.

128. See Johnson, *supra* note 93, at 96–97 (arguing for legal reform to Rule 1.9 that distinguishes between privileged communications and other information, and permits an attorney to use “a liberal sprinkling of discretion” in deciding whether to use or disclose such non-privileged information).

### A. Lawyer Education

One additional, legitimate interest to consider is the education of lawyers. As discussed earlier, some states have even acknowledged that the legal profession must “educate new lawyers, [and] circulate information about important developments in the law . . . . Literal application of [these Rules] would ban these valuable routes of intra-professional communication.”<sup>129</sup>

The education of lawyers is especially important given the state of legal education today. Law schools, in their never-ending pursuit of prestige and their disdain for the practical,<sup>130</sup> have developed the rather bizarre practice of hiring law professors with very little legal experience.<sup>131</sup> Often, these professors have no experience at all.<sup>132</sup> And those professors who have practiced law often did so for such a short period of time, and in such rarefied settings, that they were shielded from client contact and other useful experiences.<sup>133</sup> Even more worrisome, many of today’s newer professors—especially at the more prestigious schools—don’t even possess a law degree,

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129. Arnold, *supra* note 30, at 409–10 (quoting Alaska Bar Ass’n Ethics Comm., Op. 95-1 (1995)); *see also* Chavkin, *supra* note 10, at 265 (recommending reform to permit disclosure for purposes of “continuing education of lawyers or education of law students”); RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 60 cmt. h (AM. LAW INST. 2000) (permitting disclosure for purposes of “educational conversations among lawyers, or more formally, as in continuing-legal-education lectures”).

130. It is true that, due to overwhelming demand, most schools offer clinical programs in the actual practice of law. However, these programs are typically not integrated into the students’ legal education as a whole, are treated as side-shows by the faculty, and are taught by marginalized groups that are creatively labeled as experiential professors, professors in practice, or clinical professors—groups that are often thought of as second-class citizens by the professoriate. *See, e.g.,* Elie Mystal, *Law Professor Doesn’t Want Her ‘Ghetto’ Award*, ABOVE THE LAW (May 7, 2014, 3:38 PM), <http://abovethelaw.com/2014/05/law-professor-doesnt-want-her-ghetto-award/> (describing a law professor who rejected award that she believes offends and marginalizes “[e]xperiential” professors).

131. *See* Paul Campos, *Legal Academia and the Blindness of the Elites*, 37 HARV. J.L. & PUB. POL’Y 179, 180 (2014) (emphasis added) (“[T]he average amount of experience in the practice of law among new hires at top twenty-five law schools, *among those hires who had any such experience*, was 1.4 years.”).

132. *See id.* (explaining that law schools often hire new professors with little experience); *see also* David Segal, *What They Don’t Teach Law Students: Lawyering*, N.Y. TIMES (Nov. 19, 2011), [http://www.nytimes.com/2011/11/20/business/after-law-school-associates-learn-to-be-lawyers.html?ref=davidsegal.&\\_r=0](http://www.nytimes.com/2011/11/20/business/after-law-school-associates-learn-to-be-lawyers.html?ref=davidsegal.&_r=0) (“[T]he academy wants people who are not sullied by the practice of law . . .”).

133. *See* Campos, *supra* note 131, at 181 (“[W]hat little practice experience faculty have tends to be limited to a very narrow sector of the profession—either associate work at a large law firm, or work for a government agency, usually for the federal government.”).



but instead have an advanced degree in one of the social sciences.<sup>134</sup> (The Ph.D. in economics is currently the degree *du jour*.)<sup>135</sup>

In light of this now decades-old practice of hiring professors ill-equipped to train new lawyers, it is no wonder that many new graduates feel so unprepared to practice law and worse yet, often live in fear of being disbarred before their careers even develop.<sup>136</sup> Given this miserable state of affairs that, once again, our profession has somehow managed to create for itself, continuing legal education for lawyers takes on even greater importance.<sup>137</sup>

Ironically, as I write this, I have received an email from my state bar asking me to participate in its latest study—this one on legal education—because “[e]ducating tomorrow’s lawyers is a shared responsibility.”<sup>138</sup> But if we lawyers are not permitted to talk about our own cases, then legal education will be completely sanitized of the unique perspective of experience. So why would we lawyers even bother? If experience is removed from the equation, then we may as well leave legal education to the law professors.

### B. The Public Interest

Another legitimate interest satisfied by the rule interpretation proposed in this Article is the public’s right to critical and accurate commentary about the legal system.<sup>139</sup> “The judicial system, and in particular our criminal justice courts, play a vital part in a democratic state, and the public has a legitimate interest in their operations.”<sup>140</sup> More specifically, “it would be difficult to single out any aspect of government of higher concern and

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134. See *id.* (emphasis added) (“A new study of the top twenty-six law school faculties reveals that those faculties include *sixty-six* tenure track faculty members *who do not have law degrees*.”).

135. See Segal, *supra* note 132 (“[A]n economics Ph.D. is the most valuable . . . the further away you get from the humanities the better.”).

136. See, e.g., STATE BAR OF WIS., CHALLENGES FACING NEW LAWYERS TASK FORCE REPORT AND RECOMMENDATIONS (2013), <http://taxprof.typepad.com/files/challenges-facing-new-lawYERS-task-force-report.pdf> (explaining that many recent law school graduates feel underprepared).

137. Granted, continuing legal education has its own flaws, and is sometimes even invaded by the ranks of the professoriate. See, e.g., Michael D. Cicchini, *The Problem with Continuing Legal Education (and How to Fix It)*, LEGAL WATCHDOG (Nov. 22, 2014, 6:49 PM), <http://thelegalwatchdog.blogspot.com/2014/11/the-problem-with-continuing-legal.html> (offering suggestions for improving the continuing legal education experience).

138. E-mail from George C. Brown, Exec. Dir., State Bar of Wisconsin, to members of the State Bar of Wisconsin (Jan. 15, 2015, 08:05 CST) (on file with author).

139. See Johnson, *supra* note 93, at 87 (“The public’s ‘right to know’ about matters affecting the administration of justice goes to the heart of life in an open and vibrant democracy.”).

140. *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1035 (1991).

importance to the people than the manner in which criminal trials are conducted. . . .”<sup>141</sup>

Despite the importance of competent reporting on legal matters, news media coverage is often so inaccurate or superficial that “[i]t is no wonder that the average American is so confused by the laws that govern him.”<sup>142</sup> By contrast, a lawyer who is directly involved in a particular legal matter is highly motivated and ideally situated to provide accurate and critical commentary about the public aspects of that matter.<sup>143</sup> For example, a criminal defense lawyer who worked on a particular case is in the best position to discuss the nuances of subtle legal issues or defenses that the media, and even lawyers not involved in the case, will not appreciate.<sup>144</sup>

The defense lawyer who worked on a particular case is also in the best position to expose what he or she perceives as an abuse of police, prosecutorial, or judicial powers.<sup>145</sup> Finally, this lawyer is also in the best position to dispel misconceptions about the criminal justice system, including the common presumption that if a defendant is prosecuted in court—or even criminally charged, or merely even arrested—then he or she must be guilty.

When attorneys—and in particular, criminal defense attorneys—are prevented from talking about their cases, the public suffers to a great extent. The inevitable consequence of silencing this important voice is that government agents are allowed to use their enormous powers and vast discretion in ways that will go unchecked and will escape criticism.<sup>146</sup>

### C. Attorney Free Speech

When drafting and adopting confidentiality rules, the rule makers and our state authorities seemed to have glossed over the attorney’s First

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141. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 575 (1980).

142. *A Random Bit of Media Criticism*, POPEHAT (June 28, 2013), <https://www.popehat.com/2013/06/28/a-random-bit-of-media-criticism/> (discussing how even the well-respected, mainstream media confused two distinct and very different concepts—Florida’s stand-your-ground law and “the ancient and time-honored doctrine of self-defense”—in the high-profile criminal case of defendant George Zimmerman).

143. *See Johnson*, *supra* note 93, at 87 (“Lawyers . . . are well-positioned to aid the public in its understanding of America’s legal system.”).

144. *Id.* at 100.

145. *See Gentile*, 501 U.S. at 1035–36 (“Public awareness and criticism have even greater importance where, as here, they concern allegations of police corruption . . . or where, as is also the present circumstance, the criticism questions the judgment of an elected public prosecutor.”).

146. *See id.* at 1036 (“Our system grants prosecutors vast discretion at all states of the criminal process . . . . The public has an interest in its responsible exercise.”).

Amendment right to commercial and, more significantly, political speech.<sup>147</sup> And given how the right of free speech is typically jealously guarded in our country, it is somewhat surprising that the legal profession is so eager to silence its members.

At least with regard to criminal cases however, our Supreme Court has stated that “a presumption of openness inheres in the very nature of a criminal trial under [our] system of justice.”<sup>148</sup> Further, “[a] trial is a public event. What transpires in the court room is public property. . . . Those who see and hear what transpired can report it with impunity.”<sup>149</sup>

Many lawyer disciplinary bodies and courts, however, believe that this right to report what happens in open and public court is enjoyed by everyone *except* the attorneys involved in the case.<sup>150</sup> But the Supreme Court disagreed: “First Amendment protection survives even when the attorney violates a disciplinary rule . . . .”<sup>151</sup> Similarly, in a very recent lawyer discipline case, the Virginia Supreme Court held that “[t]o the extent that the information is aired in a public forum, privacy considerations must yield to First Amendment protections. In that respect, a lawyer is no more prohibited than any other citizen from reporting what transpired in the courtroom.”<sup>152</sup>

Even more to the point, rather than sidestepping the issue Virginia tackled it head-on: “we are called upon to answer whether the state may prohibit an attorney from discussing information about a client or former client that is not protected by attorney-client privilege without express consent from that client. We agree with [the attorney] that it may not.”<sup>153</sup>

#### CONCLUSION: THE ARTICLE NOT WRITTEN

Returning full circle to my proposed law review article about my former client’s criminal case,<sup>154</sup> I must first consider Rule 1.9’s unimaginably broad scope with regard to the information it protects.<sup>155</sup> It appears that even my former client’s published appellate court decision—a decision that is without

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147. See Vestal, *supra* note 90, at 1250 (discussing attorney free speech generally, and within the context of the old Model Code).

148. *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 573 (1980).

149. *Craig v. Harney*, 331 U.S. 367, 374 (1947).

150. See *Gentile*, 501 U.S. at 1030–34, 1053–54, 1071 (discussing lower court holdings that, while representing clients in pending cases, an attorney’s speech is “extremely circumscribed” in and outside of the courtroom); 16A AM. JUR. 2D *Constitutional Law* § 519 (2015).

151. See *Gentile*, 501 U.S. at 1054.

152. *Hunter v. Virginia State Bar*, 744 S.E.2d 611, 620 (Va. 2013).

153. *Id.* at 619.

154. See *supra* Introduction.

155. See *supra* Part I.A.

question within the public domain and easily accessible at no cost via the Internet—is protected under the rule.

Second, and even more problematic, it is impossible for me to determine whether writing about my former client's published case (and the pleadings and trial court transcript cited and discussed within it) would constitute the *use* or *revelation* of that information.<sup>156</sup> This leaves me to guess at which prong of the rule, and which exceptions to the rule, would apply to my Article. Unfortunately, case law and other legal authorities shed no light on this subject, and often employ the words “use” and “reveal” interchangeably, depending on their whims.<sup>157</sup> This leaves me with near-zero confidence that my literal use of information to write a law review article would constitute the use of information under the rule.

Third, even analyzing the rule's exceptions produces pure chaos. These exceptions are, in large part, indecipherable.<sup>158</sup> The rule's words and phrases such as “to the disadvantage of the former client” and “generally known” and even “reveal” are either indefinable or, worse yet, are employed in ways that defy ordinary meanings and dictionary definitions. For example, even though it would be, by definition, impossible to reveal information that is already generally known, the rule nonetheless prohibits me from doing so. The result is that I can't be confident whether the rule's exceptions even apply to my contemplated law review article, let alone whether I would be able to satisfy them.

Rule 1.9 is an unmitigated disaster that is ungrounded in any legitimate underlying policy.<sup>159</sup> It is baffling why the ABA would ever make the leap from its former rule—a rule that protected clients' confidences and secrets—to Rule 1.9's absolute, perpetual ban on attorney speech regarding public information. It is troubling that any state or bar association would impose such a deeply-flawed rule on its lawyers. Further, it remains a mystery how Rule 1.9 has not been declared unconstitutional and void on its face.<sup>160</sup>

In light of all of this, my decision regarding the law review article is obvious: it will (at least for now) be the article not written. The fact that *some* attorneys routinely and even openly violate Rule 1.9—either because they are not aware of the rule or because they simply don't care—is of little

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156. See *supra* Part I.B.

157. See *In re Anonymous*, 654 N.E.2d 1128, 1129–30 (Ind. 1995) (providing example of a case where the lawyer used, but probably did not reveal information, yet was disciplined for both using and revealing it).

158. See *supra* Part I.C.–D.

159. See *supra* Part II.

160. See *supra* Part IV.C.

consolation as *other* attorneys have felt the arbitrary bite of their state disciplinary authorities for the same behavior. Therefore, absent a favorable, controlling case on point, writing a law review article about the legal issues in a former client's case is too risky a proposition—particularly in today's anti-lawyer climate created by state bar associations, disciplinary authorities, and even many courts.<sup>161</sup>

This state of affairs is unfortunate, as there are few others who could offer commentary on the case-subject of my would-be law review article, and those people are similarly prohibited from using—or is it revealing?—the information. So thanks to Rule 1.9, the motives and actions of our police, prosecutors, and judges have, at least in this particular case, slid beneath the media's radar undetected, thereby escaping all critical commentary.<sup>162</sup>

From a personal standpoint, however, as far as consolation prizes go, writing this Article about legal reform is an excellent one. And with regard to such reform, Rule 1.9 must be reinterpreted to reflect the real, rather than fictional, expectations of clients,<sup>163</sup> as well as the other legitimate interests of the legal profession, the general public, and individual lawyers.<sup>164</sup>

More specifically, there are three parts to such reform: first, information must be considered generally known when it is publicly available—that is, when it is knowable by an interested person—thus allowing an attorney to use it; second, information that is publicly available (that is, generally known), must be considered to be already revealed, thus allowing an attorney to discuss it, write about it, or otherwise disclose it; and third, in what would actually provide more meaningful protection for clients, an attorney's use or revelation of such public information must be consistent with, or at least neutral with regard to, the former client's interests.<sup>165</sup>

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161. *See supra* Part II.

162. *See supra* Part IV.B.

163. *See supra* Part III.A.

164. *See supra* Part IV.

165. *See supra* Part III.B.