RHETORIC OVER REALITY: EXAMINING ETHICAL OBLIGATIONS OF CONFIDENTIALITY WHEN INFORMATION IS PUBLICLY AVAILABLE

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INTRODUCTION

Confidentiality between a client and an attorney is a well-known characteristic of the client-attorney relationship. The attorney-client privilege has limited exceptions,[1] and Rule 1.6 of the ABA Model Rules of Professional Conduct (Model Rules) concerning the confidentiality of client information is broad and encompassing.[2] However, attorneys can extinguish client confidentiality expectations.[3] Attorneys can even make public information of opposing counsel's clients. For example, under Model Rules 3.6 and 3.8, a prosecutor may disclose information "contained in a public record,"[4] such as defendant's prior arrest history.[5]

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1. The attorney-client privilege protects "[c]onfidential disclosures by a client to an attorney made in order to obtain legal assistance . . . ." Fisher v. United States, 425 U.S. 391, 403 (1976) (citing 8 JOHN HENRY WIGMORE ET AL., EVIDENCE IN TRIALS AT COMMON LAW § 2292 (4th ed. 1961)). One example of an exception is the crime fraud exception. The attorney-client privilege protects the confidences of clients as to prior wrongdoings but not as to future wrongdoings. *See* United States v. Zolin, 491 U.S. 554, 562–63 (1989).

2. MODEL RULES OF PRO. CONDUCT r. 1.6 (A.B.A. 2018) ("A lawyer shall not reveal information relating to the representation of a client . . . ."). Comment three to Model Rule 1.6 explains the breadth of this rule: "The confidentiality rule . . . applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source." MODEL RULES OF PRO. CONDUCT r. 1.6 cmt. 3 (A.B.A. 2018).

3. As just one example, under both the attorney-client privilege and ABA Model Rule 1.6 exceptions, in certain circumstances, an attorney may reveal a client's plan to commit future wrongdoings. *See, e.g.*, *Zolin*, 491 U.S. at 562–63; MODEL RULES OF PRO. CONDUCT r. 1.6(b)(2) (A.B.A. 2018).

4. MODEL RULES OF PRO. CONDUCT r. 3.6(b)(2) (A.B.A. 2018) ("Notwithstanding paragraph (a), a lawyer may state . . . (2) information contained in a public record . . . ."). Rule 3.8 concerns prosecutors and states in comment five: "Nothing in this Comment is intended to restrict the statements which a prosecutor may make which comply with Rule 3.6(b) or 3.6(c)." MODEL RULES OF PRO. CONDUCT r. 3.8 cmt. 5 (A.B.A. 2018).

5. Consider this continuing legal education information suggested for prosecutors in Massachusetts:

> When addressing the court for the first time, take the opportunity to . . . provide as much detail about the allegations and the nature of the Commonwealth's evidence as possible . . . . The defendant's criminal history, past incarcerations, and defaults are relevant to the issue of bail and become part of the public court proceedings. Remember: If you did not say it in open court, you should not say it later if it is barred by Mass. R. Prof. C. 3.6.

Kevin M. Mitchell & Max D. Stern, *The Media, the Open Courtroom and High-Profile Cases*, *in* MASS. CONTINUING LEGAL EDUC., MASS. SUPER. CT. CRIM. PRAC. MANUAL § 10.8.1 (2014). For further discussion, see *infra* Part III.B.

In other situations, however, information in the public record is given more protection. Model Rule 1.6 does not have a publicly available or public record exception and has been interpreted as preventing disclosure of client information, even if it is in the public record.[6] Also, Model Rule 1.9, as to former clients, and Model Rule 1.18(b), as to prospective clients, require confidentiality as to these clients consistent with Model Rule 1.6, meaning that publicly available information can also not be revealed.[7] These rules are significantly broader, protecting more client information, than the previous Model Code of Professional Responsibility confidentiality rule that some states retain[8] and the current confidentiality rule in The Restatement (Third) of the Law Governing Lawyers (Restatement),[9] resulting in different rules in different jurisdictions.[10] There is a lack of consistency in the Model Rules, as well as between the Model Rules, the Restatement, the case law, ethics opinions, and scholarly literature, as to when publicly available information[11] remains confidential.[12]

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6. A.B.A. Comm. on Ethics & Pro. Resp., Formal Op. 480 (2018) ("Significantly, information about a client's representation contained in a court's order, for example, although contained in a public document or record, is *not* exempt from the lawyer's duty of confidentiality under Model Rule 1.6. The duty of confidentiality extends generally to information related to a representation whatever its source and without regard to the fact that others may be aware of or have access to such knowledge.").

7. Under ABA Model Rule 1.9(c)(2), "[a] lawyer who has formerly represented a client . . . shall not thereafter: . . . (2) reveal information relating to the representation except as these Rules would permit or require with respect to a client." MODEL RULES OF PRO. CONDUCT r. 1.9(c)(2) (A.B.A. 2018). Thus, under Model Rule 1.9(c)(2), Model Rule 1.6 governs when a lawyer can reveal former client information. *Id.* Rule 1.18(b) states, "Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information, except as Rule 1.9 would permit with respect to information of a former client." MODEL RULES OF PRO. CONDUCT r. 1.18(b) (A.B.A. 2018).

8. *See infra* note 21, listing states. The Model Code of Professional Responsibility Rule 4-101(B)(1) & (2) prohibited a lawyer from revealing a confidence or secret or using a confidence or secret to the disadvantage of a client. MODEL CODE OF PRO. RESP. DR 4-101(B)(1), (2) (A.B.A. 1983). Confidences were defined as "information protected by the attorney-client privilege under applicable law," and secrets were defined as "other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client." MODEL CODE OF PRO. RESP. DR 4-101(A) (A.B.A. 1980).

9. ABA Model Rule 1.6 protects all information learned during the representation of a client regardless of its source, while the Restatement protects confidential information only and states, "Confidential client information does not include information that is generally known." RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 59 cmt. d (A.L.I. 2000). For an in-depth discussion of Model Rule 1.6 and The Restatement of Law Governing Lawyers rule, see *infra* Parts I.A & I.E.

10. *See infra* Part II.

11. "Publicly available information," as this phrase is used in this paper, is defined consistent with the Restatement (Third) of the Law Governing Lawyers definition of "generally known," as information that is accessible to anyone without substantial barriers, such as difficulty or expense. For a discussion of The Restatement (Third) of the Law Governing Lawyers definition, see *infra* Part I.E.

12. See *infra* Part II for a discussion of current state decisions and ethics opinions.

It should be clear whether client information that is publicly available remains confidential. Further, given that the internet and social media allow for quick and easy public dissemination of information, this paper examines whether the Model Rules have kept up with the current information-rich environment. It concludes that the Model Rules have not and that, when policy concerns are addressed, the best approach is a narrower confidentiality standard for publicly available information that considers several competing policy considerations, including consistency in the Model Rules.

This paper sets forth the information supporting this position in the following manner. Part I discusses the confidentiality rules in the Model Rules and in the Restatement, including stated policy goals behind those rules. Part II gives a detailed discussion of various state ethical rules and comments in jurisdictions with judicial and/or ethic opinions concerning the confidentiality of public information. Part III discusses policy implications. Part IV states the arguments for and against the broad confidentiality rules that the Model Rules and many states follow. It then gives two options that would create consistency in the Model Rules regarding publicly available information. It recommends the narrower confidentiality standard option, which is generally followed by states that follow the Restatement confidentiality scheme, because it better addresses valid policy concerns and, with added recommendations, should result in the consistent treatment of client information that is publicly available.

I. RULES: HISTORY & POLICY

A. ABA Model Rule of Professional Conduct 1.6

Model Rule 1.6 is a broad rule that prohibits attorneys from revealing client information.[13] In this rule, and in other Model Rules, there are stated exceptions to this prohibition.[14] Model Rule 1.6(a) states: "A lawyer shall not reveal information relating to the representation of a client . . . ."[15] It then gives three exceptions: "unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b)."[16] Section 1.6(b) gives seven exceptions to the confidentiality requirement in 1.6(a). Under any of these seven exceptions, the attorney may, but is not required to, reveal client information.[17] So, a client may give an attorney consent to reveal client information, but in Model Rule 1.6, there are eight other exceptions allowing the attorney to reveal client information without client consent. For example, Model Rule 1.6(b)(6) allows an attorney to reveal

13. MODEL RULES OF PRO. CONDUCT r. 1.6 (A.B.A. 2018).

14. *Id*. *See* MODEL RULES OF PRO. CONDUCT r. 3.3 (A.B.A. 2018) (explaining that a lawyer may be required to disclose to the tribunal information protected by Rule 1.6 if the lawyer knows she has offered false evidence).

15. MODEL RULES OF PRO. CONDUCT r. 1.6(a) (A.B.A. 2018).

16. *Id*.

17. MODEL RULES OF PRO. CONDUCT r. 1.6(b) (A.B.A. 2018).

information "to comply with other law or a court order . . . ."[18] Comment one to Model Rule 1.6 explains that the rule must be read in conjunction with other rules.[19] It states that Model Rule 1.18 governs use or disclosure of prospective client information; Model Rule 1.9 governs use or disclosure of former client information; and Model Rule 1.8(b) governs "use" of current client information.[20] Confidentiality requirements extend to all clients, whether alive or dead, whether prospective, current, or former clients.

The earlier confidentiality rule in the Model Code of Professional Responsibility was based on confidences and secrets, and some states retain this version of the rule.[21] It prohibited a lawyer from revealing a confidence or secret or using a confidence or secret to the disadvantage of a client.[22] Confidences were defined as "information protected by the attorney-client privilege under applicable law," and secrets were defined as "other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client."[23] The current Model Rule 1.6 is much broader, protecting any information learned during the course of client representation, including information that might lead to disclosure of protected information.[24] It protects information that would not be detrimental or embarrassing to the client if disclosed. The policy behind the confidentiality rules is that confidentiality is required so that the client will freely and fully disclose information to the attorney, allowing the attorney to effectively represent the client.[25]

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18. MODEL RULES OF PRO. CONDUCT r. 1.6(b)(6) (A.B.A. 2018).

19. MODEL RULES OF PRO. CONDUCT r. 1.6 cmt. 1 (A.B.A. 2018).

20. *Id*.

21. *See, e.g.*, ALASKA RULES OF PRO. CONDUCT r. 1.6 (ALASKA BAR ASS'N 2025); D.C. RULES OF PRO. CONDUCT r. 1.6 (D.C. BAR 2025); ME. RULES OF PRO. CONDUCT r. 1.6 (STATE OF ME. BD. OF OVERSEERS OF THE BAR 2025); MICH. RULES OF PRO. CONDUCT r. 1.6 (STATE BAR OF MICH. 2025); N.Y. RULES PRO. CONDUCT r. 1.6 (N.Y. STATE BAR ASS'N 2025). These states have not altered the "secret" definition to match more closely with Model Rule of Professional Conduct Rule 1.6's broad definition. Some states retain the confidence and secrets model but have modified the definition of "secret" to include all information relating to the representation, whatever its source. *See, e.g.*, CAL. RULES OF PRO. CONDUCT r. 1.6 (STATE BAR OF CAL. 2023).

22. MODEL CODE OF PRO. RESP. DR 4-101(B)(1), (2) (A.B.A. 1983). It also prevented a lawyer from using a confidence or secret for the lawyer's advantage or advantage of a third party without client consent. *Id.* at (B)(3).

23. MODEL CODE OF PRO. RESP. DR 4-101(A) (A.B.A. 1983).

24. MODEL RULES OF PRO. CONDUCT r. 1.6 cmt. 3 (A.B.A. 2018) ("The confidentiality rule, for example, applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source.").

25. Model Rule 1.6 comment two states, "The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct." MODEL RULES OF PRO. CONDUCT r. 1.6 cmt. 2 (A.B.A. 2018).

B. The Attorney-Client Privilege

The attorney-client privilege is often confused with the ethical duty of confidentiality, but the two are distinct. Generally, the attorney-client privilege is narrower than the duty of confidentiality. It only protects "[c]onfidential disclosures by a client to an attorney made in order to obtain legal assistance . . . ."[26] "The purpose of the privilege is to encourage clients to make full disclosure to their attorneys."[27] A client who believes that an attorney will be forced to divulge a client's secrets may not confide in the attorney, which then hinders the attorney's ability to properly serve the client.[28] However, the fundamental premise of the privilege is the client's expectation of confidentiality. The privilege only attaches where the client discloses information in confidence. The client waives the privilege when the client reveals information to a third party.[29] The privilege is waived because if a client divulges the information to a third party, it is likely that the client would have also divulged the information to the attorney, "even without the protection of the privilege."[30]

As to the attorney-client privilege regarding information known or available to the public, the Second Circuit succinctly explained why the client communication to the attorney would be protected but the underlying facts would not:

> In so concluding we do not suggest that an attorney-client privilege is lost by the mere fact that the information communicated is otherwise available to the public. The privilege attaches not to the information but to the communication of the information. Thus, [the holder of the privilege] may be examined as to any fact but may not, absent a waiver, be compelled to say whether or not he communicated that fact to his counsel. Likewise, his counsel may not be examined as to communications from [the holder of the privilege] and may not be examined as to facts he learned only from such confidential communications.[31]

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26. Fisher v. United States, 425 U.S. 391, 403 (1976) (citing WIGMORE, *supra* note 1, § 2292).

27. *Id.* (citing WIGMORE, *supra* note 1, §§ 2291, 2306, at 590).

28. *Id.*; Upjohn Co. v. United States, 449 U.S. 383, 389 (1981) ("The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's [sic] being fully informed by the client.").

29. *See* Blattman v. Scaramellino, 891 F.3d 1, 4 (1st Cir. 2018).

30. *In re* Pac. Pictures Corp., 679 F.3d 1121, 1126–27 (9th Cir. 2012) (quoting Comment, *Stuffing the Rabbit Back into the Hat: Limited Waiver of the Attorney-Client Privilege in an Administrative Agency Investigation*, 130 U. PA. L. REV. 1198, 1207 (1982)).

31. United States v. Cunningham, 672 F.2d 1064, 1073 n.8 (2d Cir. 1982). *See also Upjohn*, 449 U.S. at 389.

Thus, where the attorney learned the information only from the client in a circumstance where the privilege would attach, the attorney cannot reveal the information that the client communicated, even if it is publicly available.[32]

The information protected by the attorney-client privilege is a subset of the information protected by a lawyer's duty of confidentiality. This idea is easier to understand under the Model Code's "confidences and secrets" formulation of the confidentiality rule.[33] The Model Code formulation states that the duty of confidentiality applies to both confidences and secrets. Confidences are defined as information protected by the attorney-client privilege, while secrets are defined as other information learned during the representation that might be embarrassing or detrimental to the client.[34] Thus, the information protected by the attorney-client privilege is one part of the information protected by the duty of confidentiality. The attorney-client privilege is an evidentiary rule that applies when an attorney is asked to disclose confidential client information.[35] The duty of confidentiality is not so limited and always governs as to all clients unless an exception applies.[36]

C. ABA Model Rule of Professional Conduct 1.8(b)

Under the Model Rules, there is a difference between disclosure of confidential client information and use of that information. Unless an exception applies, Model Rule 1.6 prevents disclosure of client information.[37] Model Rule 1.8(b) concerns "use" and states that "a lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules."[38] Implicit in Model Rule 1.8(b), as clarified by comment five to the rule, is that a lawyer is allowed to "use" client information if it will not disadvantage the client.[39] The example given states that "a lawyer who learns a government agency's interpretation of trade legislation during the representation of one client may properly use that information to benefit other clients."[40]

Model Rule 1.8(b) applies only to current clients.[41] So as to current clients, Model Rule 1.6(a) prevents disclosure of current client information unless the

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32. *In re* WB Bridge Hotel LLC v. 11 Apple LLC, 656 B.R. 733, 754 (Bankr. S.D.N.Y. 2024) (attorney-client privilege not nullified because information is in the public record).

33. *See supra* text accompanying notes 22–23.

34. *Id.*

35. *See generally* Swidler & Berlin v. United States, 524 U.S. 399 (1998) (majority and dissent engaged in lengthy discussion regarding the attorney-client privilege).

36. *See generally* MODEL RULES OF PRO. CONDUCT r. 1.6, 1.8(b), 1.9, 1.18(b) (A.B.A. 2018).

37. MODEL RULES OF PRO. CONDUCT r. 1.6 (A.B.A. 2018).

38. MODEL RULES OF PRO. CONDUCT r. 1.8(b) (A.B.A. 2018).

39. MODEL RULES OF PRO. CONDUCT r. 1.8 cmt. 5 (A.B.A. 2018) ("The Rule does not prohibit uses that do not disadvantage the client.").

40. *Id.*

41. The title of Model Rule 1.8 is "Conflict of Interest: Current Clients: Specific Rules."

client consents or an exception applies,[42] and Model Rule 1.8(b) prevents use of current client information to the disadvantage of a current client without client consent.[43] Thus, the lawyer does not necessarily keep all current client information cloistered. Current client information can be used, if it is not disadvantageous to the client, and it can be revealed if it falls into a Model Rule 1.6 or other exception. But relevant to this discussion, there is no exception to Model Rule 1.6 that allows the attorney to reveal client information if it is "publicly available."[44] Model Rule 1.8(b) has been interpreted similarly as preventing a lawyer from using information that is publicly available if it would be detrimental to the client.[45]

D. ABA Model Rules of Professional Conduct 1.9 and 1.18(b)

Prospective and former client information is generally afforded less protection than current client information under the Model Rules. Model Rule 1.9(c), concerning former clients, has a "generally known" exception. Rule 1.9(c) states:

> A lawyer who has formerly represented a client in a matter or whose present or former firm 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 as these Rules would permit or require with respect to a client, or when the information has become generally known; or (2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.[46]

The reveal/use dichotomy is evident, and addressing 1.9(c)(2) first, an attorney may not *reveal* former client information unless an exception applies, just like current client information.[47] But different from Model Rule 1.8(b), an attorney

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42. MODEL RULES OF PRO. CONDUCT r. 1.6(a) (A.B.A. 2018).

43. MODEL RULES OF PRO. CONDUCT r. 1.8(b) (A.B.A. 2018).

44. A.B.A. Comm. on Ethics & Pro. Resp., Formal Op. 480 (2018) ("Significantly, information about a client's representation contained in a court's order, for example, although contained in a public document or record, is *not* exempt from the lawyer's duty of confidentiality under Model Rule 1.6. The duty of confidentiality extends generally to information related to a representation whatever its source and without regard to the fact that others may be aware of or have access to such knowledge.").

45. A.B.A. Comm. on Ethics & Pro. Resp., Formal Op. 417, at n.13 (2000) ("The Committee notes that a more stringent rule applies against the use of information during a current representation. The rules do not permit the use of this information to the disadvantage of the client, even if it has become generally known.").

46. MODEL RULES OF PRO. CONDUCT r. 1.9(c) (A.B.A. 2018).

47. MODEL RULES OF PRO. CONDUCT r. 1.9(c)(2) (A.B.A. 2018); *see also* A.B.A. Comm. on Ethics & Pro. Resp., Formal Op. 479 (2017). Comment eight to Model Rule 1.9 confuses the matter by stating that "[p]aragraph (c) provides that information acquired by the lawyer in the

may *use* former client information if it is "generally known," even if it is disadvantageous to the former client.[48]

Model Rule 1.18(b) concerning prospective clients is similar. It states that when a person consults with a lawyer "about the possibility of forming a client-lawyer relationship," [49] "a lawyer who has learned information from a prospective client shall not use or reveal that information, except as Rule 1.9 would permit with respect to information of a former client."[50] This prohibition applies even if no client-lawyer relationship is formed.[51] Thus, whether client information is "generally known" is relevant to an analysis of whether an attorney can use client information in both the prospective and former client analysis.

"Generally known" is not defined in Model Rule 1.9 or its comments, or in Model Rule 1.0 with the other defined terms. The ABA defined the term in a 2017 ethics opinion as follows:

> [I]nformation is generally known within the meaning of Model Rule 1.9(c)(1) if (a) it is widely recognized by members of the public in the relevant geographic area; or (b) it is widely recognized in the former client's industry, profession, or trade. Information may become widely recognized and thus generally known as a result of publicity through traditional media sources, such as newspapers, magazines, radio, or television; through publication on internet web sites; or through social media.[52]

The opinion clarifies that information that the public can find is not information that is generally known. It stated:

> Unless information has become widely recognized by the public (for example by having achieved public notoriety), or within the former client's industry, profession, or trade, the fact that the information may have been discussed in open court, or may be available in court records, in public libraries, or in other public repositories does not, standing alone, mean that the information is generally known for Model Rule 1.9(c)(1) purposes.[53]

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course of representing a client may not subsequently be used or revealed by the lawyer to the disadvantage of the client." MODEL RULES OF PRO. CONDUCT r. 1.9 cmt. 8 (A.B.A. 2018). Comment eight implies that the lawyer could reveal information if it was not disadvantageous to the client. However, Model Rule 1.9 only has the limitation regarding disadvantage to the client as to use of information. It does not have that limitation as to disclosure of client information.

48. MODEL RULES OF PRO. CONDUCT r. 1.9(c)(1) (A.B.A. 2018).

49. MODEL RULES OF PRO. CONDUCT r. 1.18(a) (A.B.A. 2018).

50. MODEL RULES OF PRO. CONDUCT r. 1.18(b) (A.B.A. 2018).

51. *Id.*

52. A.B.A. Comm. on Ethics & Pro. Resp., Formal Op. 479 (2017).

53. *Id.*

It further stated, "[T]he phrase 'generally known' means much more than publicly available or accessible. It means that the information has already received widespread publicity."[54]

Thus, as to a former and prospective client, an attorney cannot use information that is publicly available or accessible unless the information has gained public or industry-wide notoriety, or it is not disadvantageous to the client. There is no definition for this notoriety standard, and it seems contrary to a common understanding that if a layperson could find the information it would be "generally known."[55]

A different definition is used in a Model Rule 1.9(a) conflicts analysis involving a former client and confidential information. A lawyer is not able to represent a new client in a matter that is "the same" or "substantially related" to the former client matter when the new client's interests are materially adverse to the former client.[56] According to Model Rule 1.9 comment three, matters are substantially related if there "is a substantial risk that confidential factual information as would normally have been obtained in the prior representation would materially advance the [new] client's position in the subsequent matter."[57]

Confidential factual information is not defined, but the comment states that "[i]nformation that has been disclosed to the public or to other parties adverse to the former client ordinarily will not be disqualifying."[58] As to organizational clients, the comment states that "general knowledge of the client's policies and practices ordinarily will not preclude a subsequent representation; on the other hand, knowledge of specific facts gained in a prior representation that are relevant to the matter in question ordinarily will preclude such a representation."[59] Thus, in a Model Rule 1.9(a) conflicts analysis, as opposed to an analysis involving use of former client information in Model Rule 1.9(c), public information and general organizational information are not confidential types of information.

Perhaps this dichotomy can be explained by the policy behind each subsection of Model Rule 1.9. The stricter public notoriety standard in Model Rule 1.9(c) prevents a lawyer from using former client information. The

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54. *Id.* (quoting ROY D. SIMON & NICOLE HYLAND, SIMON'S NEW YORK RULES OF PROFESSIONAL CONDUCT ANNOTATED 685 (2017) (discussing former comment 4A to New York Rule 1.6)).

55. *See generally*, Suzanne Lever, *Myth Busters: What Is Generally Known About the Lawyer's Duty of Confidentiality?*, 26 N.C. STATE BAR J., no. 4, Winter 2021, at 38 (discussing popular opinion that publicly available information is generally known). As a side note, the ABA Model Rules on conflicts have several terms of art, such as "directly adverse," "materially adverse," and "substantially related," each with its own unique meaning to which "generally known" is now added, making conflicts analysis even more challenging.

56. MODEL RULES OF PRO. CONDUCT r. 1.9(a) (A.B.A. 2018).

57. MODEL RULES OF PRO. CONDUCT r. 1.9(a) cmt. 3 (A.B.A. 2018).

58. *Id.*

59. *Id.*

lawyer's use of former client information may only serve the lawyer's interests and not necessarily serve any public interest, although there are several scenarios in which the lawyer's use could serve the public interest.[60] The confidential information standard in Model Rule 1.9(a), although it benefits the lawyer's employment interest, also benefits the public's interest in allowing people to select and retain their attorney of choice while protecting a former client's information that is nonpublic. Neither the rule nor the comments, nor ABA Opinion 17-479 that created the disparity, discuss the policies behind the rule that support this inconsistency.[61] All Model Rule 1.9 states is that "[t]he provisions of this Rule are for the protection of former clients . . . ."[62]

Although stated only in the context of lawyers who end a relationship with a firm, Model Rule 1.9 comment four discusses competing policy concerns:

> First, the client previously represented by the former firm must be reasonably assured that the principle of loyalty to the client is not compromised. Second, the rule should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel. Third, the rule should not unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association . . . . If the concept of imputation were applied with unqualified rigor, the result would be radical curtailment of the opportunity of lawyers to move from one practice setting to another and of the opportunity of clients to change counsel.[63]

Thus, in this context, Model Rule 1.9 is not to be applied with "unqualified rigor" because that would inhibit lawyers' ability to change jobs and limit clients' reasonable choice of counsel. If this policy reasoning is applied to Model Rule 1.9 as a whole, it would further explain the narrower confidentiality standard regarding publicly available information in a conflicts analysis where access to counsel and lawyers' opportunities to move firms are at issue.

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60. For example, where a lawyer is using former client information to rectify a wrong. *See* RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 60 cmt. b (A.L.I. 2000) (discussing times when secrecy is disadvantageous to society where a person's plight is more sympathetic than the client's whose secrecy is being protected or where a great public harm could be avoided or a great public good accomplished). Further, lawyer education and the public's interest in information about the legal system are other beneficial uses of former client information. Michael D. Cicchini, *On the Absurdity of Model Rule 1.9*, 40 VT. L. REV. 69, 100–02 (2015).

61. ABA Formal Opinion 479 does not mention Model Rule 1.9 comment three. *See* A.B.A. Comm. on Ethics & Pro. Resp., Formal Op. 479 (2017).

62. MODEL RULES OF PRO. CONDUCT r. 1.9 cmt. 9 (A.B.A. 2018).

63. MODEL RULES OF PRO. CONDUCT r. 1.9 cmt. 4 (A.B.A. 2018).

E. The Restatement of the Law Governing Lawyers, Sections 59 and 60

The "generally known" requirement in Model Rule 1.9 is different from the definition in the Restatement (Third) of the Law Governing Lawyers. Initially, the Restatement definition does not require notoriety. The relevant Restatement provision states that confidential information "includes information that becomes known by others, so long as the information does not become generally known."[64] It defines "generally known" as follows:

> Whether information is generally known depends on all circumstances relevant in obtaining the information. Information contained in books or records in public libraries, public-record depositaries 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. Information 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.[65]

Under this definition, information that a member of the public could find without "special knowledge or substantial difficulty or expense" is information that is generally known. Further, unlike the Model Rules that use the term "generally known" only for the use of former or prospective client information, the Restatement applies the term "generally known" to all confidential client information.[66] With this definition, the Restatement prevents a lawyer from using or disclosing confidential client information "if there is a reasonable prospect" that use or disclosure "will adversely affect" a client's material interest, and the lawyer must take reasonable steps to prevent use or disclosure by the lawyer's agents.[67] Thus, the Restatement definition is narrower. First, the client information must be confidential. If the client information is easily accessible to the public, it is not confidential and can be used or disclosed, even if such use or disclosure is adverse to a material client interest.[68] Even if the information is confidential, it can be used or disclosed if that use or disclosure would not adversely affect a client's material interest.[69] Model Rule 1.6 prevents disclosure of all client information even if it is publicly available and even if the

64. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 59 cmt. b (A.L.I. 2000).

65. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 59 cmt. d (A.L.I. 2000).

66. The Restatement essentially applies the ABA position on confidentiality for former and prospective clients to all clients. Thomas Spahn, *Lawyers' Duty of Confidentiality, Part V: Obligations to Former Clients*, BLOOMBERG L. (Aug. 27, 2014), https://news.bloomberglaw.com/legal-ethics/lawyers-duty-of-confidentiality-part-v-obligations-to-former-clients [https://perma.cc/8K55-VXUG].

67. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 60(1) (A.L.I. 2000).

68. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 59 cmt. d (A.L.I. 2000).

69. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 60(1) (A.L.I. 2000).

disclosure would not disadvantage the client, unless it falls within a stated exception.[70] However, similar to the Restatement, Model Rule 1.8(b) prevents use of publicly available information that is adverse to the client.[71] Also, similar to the Restatement, if the client requests that information not be used or disclosed, then under the Model Rules the lawyer must keep that information confidential.[72]

The policy behind the Restatement's rule is a balancing of the attorney's free speech interests along with the costs of the secrecy to society when a person whose "personal plight and character are much more sympathetic than those of the lawyer's client or who could accomplish great public good or avoid great public detriment if the information were disclosed" versus the need for lawyers to have client information to accomplish the clients' lawful objectives.[73] This recognizes that "[t]here is no important social interest in permitting lawyers to make unconsented use or revelation of confidential client information for self-enrichment in personal transactions."[74]

Similarly, the asserted policy reason behind the broad confidentiality rules in the Model Rules is that an attorney must keep client information confidential so that a client will trust the lawyer and fully disclose even detrimental information because such disclosure is necessary for effective legal representation.[75] The Restatement lists the same policy consideration with a narrower confidentiality rule. Thus, the policy consideration regarding the necessity of client disclosure of information to an attorney under the cloak of confidentiality does not necessarily mandate the broad confidentiality rules in the Model Rules. The question is whether this policy concern touted as requiring the broad confidentiality rules in Model Rules 1.6, 1.9, and 1.18(b) remains valid when the client information is easily accessible, when the information serves other valid purposes, and/or when other competing policy purposes outweigh the prohibition. The Restatement's position is that it does not.

F. ABA Model Rule of Professional Conduct 3.6

Other Model Rules also provide exceptions to the disclosure and use prohibitions, and these rules have policy justifications of their own. As mentioned in the Introduction, Model Rule 3.6, concerning trial publicity, allows for a lawyer to disclose information in the public record. Initially, Model Rule 3.6(a) states that "[a] lawyer who is participating or has participated in the

70. MODEL RULES OF PRO. CONDUCT r. 1.6 (A.B.A. 2018).

71. MODEL RULES OF PRO. CONDUCT r. 1.8(b) (A.B.A. 2018).

72. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 59 cmt. d, 60(1)(a) (A.L.I. 2000). Model Rule 1.6 discusses this point in the inverse. Unless an exception applies, the lawyer must keep information confidential unless the client gives informed consent allowing the lawyer to reveal it. MODEL RULES OF PRO. CONDUCT r. 1.6(a) (A.B.A. 2018).

73. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 60 cmt. b (A.L.I. 2000).

74. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 60 cmt. j (A.L.I. 2000).

75. MODEL RULES OF PRO. CONDUCT r. 1.6 cmt. 2 (A.B.A. 2018).

investigation or litigation of a matter shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter."[76] Model Rule 3.6 section (b) contains exceptions to section (a). Relevant to this paper, Model Rule 3.6(b)(2) states, "Notwithstanding paragraph (a), a lawyer may state: . . . information contained in a public record . . . ."[77]

Model Rule 3.6's competing policy concerns are protecting the right to a fair trial for the litigants while safeguarding the right to free speech and having transparency regarding the judicial process.[78] Comment one to Model Rule 3.6 explains these policy concerns:

> It is difficult to strike a balance between protecting the right to a fair trial and safeguarding the right of free expression. Preserving the right to a fair trial necessarily entails some curtailment of the information that may be disseminated about a party prior to trial, particularly where trial by jury is involved. If there were no such limits, the result would be the practical nullification of the protective effect of the rules of forensic decorum and the exclusionary rules of evidence. On the other hand, there are vital social interests served by the free dissemination of information about events having legal consequences and about legal proceedings themselves. The public has a right to know about threats to its safety and measures aimed at securing its security. It also has a legitimate interest in the conduct of judicial proceedings, particularly in matters of general public concern. Furthermore, the subject matter of legal proceedings is often of direct significance in debate and deliberation over questions of public policy.[79]

Attorney free speech and Model Rule 3.6 have a long history currently represented by the United States Supreme Court decision in *Gentile v. Nevada State Bar*.[80] *Gentile* concerned the discipline of a criminal defense attorney, under Nevada Supreme Court Rule 177, for a prepared statement that he made to the press.[81] He stated generally that the evidence showed his client's

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76. MODEL RULES OF PRO. CONDUCT r. 3.6(a) (A.B.A. 2018).

77. MODEL RULES OF PRO. CONDUCT r. 3.6(b)(2) (A.B.A. 2018). Model Rule 3.6 comment four explains that section (b) statements are not prohibited by section (a) because they "would not ordinarily be considered to present a substantial likelihood of material prejudice . . . ." MODEL RULES OF PRO. CONDUCT r. 3.6 cmt. 4 (A.B.A. 2018).

78. MODEL RULES OF PRO. CONDUCT r. 3.6 cmt. 1 (A.B.A. 2018).

79. *Id.*

80. 501 U.S. 1030 (1991).

81. *Id.* at 1033. Nevada Supreme Court Rule 177, at the time, "prohibit[ed] an attorney from making 'an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding.'"

innocence, that the likely thief was a police detective, and that witnesses, who were drug dealers or convicted criminals, had only accused the defendant in response to police pressure.[82]

The case was characterized as concerning the punishment of "classic political speech" aimed at "public officials and their conduct in office."[83] The divided decision started by discussing the important policy interests at issue, repeating a statement that the Court had made in 1966 that "[t]he press . . . guards against the miscarriage of justice by subjecting the police, prosecutors, and judicial processes to extensive public scrutiny and criticism."[84] It further stated that "[t]here is no question that speech critical of the exercise of the State's power lies at the very center of the First Amendment."[85]

The Court also explained in a discussion regarding balancing First Amendment rights against the State's interest in regulating an activity that "[f]ew, if any, interests under the Constitution are more fundamental than the right to a fair trial by 'impartial' jurors, and an outcome affected by extrajudicial statements would violate that fundamental right."[86]

So, despite the First Amendment, attorney speech can be regulated in the courtroom during a proceeding. An often-quoted statement from the Court in *Seattle Times Co. v. Rhinehart*[87] expresses that "[a]lthough litigants do not 'surrender their First Amendment rights at the courthouse door,' . . . on several occasions [we have] approved restriction on the communications of trial participants where necessary to ensure a fair trial for a criminal defendant."[88]

The *Gentile* court stated that it was not determining the constitutionality of ABA Model Rule of Professional Conduct 3.6 because its "substantial likelihood of material prejudice standard is not necessarily flawed."[89] Instead, the Court determined that it was the Southern Nevada Disciplinary Board of the State Bar's interpretation of the Nevada Rule 177 that was unconstitutional because it violated the First Amendment.[90]

Based on the record, the Court determined that there was no support for the Nevada court's conclusion that the speech presented a substantial likelihood of

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82. *Id.* at 1045.

83. *Id.* at 1034 (Kennedy, J.) (plurality opinion). There were two majorities in this decision. Justice Kennedy's opinion as to Parts III and VI was joined by Justices Marshall, Blackmun, Stevens, and O'Connor, and his opinion as to Parts I, II, IV and V was joined by Marshall, Blackmun, and Stevens. Justice Rehnquist's opinion in Parts I and II was joined by White, O'Connor, Scalia, and Souter, and his dissenting opinion as to Part III was joined by White, Scalia, and Souter. O'Connor filed a concurring opinion.

84. *Id.* at 1035 (Kennedy, J.) (plurality opinion) (quoting Sheppard v. Maxwell, 384 U.S. 333, 350 (1966)).

85. *Id.* at 1034 (Kennedy, J.) (plurality opinion).

86. *Id*. at 1075 (Rehnquist, J.) (plurality opinion).

87. 467 U.S. 20, 32–33 (1984).

88. *Id*. at 32 n.18 (quoting *In re* Halkin, 598 F.2d 176, 186 (D.C. Cir. 1979)).

89. *Gentile*, 501 U.S. at 1036 (Kennedy, J.) (plurality opinion).

90. *Id.* at 1033 (Kennedy, J.) (plurality opinion).

material prejudice,[91] in part, because the attorney's statements were made six months before the trial and because they were in response to a barrage of newspaper articles[92] that the attorney believed would prejudice the jury pool and were harmful to his client's health. Relevant to this paper, the Court determined that "[m]uch of the information," the lawyer stated, "had been published in one form or another, obviating any potential for prejudice."[93]

Model Rule 3.6 is an attempt to balance competing rights—the attorney's right to free speech and the defendant's right to a fair trial. The safe harbor provision in Model Rule 3.6(b) represents the Model Rule's current balancing of those interests. Under Model Rule 3.6(b), information that is in the public record is not confidential.[94] Thus, as to information in the public record, Model Rule 3.6(b) is an exception to Model Rule 1.6 based, in part, on the idea that repeating information in the public record does not create a substantial likelihood of material prejudice.

As a result of the *Gentile* opinion, Model Rule 3.6 was amended to include a retaliation provision, which states, "Notwithstanding paragraph (a), a lawyer may make a statement that a reasonable lawyer would believe is required to protect a client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client."[95] Such a statement is required to be limited to only the information necessary to answer the publicity.[96] The rule allows an attorney to breach confidentiality to respond to negative publicity.

Thus, unlike the confidentiality rules in the Model Rules, Model Rule 3.6(b) allows disclosure of information in the public record, referencing other policy concerns that compete with the premise that client information must be broadly protected to allow full discourse between clients and lawyers.

G. ABA Model Rule of Professional Conduct 3.8(f)

Relatedly, Model Rule of Professional Conduct 3.8(f) states that:

> The prosecutor in a criminal case shall . . . (f) except for statements that are necessary to inform the public of the nature and extent of the prosecutor's action and that serve a legitimate law enforcement purpose, refrain from making extrajudicial comments that have a

91. *Id.* at 1039 (Kennedy, J.) (plurality opinion).

92. *Id.* at 1039–41, 1044 (Kennedy, J.) (plurality opinion). The attorney stated he was aware of at least seventeen articles in major local newspapers and numerous local television news stories. *Id.* at 1042.

93. *Id.* at 1046 (Kennedy, J.) (plurality opinion) (quoting ANN. MODEL RULES OF PRO. CONDUCT 243 (A.B.A. 1984), which states that the "extent to which information already circulated significant factor in determining likelihood of prejudice.").

94. MODEL RULES OF PRO. CONDUCT r. 3.6(b)(2) (A.B.A. 2018).

95. MODEL RULES OF PRO. CONDUCT r. 3.6(c) (A.B.A. 2018).

96. *Id.*

> substantial likelihood of heightening public condemnation of the accused . . . .[97]

Model Rule 3.8 comment five explains this rule's relationship to Model Rule 3.6. It states:

> Paragraph (f) supplements Rule 3.6, which prohibits extrajudicial statements that have a substantial likelihood of prejudicing an adjudicatory proceeding. In the context of a criminal prosecution, a prosecutor's extrajudicial statement can create the additional problem of increasing public condemnation of the accused . . . . Nothing in this Comment is intended to restrict the statements which a prosecutor may make which comply with Rule 3.6(b) or 3.6(c).[98]

The comment states that Model Rule 3.6's safe harbors apply to prosecutors, and thus prosecutors can make statements regarding information in the public record. There is no definition of "information in the public record" in the Model Rules.

H. ABA Model Rule of Professional Conduct 5.6

Model Rule 5.6(b) relatedly prohibits "an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy."[99] This rule was the subject of ABA Formal Opinion 00-417, which concluded that a settlement agreement that prohibited an attorney from *using* information learned during the current controversy in a subsequent controversy against the same defendant, restricted the lawyer's right to practice in violation of Model Rule 5.6(b).[100] The reasoning is that when a lawyer cannot use information that the lawyer would otherwise be able to use under the rules, then the lawyer cannot adequately represent a client.[101] A rationale behind Model Rule 5.6 is that "permitting such agreements restricts the access of the public to lawyers who, by virtue of their background and experience, might be the very best available talent to represent these individuals."[102] Agreements that prohibit an attorney from *disclosing* information, however, are allowed.[103]

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97. MODEL RULES OF PRO. CONDUCT r. 3.8(f) (A.B.A. 2018).

98. MODEL RULES OF PRO. CONDUCT r. 3.8(e) cmt. 5 (A.B.A. 2018).

99. MODEL RULES OF PRO. CONDUCT r. 5.6(b) (A.B.A. 2018).

100. A.B.A. Comm. on Ethics & Pro. Resp., Formal Op. 417 (2000).

101. *Id.*

102. *Id.* (quoting A.B.A. Comm. on Ethics & Pro. Resp., Formal Op. 371 (1993)). *See also* D.C. Bar Legal Ethics Comm., Formal Op. 335 (2006) (explaining the balancing of the policy issues, states, "This is a policy choice that the value to future clients of the ability to choose the best lawyer to represent them exceeds the harm to the current client of not being able to trade for consideration her lawyer's ability to sue the settling defendant in the future.").

103. A.B.A. Comm. on Ethics & Pro. Resp., Formal Op. 417 (2000).

Disclosure can be prohibited, but use cannot be prohibited where it would impede an attorney's right to practice, limit clients' choice of attorney, and where the attorney would otherwise be able to use the information under the Model Rules.[104]

Specific to public information, several state ethics opinions interpreting Rule 5.6 determined that where client information has become public or is in the public record, an agreement restricting a lawyer's use or disclosure of that information violates Rule 5.6.[105] These opinions did not require public notoriety as a condition of use or disclosure.[106] As explained in a Chicago ethics opinion, drawing the line to prohibit a settlement agreement that prevents use or disclosure of public information "strikes an appropriate balance between the genuine interests of parties who wish to keep truly confidential information confidential and the important policy of preserving the public's access to, and ability to identify, lawyers whose background and experience may make them the best available persons to represent future litigants in similar cases."[107]

Thus, several model rules are implicated when discussing confidentiality and publicly available information. These rules contained different standards for current client information versus prospective and former client information, and a distinction between disclosure versus use of confidential client information. However, these distinctions do not explain why a prosecutor can reveal information in the public record about a defendant under Model Rule 3.8 and public information cannot be restricted under Model Rule 5.6, but that same information is confidential under Model Rules 1.6 and 1.9. Policy reasons can help explain these differences, but not explicitly or convincingly, as will be discussed in Part III. Further, no policy reasoning has been officially given for why publicly available information is treated differently in Model Rule 1.9(a) versus Model Rule 1.9(c). The next section demonstrates that courts and disciplinary committees balance these policy concerns differently resulting in

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104. *Id.*

105. D.C. Bar Legal Ethics Comm., Formal Op. 335 (2006) ("A settlement agreement may provide that the terms of the settlement or other non-public information may be kept confidential, but it may not require that public information be confidential."); Md. State Bar Ass'n Comm. on Ethics, Formal Op. 07 (2016) ("Maryland Rule 5.6 prohibits a lawyer from agreeing (or asking another lawyer to agree) never to use or disclose public information regarding a matter."); N.Y. State Bar Ass'n Comm. on Pro. Ethics, Formal Op. 730 (2000) (settlement agreement violated ethics rule where it prohibited the lawyer from disclosing public information); State Bar Ass'n of N.D. Ethics Comm., Formal Op. 05 (1997) ("Under Rule 5.6(b) an attorney may not agree—even at a client's request: . . . [t]o keep confidential information that is not confidential client information under Rule 1.6, for example, information that is a public record . . . ."); Chi. Bar Ass'n Comm. on Pro. Resp., Informal Op. 2012-10 (2013) ("[E]thics authorities have found that a settlement agreement may not prohibit a party's lawyer from disclosing information that is publicly available . . . .").

106. The case at issue in D.C. Ethics Op. 335 had received "substantial media attention." However, the committee's reasoning was not based on the public notoriety but instead on the fact that information restricted in the agreement was in the public record once the complaint was filed. D.C. Bar Legal Ethics Comm., Formal Op. 335 (2006).

107. Chi. Bar Ass'n Comm. on Pro. Resp., Informal Op. 2012-10 (2013).

states taking different positions on when publicly available information remains confidential.[108]

II. COURT, DISCIPLINARY, AND ETHICS DECISIONS

This section first discusses states that follow the Restatement rule or an equivalent narrow rule that exempts publicly available information from the confidentiality rules. It follows with a discussion of the state courts that have endorsed the narrow rule, but the state ethics opinions follow the broad notoriety standard. Next, it discusses states that have moved to a broad confidentiality rule or have always used the broad rule. Opinions concerning the public record exception in Rule 3.6 follow, and this section concludes by discussing the use of confidential information.[109] This section demonstrates that although it might be possible to predict how some states will treat the confidentiality of publicly available information, for other states that is not possible, and there is a lack of consistency among states.

A. States Where Publicly Available Information May Not Be Confidential

1. Narrow Rule 1.6: Illinois, Louisiana, Missouri, New Jersey, & Washington.—In a 2010 disciplinary case, where an attorney called a client's wife and told the wife of the client's affair after a third party mentioned the affair in open court, the Illinois Review Board interpreted both Illinois Rule 1.6 and 1.9.[110] As to Rule 1.6, at the time of this decision, Illinois's confidentiality rule followed the confidence and secret format.[111] Under this rule, the Review Board determined that the client's affair was not a secret because the affair was mentioned by a third party in open court.[112]

As to public records, in 1996, the Louisiana Supreme Court stated that information in the public record is not confidential under Rule 1.6.[113] In this case, based on the client's request, the attorney did not inform the client's nephew, who was purchasing property from the client (his aunt), that there was a mortgage on the property. The court determined that "[b]ecause the mortgage was filed in the public record, the disclosure of its existence could not be a

108. *See also* People v. Muhr, 370 P.3d 677, 695 (Colo. 2016) ("[A]uthorities differ as to whether a lawyer is permitted to reveal information generally known to all members of the public . . . .").

109. Interpretations of Rule 5.6 are consistent regarding publicly available information, so they were only discussed in Part I. The rules discussed in Part II have differing interpretations regarding publicly available information.

110. *In re* Murawski, No. 6243546, 2010 WL 2007961, at *16–19 (Ill. Att'y Registration & Disciplinary Comm'n May 12, 2010).

111. *Id.* at *16–17.

112. *Id.* at *17. Further, the client's testimony that the revelation was detrimental to his marriage was not credible. *Id.* at *16.

113. *In re* Sellers, 669 So.2d 1204 (La. 1996).

confidential communication, and was not prohibited by Rule 1.6."[114] Both Missouri and Washington courts have determined that the attorneys had not violated Rule 1.6 when revealing information that was already in the public record.[115]

In 1982, the Supreme Court of New Jersey determined that the New Jersey disciplinary committee had not provided by clear and convincing evidence that a former prosecutor violated New Jersey Disciplinary Rule 4–101(B)(1), New Jersey's precursor to Rule 1.6, prohibiting an attorney from "[r]eveal[ing] a confidence or secret of his client."[116] The information that the attorney mentioned—that the defendant had agreed but then refused a lie detector test and had turned down a plea bargain—had already been publicly revealed.[117] New Jersey subsequently adopted the Model Rules,[118] but different from Model Rule 1.6, New Jersey's Rule 1.6 has an exception that allows a lawyer to reveal information that is "generally known."[119] The official comment from September 1, 2018, states that the rules follow the Restatement (Third) of the Law Governing Lawyers on confidential information,[120] which means generally that publicly available information that is not difficult to obtain is generally known and not confidential.[121]

In Michigan and New York, courts recognize an exception for publicly available information, but ethics opinions do not, creating uncertainty as to whether publicly available information remains confidential under Rule 1.6 in those states.[122] The situation is also uncertain in Alabama where the court stated

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114. *Id.* at 1206. The attorney was charged with violating Louisiana Rule of Professional Conduct 4.1(b) for "failing to disclose a material fact to a third person when disclosure was necessary to avoid assisting in a criminal or fraudulent act." *Id.* at 1205.

115. *In re* Lim, 210 S.W.3d 199, 201 (Mo. 2007) (en banc) (client outstanding debt publicly available due to collection action); *In re* Schafer, 66 P.3d 1036, 1042 (Wash. 2003) (en banc) (information was in deeds, probate file, and gambling commission records, and therefore all publicly available).

116. *In re* Rachmiel, 449 A.2d 505, 513 (N.J. 1982) (quoting New Jersey Disciplinary Rule 4-101(B)(1)).

117. *Id.*

118. *Alphabetical List of Jurisdictions Adopting Model Rules*, A.B.A. (Mar. 28, 2018), https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules.

119. N.J. RULES OF PRO. CONDUCT r. 1.6(a)(2) (N.J. STATE BAR ASS'N 2020) ("(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for (1) disclosures that are impliedly authorized in order to carry out the representation, (2) disclosures of information that is generally known, and (3) as stated in paragraphs (b), (c), and (d).").

120. N.J. RULES OF PRO. CONDUCT r. 1.6, official cmt. (N.J. STATE BAR ASS'N Sep. 1, 2018).

121. *See* N.J. Advisory Comm. on Pro. Ethics, Op. 738 (2020). This ethics opinion concerned responding to negative online reviews and reiterated that the official comment to New Jersey Rule 1.6 adopting the Restatement (Third) of the Law Governing Lawyers definition of confidentiality governs. *Id.* at n.1.

122. *See infra* Parts II.B.1 and 2.

a broad rule but applied it narrowly in a situation where public information was one factor.[123] These states' decisions are discussed in Part B.

2. Narrow Rule 1.9: Florida, Hawaii, Minnesota, North Carolina, Oregon, Pennsylvania, Tennessee, Utah, & West Virginia.—Some states have determined that publicly available information regarding a former client can be used or disclosed under Rule 1.9. For example, North Carolina's Rule 1.9 excepts public information in both Rule 1.9(c)(1) regarding use and its Rule 1.9(c)(2) regarding disclosure if the information is not embarrassing or detrimental if disclosed.[124] North Carolina's Rule 1.9 comment 8 clarifies by stating:

> To reveal is to make public something that was secret or hidden. A lawyer cannot reveal that which has already been revealed via public disclosure. Accordingly, the prohibition on a lawyer revealing information pursuant to Rule 1.9(c)(2) does not extend to information that has been made public because public information by its nature is no longer capable of being revealed.[125]

Tennessee Rule 1.9 comment 8a also adopts the Restatement definition of generally known stating that publicly available information that does not require special knowledge or substantial difficulty or expense is not confidential.[126] Referencing this comment, a 2014 Tennessee ethics opinion determined that a will or other testamentary documents in the public record are generally known and can be revealed by the lawyer.[127]

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123. *See infra* Part II.B.3.

124. N.C. RULES OF PRO. CONDUCT r. 1.9(c)(1), (2) (N.C. STATE BAR 2022). Both subsections exempt information contained in the public record, disclosed at a public hearing, or information otherwise publicly disseminated. Rule 1.9(c)(2), although exempting the information, only allows disclosure if the information is not embarrassing or detrimental to the client if disclosed.

125. N.C. RULES OF PRO. CONDUCT r. 1.9 cmt. 8 (N.C. STATE BAR 2022) (citation omitted).

126. TENN. RULES OF PRO. CONDUCT r. 1.9 cmt. 8a (TENN. BAR ASS'N 2023).

127. Tenn. Bd. Pro. Resp., Formal Op. 2014-F-158 (2014) (citing TENN. RULES OF PRO. CONDUCT r. 1.9 cmt. 8a).

Courts in Florida, [128] Hawaii, [129] and Minnesota [130] addressing disqualification in criminal cases have determined, without much analysis, that under Rule 1.9, concerning whether an attorney could "use" information from a prior representation, that criminal charges are a matter of the public record and consequently, are "generally known" and not disqualifying. [131] In another disqualification case in a criminal matter, where the defense attorney had previously represented a potential government witness, and concerning whether the matters were substantially related under Rule 1.9, a Utah district court ruled that disqualification was not necessary because the matters were not substantially related, and the witness's prior drug activity was a matter of public record.[132] The court did not discuss whether the information was "generally known."[133]

The West Virginia Supreme Court stated its policy rationale when addressing West Virginia's Rule 1.9 in a criminal context. In a 2002 West Virginia Rule 1.9 case, the court overturned the disqualification order of the defense counsel where a prospective client (co-defendant) hired a different attorney, but his wife had disclosed information to the defense counsel's paralegal.[134] The West Virginia Supreme Court determined that the disclosed

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128. Freund v. Butterworth, 165 F.3d 839, 864–65 (11th Cir. 1999). Florida's rule 1.9 at that time stated, "Information acquired by the lawyer in the course of representing a client may not subsequently be used by the lawyer to the disadvantage of the client. However, the fact that a lawyer has once served a client does not preclude the lawyer from using generally known information about that client when later representing another client." *Id.* at 865 (emphasis omitted). Previously, Florida had a Rule 1.9 comment that defined generally known as "information of the type that a reasonably prudent lawyer would obtain from public records or through authorized processes for discovery of evidence." Amend. to Rules Regulating the Fla. Bar, 820 So.2d 210, 214 (Fla. 2002) (Pariente, J., concurring in part and dissenting in part). Currently, Florida's Rule 1.9 comment retains this language but added the Model Rule language. The comment now defines generally known as "[i]nformation that has been widely disseminated by the media to the public, or that typically would be obtained by any reasonable prudent lawyer who had never represented the former client . . . . The essential question is whether, but for having represented the former client, the lawyer would know or discover the information." FLA. RULES OF PRO. CONDUCT r. 1.9 cmt. (FLA. BAR 2025).

129. State v. Mark, 231 P.3d 478, 511 (Haw. 2010).

130. State v. Mancilla, No. A06-581, 2007 WL 2034241, at *1 (Minn. Ct. App. July 17, 2007). In this case, the criminal defendant stated that his counsel's conflict of interest resulted in his counsel not using a witness' two prior convictions to impeach the witness because she misunderstood the scope of Minnesota Rule of Professional Conduct 1.9(c). The Minnesota Court of Appeals stated that prior convictions are a matter of public record and fall within the Rule 1.9(c) generally known exception and that defense counsel may have had strategic reasons for not using the prior convictions to impeach the witness. *Id*. at *2–3.

131. *Freund*, 165 F.3d at 864–65.

132. United States v. Valdez, 149 F.R.D. 223, 225 (D. Utah 1993).

133. The court did not state whether it was relying on Rule 1.9, comment three or the "generally known" exception in Rule 1.9, but the court quoted all of Rule 1.9, including the generally known exception in Rule 1.9(b) and did not mention any comments to Rule 1.9. *Id*. at 225–26.

134. State *ex rel.* Youngblood v. Sanders, 575 S.E.2d 864, 872–73 (W. Va. 2002).

information was generally known because it was in police reports.[135] The court stated it was balancing the defendant's constitutional right to counsel versus a fundamentally fair trial process and that the right to choice of counsel can only be overcome by a serious and actual conflict.[136] An Oregon ethics opinion interpreting "generally known" in Oregon's Rule 1.9(c)(1) adopted the Restatement definition and gave more specific examples stating that information in "magazine[s] . . . , newspaper articles, court pleadings, published court decisions, and public records in government offices [is] generally known, while pleading filed under seal and records of an international court are not."[137] The opinion stated that not all public information is generally known if obtaining it "would require substantial difficulty or expense."[138] But that criminal convictions are generally known "because they are part of the public record that require no expertise or expense to access them."[139]

Interestingly, none of these disqualification cases in this section stated that they were relying on comment three to Rule 1.9, which states: "Information that has been disclosed to the public or to other parties adverse to the former client ordinarily will not be disqualifying."[140] Instead, the courts' disqualification analysis mainly concerns whether the information is generally known.

Outside of criminal activity, in a civil breach of fiduciary duty case concerning public records, the Pennsylvania Supreme Court used the Restatement definition of confidential information to interpret Rule 1.9 and duties owed to former clients.[141] However, it denied a summary judgment motion stating that there was an issue of fact as to whether an affidavit that was inadvertently attached to a filed document in an unrelated criminal matter was publicly available.[142] The court stated that even though the document was available on PACER for several years, there was a question as to whether it was generally known because the document was not "'indexed' under Appellant's name and that a person interested in the FBI Affidavit 'could obtain it only by means of special knowledge.'"[143] Whether this information was confidential

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135. *Id.*; *see also* State v. Rogers, 744 S.E.2d 315, 324 (W. Va. 2013) (court refused to disqualify attorney when attorney stated that only information that would be used to impeach a witness was in the public record).

136. *Youngblood*, 575 S.E.2d at 872 (quoting United States v. Flanagan, 679 F.2d 1072, 1076 (3d Cir. 1982), *rev'd on different grounds*, 465 U.S. 259 (1984)).

137. Or. Bar Ass'n Bd. of Gov., Formal Op. 110, at n.2 (2005, rev. 2016) (citing Cohen v. Wolgin, Civ. A. No. 87-2007, 1993 WL 232206 (E.D. Pa. June 24, 1993)).

138. *Id.* (citing *In re* Adelphia Commc'ns. Corp., No. 02-41729REG, 04 Civ. 2192DAB, 2005 WL 425498 (S.D.N.Y. Feb. 16, 2005)).

139. *Id.* (citing State v. Mancilla, No. A06-581, 2007 WL 2034241, at *8 (Minn. Ct. App. July 17, 2007)).

140. MODEL RULES OF PRO. CONDUCT r. 1.9 cmt. 3 (A.B.A. 2018).

141. Dougherty v. Pepper Hamilton LLP, 133 A.3d 792 (Pa. Super. Ct. 2016).

142. *Id.* at 800.

143. *Id. See also* Cohen v. Wolgin, Civ. A. No. 87-2007, 1993 WL 232206 (E.D. Pa. June 24, 1993), where the court adopted the Restatement definition and gave an in-depth discussion of

was relevant to whether the law firm breached its fiduciary duties to its former client.[144]

The above states take a consistent position regarding the confidentiality of public information either with both Rule 1.6 and 1.9 or at least a consistent position as to one rule or the other. Below are states where that consistency is absent.

B. States Where Case Law Has Determined that Publicly Available Information May Not Be Confidential, but State Ethics Opinions Protect Publicly Available Information

1. Rules 1.6 & 1.9: Michigan.—In a 2008 disqualification case from the Sixth Circuit, the court, in interpreting Michigan Rules of Professional Conduct 1.6, 1.9, and the definition of "generally known," followed the Restatement's definition of confidential information that does not include information that the public can easily access.[145] It further stated, "Rule 1.9, by exempting information that is generally known, suggests that generally known information is similarly exempt from Rule 1.6's bar from disclosure."[146] The court then quoted State Bar of Michigan Formal Ethics Opinion R-4, which discussed when information may not be a confidence or a secret, stating, "[f]or example, where the only information acquired by the lawyer was a copy of a filed complaint forwarded to the defense firm by the client, since a filed complaint is, by its nature, both a public and a published document, there would thus be nothing confidential or secret."[147] Policy reasons discussed in Opinion R-4 were preventing junior associates or other firm members from being beholden to their original firms due to their handling of confidential information.[148]

Further, in a 2019 unreported disqualification case, the Eastern District Court of Michigan stated, "Although Rules 1.6 and 1.9 bar the disclosure of information obtained by a lawyer representing a client, 'documents or information that are public or published are not considered confidential under

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various sources, concluding that information published in a magazine article, two published Third Circuit Court opinions, pleadings in an Eastern District of Pennsylvania case, and information filed in the Corporate Bureau of the Secretary of the Commonwealth of Pennsylvania were generally known. *Id.* at *2–3. However, sealed pleadings and information in the Italian or American Embassy, and in an Italian court were not generally known. *Id.* at *3.

144. *Dougherty*, 113 A.3d at 800.

145. CenTra, Inc. v. Estrin, 538 F.3d 402, 422 (6th Cir. 2008).

146. *Id.* Michigan retains the Model Code of Professional Responsibility's confidences and secrets version of Rule 1.6. MICH. RULES OF PRO. CONDUCT r. 1.6(a) (STATE BAR OF MICH. 2025).

147. *CenTra*, 538 F.3d at 422 (quoting Mich. Bar Comm. on Pro. Ethics, Formal Op. R-4 (1989)).

148. Mich. Bar Comm. on Pro. Ethics, Formal Op. R-4 (1989) (citing *Bernstein, Bernstein, Wile & Gordon v. Ross*, 177 N.W.2d 193 (Mich. Ct. App. 1970)).

Michigan's Rules of Professional Conduct.'"[149] And in a 2021 unreported disqualification case, the Eastern District Court determined that the attorney had not violated Rule 1.9(c) when the attorney put an OWI guilty plea into evidence in a summary judgment motion.[150] The court stated that "the guilty plea . . . is a public record and the comments to MRPC 1.9 explain that nothing 'preclude[s] [a] lawyer from using generally known information about [a former] client when later representing another client.'"[151] The court determined that the "heavy burden to prove disqualification under MRPC 1.9(c)" had not been met.[152]

However, a 2018 Michigan ethics opinion, discussing the "generally known" exception in Michigan's Rule 1.9(c), adopted the public notoriety definition of "generally known" requiring that the information be "widely recognized by members of the public in the relevant geographic area, or . . . widely recognized in the former client's industry, profession, or trade."[153] Without referring to the previous Formal Opinion R-4 or the 2008 Sixth Circuit case, this informal opinion stated that "there is consensus among legal authority that information is not generally known merely because it is publicly available or might qualify as a matter of public record."[154] The majority of cases cited, however, were older than the Sixth Circuit case mentioned above and were not from Michigan.[155] Citing an unreported 2006 New Jersey case, the committee stated that "[t]he information must be within the basic understanding and knowledge of the public."[156] It concluded that "generally known 'does not mean

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149. State Farm Mut. Auto. Ins. Co. v. Elite Health Ctrs., Inc., No. 2:16-cv-13040, 2019 WL 2576360, at *3 (E.D. Mich. June 24, 2019) (quoting *Centra*, 538 F.2d at 423). The court stated:

> Moreover, as the parties well know from the extensive record in this heavily litigated case, State Farm has likely had multiple sources, including some publicly available ones, from which it was able to piece together the history of Katke's corporate dealings, without access to Miller Canfield's files. The accusation being leveled against Miller Canfield is a serious one, and very loose inferences will not suffice to convince the Court that the law firm's ethical integrity has been breached.

Id. at *3.

150. Allen v. Handover Ins. Grp., No. 2:19-cv-12024, 2021 WL 607101, at *3 (E.D. Mich. Jan. 14, 2021).

151. *Id.* (alteration in original).

152. *Id.*

153. Mich. Bar Comm. on Pro. Ethics, Formal Op. RI-377 (2018).

154. *Id.* (citing Emle Indus., Inc. v. Patentex, Inc., 478 F.2d 562, 572–73 (2d Cir. 1973); Law. Disciplinary Bd. v. McGraw, 461 S.E.2d 850 (W. Va. 1995); Akron Bar Ass'n v. Holder, 810 N.E.2d 426, 435 (Ohio 2004); Comm. on Legal Ethics v. Walker, 358 S.E.2d 234 (W. Va. 1987); Fla. Bar v. McCain, 330 So.2d 712 (Fla. 1976); EF Hutton & Co., Inc. v. Brown, 305 F. Supp. 371 (S.D. Tex. 1969)).

155. *See supra* note 154. The court cited the following cases later in the opinion: a 2013 Virginia bankruptcy case, *In re* Gordon Props, LLC, 505 B.R. 703 (Bankr. E.D. Va. 2013), and a 2010 Indiana case, *In re* Anonymous, 932 N.E.2d 671 (Ind. 2010). Both cases are not from Michigan.

156. Mich. Bar Comm. on Pro. Ethics, Formal Op. RI-377 (2018) (alteration in original) (citing Pallon v. Roggio, Nos. 04-3625 (JAP), 06-1068 (FLW), 2006 WL 2466854, at *1, *7 (D.N.J. Aug. 24, 2006)). Although New Jersey follows a narrow confidentiality rule in a Rule 1.6 analysis, it follows a broad confidentiality rule in a Rule 1.9 analysis. See *infra* Part II.C.2.

information that someone can find' in 'public sources.'"[157] Offering an example, the committee stated that "[g]enerally known does not require publication on the front page of a tabloid, but it is more than merely sitting in a file in the court house."[158]

2. Rules 1.6 & 1.9: New York.—New York Rule of Professional Conduct 1.6(a) states that "[a] lawyer shall not knowingly reveal confidential information, as defined in this Rule, or use such information to the disadvantage of a client or for the advantage of the lawyer or a third person . . . ."[159] Confidential information as defined "does not ordinarily include (i) a lawyer's legal knowledge or legal research or (ii) information that is generally known in the local community or in the trade, field or profession to which the information relates."[160]

Previously, comment 4(A) to Rule 1.6 concerning the generally known exception in New York's Rule 1.6, stated, "Information that is in the public domain is not protected unless the information is difficult or expensive to discover. For example, a public record is confidential information when it may be obtained only through great effort or by means of a Freedom of Information request or other process."[161] The comment was amended in 2010.[162] Comment 4(A) now states, "Information is not 'generally known' simply because it is in the public domain or available in a public file."[163]

In 2013, interpreting New York's confidentiality rules 1.6, 1.8, and 1.9, a New York ethics opinion stated that only information "known to a sizable percentage of people in 'the local community or in the trade, field or profession to which the information relates'" is generally known, determining that where "hundreds or thousands of homes are in foreclosure in any locale at any given time, we do not believe that the identity of particular properties that would make sound investments is 'generally known' within the meaning of Rule 1.6(a)."[164] It then determined that because the information was confidential under Rule 1.6,

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157. Mich. Bar Comm. on Pro. Ethics, Formal Op. RI-377 (2018) (citing *Anonymous*, 932 N.E.2d at 674).

158. *Id.* (citing *Gordon Props*, 505 B.R. at 707 n.6).

159. N.Y. RULES OF PRO. CONDUCT r. 1.6 (N.Y. STATE BAR ASS'N 2025).

160. *Id*. ("'Confidential information' consists of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential.").

161. SIMON'S NEW YORK RULES OF PROFESSIONAL CONDUCT ANNOTATED § 1.6:49 (2024).

162. *Id.*

163. N.Y. RULES OF PRO. CONDUCT r. 1.6 cmt. 4(A) (N.Y. STATE BAR ASS'N 2025).

164. N.Y. State Bar Ass'n Comm. on Pro. Ethics, Op. 991 (2013) ("This legislative history strongly suggests that information in the public domain may be protected as confidential information even if the information is not 'difficult or expensive to discover' and even if it could be obtained without 'great effort' and without a Freedom of Information request or other formal process.").

it could not be used under Rule 1.8 and remained confidential even if the lawyer switched firms under Rule 1.9.[165]

Subsequently, a 2015 ethics opinion applying the current comment 4(A) determined that if the information was reported in the public media or widely publicized by the client, it would fall within Rule 1.9(c), but that papers filed in a separate federal case did not fall within the exception without being widely publicized.[166] Recently, in a 2024 ethics opinion concerning whether a lawyer could publish an article that discussed legal issues that had arisen in the representation of a former client, the opinion referenced New York Rule of Professional Conduct Rule 7.1(r).[167] This rule "encourages lawyers to speak publicly and write for publication on legal topics that help lay persons identify legal problems."[168] In determining whether client information was "generally known" as to not be confidential under New York's Rule 1.6, the opinion referenced the 2013 and 2015 opinions mentioned above and stated, "We continue to believe that pleadings and other documents filed in a court case are not 'generally known' within the meaning of Rule 1.6" and thus, were not generally known under New York's Rule 1.9.[169] The opinion concluded that the lawyer could publish the article only if it did not reveal confidential information, which would not include the lawyer's "legal knowledge or legal research" but would include information available in court files.[170]

These ethics opinions did not cite any case law in support of the broad confidentiality standard. Instead, the 2015 ethics opinion only cited and recognized a 1998 case that reached the opposite conclusion. In 1998, the New York Court of Appeals interpreted DR 5-108(A)(2), which provided that "an attorney may not use 'any confidences or secrets of the former client except as permitted by DR 4-101 (C) or when the confidence or secret has become generally known.'"[171] The court held that information is generally known when it "was readily available in such public materials as trade periodicals and filings with State and Federal regulators."[172]

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165. *Id.*

166. N.Y. State Bar Ass'n Comm. on Pro. Ethics, Op. 1057 (2015); N.Y. State Bar Ass'n Comm. on Pro. Ethics, Op. 1125 (2017) ("[I]nformation is not 'generally known' simply because it is in the public domain or available in a public file" and consequently, lawyer could not discuss a former client's will); N.Y. State Bar Ass'n Comm. on Pro. Ethics, Op. 1088 (2016) (information on client's website stating firm is representing the client may make the fact of representation generally known, but then the committee stated, "More broadly, if the fact that the law firm represents its co-op board clients is widely known in the local real estate industry than the information would be considered to be generally known.").

167. N.Y. State Bar Ass'n Comm. on Pro. Ethics, Op. 1268 (2024).

168. *Id.* (citing N.Y. RULES OF PRO. CONDUCT r. 7.1(r)).

169. *Id.*

170. *Id.*

171. Jam. Pub. Serv. Co. Ltd. v. AIU, Ins. Co., 92 N.Y.2d 631, 636 (N.Y. 1998).

172. *Id.* at 637–38. The ethics opinions could have cited to Emle Indus., Inc. v. Patentex, Inc., 478 F.2d 562 (2d Cir. 1973), a New York case where an attorney was disqualified because

Notably, after the ethics opinions discussed above, in a 2019 unreported case, where the defendants sought dismissal of the case because the complaint relied on confidential information, the Southern District of New York adopted the Restatement definition of "generally known" for New York's Rule 1.6 in absence of a definition of "generally known" in the New York rules.[173] The court opined that New York courts would apply the Restatement definition of confidential information, holding "that where information is publicly filed (and the party seeking to protect it does not take immediate steps to do so), the information no longer qualifies as 'confidential.'"[174] In applying this rule as to the information in the complaint, the court stated, the court concluded that the information was no longer protected and stated that "the cat [wa]s out of the bag."[175]

The New York case law cited above only referenced Rule 1.6 and not Rule 1.9. New York, therefore, like Michigan, has case law reaching a different conclusion on Rule 1.6 than the ethics opinions. But as to Rule 1.9, in the absence of case law, the New York ethics opinions indicate that New York follows a broad confidentiality rule.

3. Rule 1.6: Alabama.—In a 1981 disqualification case based on the Alabama Code of Professional Conduct, the Alabama Supreme Court determined that there was a substantial relationship between the current quiet title matter and the matter that the defense lawyer had previously represented the intervenor, but the court did not disqualify the attorney because the only information the defense attorney had was a matter of public record and in the small town there was a limited number of available attorneys.[176] The intervenor accused the defense attorney of violating Disciplinary Rule 4-101(B), which prevented the lawyer from revealing a client's confidences or secrets.[177] The court stated that "once an attorney-client relationship is established all information coming to the attorney from his client, whether it be from public

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the current matter was substantially related and adverse to a former client. That court dismissed the argument that relevant confidential information of the former client was widely known throughout the industry, stating that confidential information disclosed to an attorney by a former client remains confidential even if "part of a public record" or if " there are other available sources of such information" or if "the lawyer received the same information from other sources." *Emle Indus.*, 478 F.2d at 572–73 (quoting H. DRINKER, LEGAL ETHICS 135 (1953)). More recent cases are used in this section on New York's rules.

173. Fischman v. Mitsubishi Chem. Holdings Am., Inc., No. 18-CV-8188 (JMF), 2019 WL 3034866, at *5 (S.D.N.Y. July 11, 2019).

174. *Id.* (citing Gambale v. Deutsche Bank AG, 377 F.3d 133, 144 (2d Cir. 2004)).

175. *Fischman*, 2019 WL 3034866, at *5 (internal citation omitted). The *Fischman* court cited to a 2004 Second Circuit decision concerning the unsealing of court documents, which as to publicly available information used another euphemism and stated, "The genie is out of the bottle . . . . We have not the means to put the genie back." *Gambale*, 377 F.3d at 144. The Second Circuit court further stated in a footnote, "Once [information] is public, it necessarily remains public." *Id*. at 144 n.11.

176. *Ex parte* Taylor Coal Co. Inc., 401 So.2d 1, 8–9 (Ala. 1981).

177. *Id.* at 5–6.

records or not, is confidential.[178] However, the court determined that the situation was "very close to the exception that allows a lawyer to sue a former client where both have employed him with reference to the same business transaction," especially because the only legal information given was prepared from public documents, and thus, "in a legal sense is known to the whole world."[179] The court then balanced "the weighty considerations of those Canons against the need of the public to obtain counsel of its choosing" and concluded there was no violation of the Disciplinary Rules and refused to disqualify the attorney.[180] Thus, although this case concerned disqualification, the analysis concerned the confidentiality of information under the state's confidences and secrets rule. In this situation, the court referenced a broad rule but applied it narrowly based on policy.

4. Rule 1.9: Arizona.—In a 1995 disqualification case concerning Rules 1.9 and 1.10, the Arizona appellate court held that disqualification of the prosecutor was not necessary, when another prosecutor in the same office had previously represented the defendant's victim, because the trial court limited the government's impeachment of the victim to matters in the public record.[181] However, Arizona ethics opinions have held that information in the public record remains confidential.[182] Further, in response to a question about Rule 1.9, the FAQ section of the Arizona Bar website states that "[i]nformation is not generally known simply because it is publicly available. This exception contemplates information widely recognized by members of the public in the geographic area or widely recognized in the former client's industry, profession, or trade. *See* ABA Formal Op. 479."[183]

5. Rule 1.9: Illinois.—As mentioned previously, in a Illinois 2010 disciplinary case, where an attorney called a client's wife and told the wife of the client's affair after a third party mentioned the affair in open court, the Illinois Review Board interpreted both Illinois Rule 1.6 and 1.9.[184] As to Illinois's Rule 1.9, the Board recognized that there was no case precedent

178. *Id.* at 9.

179. *Id.*

180. *Id.*

181. *State v. Sustaita,* 902 P.2d 1344, 1347 (Ariz. Ct. App. 1995). The court later in discussing the appearance of impropriety claim stated that "no allegation that the public defender obtained confidential information about the victim from the public defender office's files that would be used to the victim's detriment." *Id.*

182. State Bar of Ariz. Comm. on Rules of Pro. Conduct, Formal Op. 22 (1987) ("The fact that the client's name and address may appear in a public record does not mean that the information should not be regarded as confidential."); State Bar of Ariz. Comm. on Rules of Pro. Conduct, Formal Op. 13 (1990) ("Even after filing suit . . . and [it becoming] a matter of public record, it may not have been sufficiently generally known . . . .").

183. *Best Practices from the Ethics Advisory Group: ER 1.9 Duties to Former Clients*, STATE BAR OF ARIZ., https://www.azbar.org/for-legal-professionals/ethics/best-practices/er-1-9-duties-to-former-clients [https://perma.cc/FDW4-F2V2] (last visited Feb. 20, 2025).

184. *In re* Murawski, No. 6243546, 2010 WL 2007961, at *1 (Ill. Att'y Registration & Disciplinary Comm'n May 12, 2010).

defining "generally known." [185] The administrator noted that "the only information given to Respondent about [the client's] sexual relationship with [the third party] was [her] public statements in court and the documentation [she] brought to court."[186] The Board determined that the woman's testimony during a public proceeding that she had engaged in an affair with the client "caused this information to become generally known." [187] The opinion recognized that an Illinois Court of Appeals case in interpreting the Canons of Professional Responsibility, which Illinois followed at that time, had stated that "the client's privilege in confidential information disclosed to his attorney is not nullified by the fact that the circumstances to be disclosed are part of a public record," but distinguished that case because the attorney had not learned the information from the client but from a third-party statement in court.[188] For these reasons, the charges were dismissed.[189]

Subsequently, however, in a 2022 Illinois ethics opinion concerning disqualification under Rule 1.9, the committee referenced the ABA's definition of "generally known," requiring that information be "widely recognized," stating that availability in public repositories or a discussion "in open court does not, alone, mean that the information is 'generally known.'"[190] This opinion did not concern a situation involving information stated in court or in the public record, but this definition was given when the committee pointed out that even if there is no conflict under Rule 1.9, the attorney still cannot use or reveal certain former client information. There is a question as to the value of this opinion because the opinion stated that Illinois Rule of Professional Conduct 1.9 comment three only allows disqualification to be avoided when information is generally known.[191] However, Illinois's Rule 1.9 comment three does not mention the term, "generally known" but instead states that public information is not disqualifying. This error is the only way to reconcile Rule 1.9 comment three with the ABA definition of generally known.

In summary, in Michigan as to Rule 1.6 and 1.9 and in Arizona and Illinois as to Rule 1.9, the case law does not support the broad notoriety standard that the state ethics opinions or rules are taking, making it unclear which standard

185. *Id.* at *18.

186. *Id.* at *17.

187. *Id.* at *19.

188. *Id.* at *17 (quoting Skokie Gold Standard Liquors v. Joseph, 452 N.E.2d 804, 813 (Ill. App. Ct. 1983)) The confidentiality discussion regarding matters in the public record was dicta because the court determined that the two matters were substantially related and consequently, confidential information is presumed.

189. *Id.* at *19.

190. Ill. State Bar Ass'n Comm. on Pro. Conduct, Advisory Op. No. 01 (2022). An earlier ethics opinion also concerning disqualification under Illinois Rule 1.9 had defined 'generally known' as "common knowledge in the community." Ill. State Bar Ass'n Comm. on Pro. Conduct, Advisory Op. No. 01 (2005). This opinion also did not concern publicly disclosed or available information.

191. Ill. State Bar Ass'n Comm. on Pro. Conduct, Advisory Op. No. 01 (2022).

courts will adopt in the future.[192] New York is similar as to Rule 1.6, but an absence of case law on Rule 1.9 indicates that the ethics opinions would govern, and New York would determine that publicly available information was disqualifying and must be kept confidential.[193] It is also not clear what position governs in Alabama concerning Rule 1.6 because the court cited a broad 1.6 rule but did not disqualify counsel based, in part, because the information was a matter of public record.[194]

Thus, among the states that have adopted the narrower rule in some form, there are states where an attorney may be able to predict the state's position on the confidentiality of publicly available information as to the state's Rule 1.6 or Rule 1.9. However, in other states, such a prediction is not possible. Below is a discussion of states that have adopted or consistently applied a broad confidentiality rule.

C. States Where Publicly Available Information is Confidential

The ABA has taken the position in Formal Opinion 04-433 that Model Rule 1.6 has no publicly available exception.[195] It stated, "Indeed, the protection afforded by Rule 1.6 is not forfeited even when the information is available from other sources or publicly filed, such as in a malpractice action against the offending lawyer."[196] Consequently, under Model Rule 1.9(c)(2) there would be no publicly available exception because that section is governed by Model Rule 1.6. As discussed previously, as to use of former client information in Model Rule 1.9(c)(1), a 2017 formal opinion created the broad rule for "generally known" requiring notoriety.[197]

1. Broad Rule 1.6: Arizona, California, Colorado, D.C., Iowa, Massachusetts, Nevada, Ohio, Oregon, Pennsylvania, West Virginia, Wisconsin & Wyoming.—Several states have determined that information in the public record is confidential under Rule 1.6.[198] For example, a 2000 Arizona

192. *See supra* Parts I.B.1, B.4 & B.5.

193. *See supra* Part II.B.2.

194. *See supra* Part II.B.3.

195. A.B.A. Comm. on Ethics & Pro. Resp., Formal Op. 433 (2004).

196. *Id.*

197. A.B.A. Comm. on Ethics & Pro. Resp., Formal Op. 479 (2017).

198. Iowa Sup. Ct. Att'y Disciplinary Bd. v. Marzen, 779 N.W.2d 757, 765–66 (Iowa 2010) (disclosure of information in a media interview regarding client's previous litigation violated Rule 1.6 even though information was publicly available and attorney had ended the representation); Colo. Bar Ass'n Ethics Comm., Formal Op. 130 (adopted Apr. 3, 2017, revised Nov. 17, 2018) ("There is no exception for disclosing information in public records or those public records themselves."); *In re* Herron, 441 P.3d 24, 46 (Kan. 2019) (where attorney revealed to court that client cheated on urinalysis test, court determined, despite attorney's argument test was publicly available, "duty of confidentiality survives the disclosure of the information through other sources."); State Bar of Nev. Comm. on Ethics & Pro. Resp., Formal Op. 41 (2009) (citing GEOFFREY C. HAZARD & W. WILLIAM HODES, THE LAW GOVERNING LAWYERS § 9.15 (3d ed.

ethics opinion concluded that under Arizona Rule 1.6 "a lawyer is required to maintain the confidentiality of all information relating to representation, regardless of the fact that the information can be discovered elsewhere."[199] Later in 2017, in an attorney discipline case, the Arizona Supreme Court stated, "Rule 1.6 contains no exception permitting disclosure of information previously disclosed or publicly available."[200] Specifically, neither "[a] client's prior disclosure of information relating to her custody representation to friends nor availability of information in police reports and other public records . . . absolve[s] a lawyer of a violation of Rule 1.6."[201]

The West Virginia Supreme Court of Appeals compared its current Rule 1.6 with the older Model Code of Professional Conduct confidentiality rule, explaining that its current Rule 1.6 protects "*information* relating to representation of a client," which is broader than just protecting confidences and secrets.[202] Consequently, under this broad rule, in an attorney discipline case where the attorney revealed client information to a third party, the court determined that regardless of whether the information is publicly available, either through the public record or other available sources, the attorney would not be able to disclose it because the attorney learned of it during the representation.[203] Further, the court was not swayed by the fact that the information may be subject to public inspection under a FOIA request.[204]

Ohio had, and California and D.C. have, Rules 1.6 similar to the Model Code of Professional Conduct confidentiality rule, which references

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2005)) (public information is confidential under Rule 1.6 and "[t]elling a story to friends about a recent trial without revealing the identity of the client or any other fact not contained in the public record of the case" violates Rule 1.6); *In re* Harman, 628 N.W.2d 351, 359–361 (Wis. 2001) (attorney disciplined under Rule 1.6 and 1.9(b) because the attorney revealed medical records once when the client was a current client and again when client was a former client even though medical records were in the public record). In *Harman*, the court stated, "Regardless of whether S.W.'s medical records lost their 'confidentiality' because they had been made part of the Wood County medical malpractice action, the fact remains that Attorney Harman obtained those records while he was representing S.W. and he then disseminated those records without her consent." *Id*. at 361. *See* State Bar of Wis. Comm. on Pro. Ethics, Formal Op. EF-17-02, at 3 (2017) ("Thus the Wisconsin Supreme Court has recognized that whether information has been previously publicly disclosed does not prevent the information from being protected by the Rule."); *In re* Merry, 5 N.W.3d 285, 291–92 (Wis. 2024) (generally known exception does not apply unless information is "widely recognized by members of the public").

199. State Bar of Ariz. Comm. on Rules of Pro. Conduct, Formal Op. 11 (2000) (citing State Bar of Ariz. Comm. on Rules of Pro. Conduct, Formal Op. 05 (1997) (citing *Ex parte* Taylor Coal Co., 401 So.2d 1 (Ala. 1981))).

200. *In re* Yosha, No. PDJ 2017-9071, 2017 WL 9480270, at *4 (Presiding Disciplinary J. of the Sup. Ct. of Ariz. Oct. 23, 2017).

201. *Id*. at *4. *See also In re* Johnson, No. 97-O-11791, 2000 WL 1682427, *10 (Cal. Bar. Ct. Oct. 26, 2000) (review committee determined attorney violated California's rule against revealing confidential information when the attorney told a client that another client was a convicted felon, even though the client's conviction was a matter of public record).

202. Law. Disciplinary Bd. v. McGraw, 461 S.E.2d 850, 861 (W. Va. 1995).

203. *Id.* at 856, 860.

204. *Id.* at 862.

confidences and secrets, but still interpreted their Rule 1.6 broadly.[205] In a California 2016 ethics opinion, the question was whether a lawyer owed current and former clients a duty of confidentiality as to potentially embarrassing or detrimental client information that is publicly available. It determined that a lawyer violated her client's confidentiality when she forwarded to her friends a blog previously published by someone else about her current client, even though the blog was publicly available.[206] The opinion, in a footnote, defined "publicly available" as information available "outside the attorney-client relationship, although it must be searched for (e.g., in an internet search, a search of public court file, or something similar)."[207] Separately, it defined "generally known" as information most people know without having to look for it.[208] Similarly, in a 2004 Ohio case concerning its Rule 1.6, which at the time followed the Model Code's confidences and secrets format, and an attorney telling a current client of a former client's criminal convictions, the Ohio Supreme Court explained that "an attorney is not free to disclose embarrassing or harmful features of a client's life just because they are documented in public records."[209] D.C. follows the confidence and secrets version of Rule 1.6 and determined that information is not protected as a confidence or a secret if it is "generally known" and adopted the ABA definition of generally known requiring wide recognition.[210]

Massachusetts's Rule 1.6 is different from both the Model Code of Professional Responsibility and the current Model Rules of Professional Conduct. It defines confidential information and states:

> "Confidential information" consists of information gained during or relating to the representation of a client, whatever its source, that is (i) protected by the attorney-client privilege, (ii) likely to be embarrassing or detrimental to the client if disclosed, or (iii) information that the lawyer has agreed to keep confidential. "Confidential information" does not ordinarily include (A) a lawyer's legal knowledge or legal research

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205. Ohio now follows the Model Rules version of Rule 1.6. OHIO RULES OF PRO. CONDUCT r. 1.6 (OHIO SUP. CT. 2024). California's Rule 1.6 mentions confidences and secrets. CAL. RULES OF PRO. CONDUCT r. 1.6 (STATE BAR OF CAL. 2023).

206. State Bar of Cal. Comm. on Pro. Resp. & Conduct, Formal Op. 195 (2016). The opinion quoted from California's Rule 1.6, which quotes "Business and Professions Code section 6068, subdivision (e)(1) [that] states that it is the duty of an attorney '[t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.' . . . As this Committee has explained, 'Client secrets means any information obtained by the lawyer during the professional relationship, or relating to the representation, which the client has requested to be inviolate or the disclosure of which might be embarrassing or detrimental to the client.'" *Id.* (quoting Cal. Bus. & Pro. Code § 6068(e)(1)); State Bar of Cal. Comm. on Pro. Resp. & Conduct, Formal Op. 133 (1993)).

207. State Bar of Cal. Comm. of Pro. Resp. & Conduct, Formal Op. 195, at 3 n.4 (2016).

208. *Id.*; *See also In re* Johnson, No. 97-O-11791, 2000 WL 1682427, *10 (Cal. Bar Ct. Oct. 26, 2000) (attorney violated California confidentiality rule by revealing client was a convicted felon, even though the client's conviction was a matter of public record).

209. Akron Bar Ass'n v. Holder, 810 N.E.2d 426, 435 (Ohio 2004).

210. D.C. Bar Legal Ethics Comm., Formal Op. 383, at n.8 (2022).

> or (B) information that is generally known in the local community or in the trade, field or profession to which the information relates. [211]

Massachusetts's Rule 1.6, comment 3A further clarifies:

> Information that is "generally known in the local community or in the trade, field or profession to which the information relates" includes information that is widely known. Information about a client contained in a public record that has received widespread publicity would fall within this category. On the other hand, a client's disclosure of conviction of a crime in a different state a long time ago or disclosure of a secret marriage would be protected even if a matter of public record because such information was not "generally known in the local community."[212]

In 2022, the Massachusetts Supreme Court addressed "the role of the 'generally known' analysis in deciding whether an attorney" had improperly disclosed confidential information.[213] As part of its analysis of comment 3A, the court stated:

> As this comment makes clear, the rule is concerned with whether information is known, not whether it is knowable. That the information is available in a public record is not dispositive; rather, the focus is on how many people in the relevant community, trade, field, or professional actually have learned the information.[214]

Where the attorney stated that he had learned about the arrests of his former client in the local newspaper, it became the Board's burden to establish that the information was not generally known, and it did not do so. The court stated, "We do observe, however, that information in a local newspaper of record might well be the sort of information that we would consider to be generally known, especially when the information is printed within a short time of the disclosure."[215] Similarly, in a 2011 ethics opinion, concerning a probate matter, interpreting what is "generally known" and consequently not confidential under Massachusetts Rule 1.6, it was determined that whether a probate proceeding has started is easily attainable from the public record, such that a lack of probate could be disclose; and that the decedent's death was "generally known" because

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211. MASS. RULES OF PRO. CONDUCT r. 1.6 (MASS. SUP. JUD. CT. 2025).

212. MASS. RULES OF PRO. CONDUCT r. 1.6 cmt. 3A (MASS. SUP. JUD. CT. 2025). Another example was given: "a client's disclosure of the fact of infidelity to a spouse is protected information, although it normally would not be after the client publicly discloses such information on television and in newspaper interviews." *Id.*

213. *In re* Kelley, 182 N.E.3d 949, 951 (Mass. 2022).

214. *Id.* at 953.

215. *Id.* at 954 n.1.

"[h]is obituary appeared in the newspapers and remains easily findable on the internet."[216] But recently, a 2024 ethics opinion also interpreting comment 3A clarified that "a lawyer must have evidence other than the fact of publication to show that the [judicial] opinion was widely known in the local community . . . ."[217]

Wyoming Rule 1.6 generally follows the Model Rule 1.6 format and not Massachusetts's rule 1.6 and consequently Wyoming Rule 1.6 does not have the equivalent of Massachusetts's comment 3A.[218] Despite this difference, the Wyoming Supreme Court quoted the above mentioned 2022 Massachusetts court's discussion regarding Massachusetts's comment 3A and determined that whether information is confidential is based on whether it is generally known and that whether "the information is available in a public record is not dispositive; rather, the focus is on how many people in the relevant community, trade, field, or profession actually have learned the information."[219] The Wyoming court concluded that the attorney had revealed confidential information in her motion to withdraw because even though the client had contacted a realtor about selling property involved in the lawsuit, the information was not generally known and therefore confidential.[220]

Confidentiality under various states' Rule 1.6 has been discussed recently in the context of online attorney reviews.[221] For example, in a 2022 Oregon ethics opinion regarding an online negative review, the committee stated that the attorney could not respond using information in the public record because even "confirming embarrassing information" is likely detrimental to the

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216. Mass. Bar Ass'n Comm. on Pro. Ethics, Formal Op. 04 (2011). *See generally* Mass. Bar Ass'n Comm. on Pro. Ethics, Formal Op. 01 (2012) ("The mere fact that information disclosed by a client to a lawyer is a matter of public record does not mean that it may not fall within the protection of this rule.").

217. Mass. Bar Ass'n Comm. on Pro. Ethics, Formal Op. 2 (2024) (concerning publication of judicial opinions).

218. WYO. RULES OF PRO. CONDUCT r. 1.6 (WYO. JUD. BRANCH 2025).

219. Bd. of Pro. Resp., Wyo. State Bar v. Austin, 538 P.3d 653, 662–63 (Wyo. 2023) (quoting *In re* Kelley, 182 N.E.3d at 953).

220. *Austin*, 538 P.3d at 662 ("[K]nowledge by 'a' member of the public does not make confidential information public.").

221. *See, e.g.*, People v. Isaac, 470 P.3d 837, 840 (Colo. 2016) (irrelevant that information in posting in response to online negative review was already public); People v. Waters, 438 P.3d 753, 761 (Colo. 2019) (even if information available from another source, confidentiality rule applies); Pa. Bar Ass'n Comm. on Legal Ethics & Pro. Resp., Formal Op. 200 (2014) (citing Iowa Sup. Ct. Att'y Discipline Bd. v. Marzen, 779 N.W.2d 757, 765–67 (Iowa 2010)) (Rule 1.6 breached "even if [the] information is otherwise publicly available."); *In re* Calpin, No. DRB 19-172 (N.J. Sup. Ct. Disciplinary Rev. Bd. Dec. 17, 2019) (public record information is not generally known). The board did not reference the Restatement (Third) of the Law Governing Lawyers, which is used in New Jersey's Rule 1.6 comment 3A; the opinion referenced ABA Formal Op. 479 and the notoriety standard. *Id.*

client.[222] Oregon follows the Model Rule version of Rule 1.6[223] but defines "information relating to the representation of a client" in Oregon Rule 1.0 as "denot[ing] both information protected by the attorney-client privilege under applicable law, and other information gained in a current or former professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client."[224] This opinion determined, "Under the broad definition of this term, 'information' can include even basic information such as the client's name or information in the public record."[225] Further, the committee stated:

> A response based solely on the public record can also be an embarrassing or detrimental disclosure, including when the client has already disclosed information that would be embarrassing. If the attorney's response is likely to reach more members of the public than the client's post, the attorney risks revealing embarrassing information to individuals that the client's disclosure would not otherwise have reached.[226]

The opinion stated that "the fact that an attorney includes information about a client in response to a negative review may in itself suggest that the information is intended to discredit because it is embarrassing or detrimental to the client."[227]

In the 2021 disciplinary proceeding concerning an attorney's response to a negative online review cited in the above ethics opinion, the Oregon Supreme Court determined that although the self-defense exception in Rule 1.6 could apply, when the attorney revealed the former client's full name along with his criminal conviction, the attorney did not limit his response to necessary information as required by the exception.[228] Under Oregon's Rule 1.6 and the definition discussed above, the court determined that even though the information—the client's name and criminal convictions—were a matter of public record, the attorney had revealed this information. The court reasoned that although people reading the attorney's post could have gathered the information on their own, they were unlikely to do so because "they would have had difficulty determining which of the millions of criminal records on file

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222. Or. State Bar Bd. of Governors, Formal Op. 201, at 7, 8 n.25 (2022) (citing *In re* Heinzelman, 33 Or. Disciplinary Bd. Rptr. 6, 24 (2019) (holding that lawyer "may not accurately report that the client lied to the attorney during the representation, as this would reveal information relating to the representation of the client that would be embarrassing or detrimental to the client.").

223. OR. RULES OF PRO. CONDUCT r. 1.6(a) (OR. STATE BAR 2025).

224. OR. RULES OF PRO. CONDUCT r. 1.0(f) (OR. STATE BAR 2025).

225. Or. State Bar Bd. of Governors, Formal Op. 201 (2022).

226. *Id.*

227. *Id. See also* Or. State Bar Bd. of Governors, Formal Op. 204 (2024) (lawyers may not tell war stories based on information that is public because "Oregon does not have an exception that allows disclosure of information that is generally known or publicly available.").

228. *In re* Conduct of Conry, 491 P.3d 42, 55 (Or. 2021).

around the nation referred to the author of the reviews."[229] Similar conclusions have been reached in states that have adopted a Model Rules' version of Rule 1.6.[230]

In summary, several states have determined that there is no publicly available exception in Rule 1.6 under a variety of circumstances. Some opinions have simply concluded that all information learned during the representation is confidential even if it later becomes public. Others have engaged in a broad interpretation of the words, "embarrassing," and "detrimental," or "information," or distinguishing between information that is known and information that is knowable.

2. Broad Rule 1.9: Alaska, Indiana, Kansas, New Jersey, Ohio, Texas, Virginia & Wisconsin.—Similar to Rule 1.6, some states have moved to interpreting confidentiality under Rule 1.9 broadly. For example, in 1974 in a Kansas eminent domain proceeding regarding use of a report prepared for a former client, the court determined, under the governing Kansas rule based on the Model Code of Professional Responsibility, that the report could be used because it was accessible to the public and therefore not a client confidence.[231] Conversely, in a 2003 attorney discipline based on Kansas's version of the Model Rules, an attorney revealed the existence of his defamation suit against his former client in documents involving a motion to sever the former client from a case with his current client and then claimed that because this information was previously disclosed in court pleadings, it was not confidential.[232] The Kansas Supreme Court rejected the argument relying on Kansas's Rule 1.6, holding that the rule of confidentiality applied to all attorney-client communications, even if the information is otherwise available.[233]

New Jersey has reached the same conclusion regarding its Rule 1.9. Initially, in a 1995 disqualification case, an attorney had been counsel for General Motors for several years handling lemon law cases, then moved to different firms and handled different matters.[234] But two years later, the attorney went to work for a firm and represented plaintiffs against General Motors in

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229. *Id.* at 53.

230. *See, e.g.*, State Bar of Wis. Comm. on Pro. Ethics, Formal Op. EF-23-01, at 2 (2023) (Wisconsin's confidentiality rule protects publicly available information and information previously disclosed to others, preventing use in a response to an online criticism); *See also supra* note 222.

231. City of Wichita v. Chapman, 521 P.2d 589, 591 (Kan. 1974). The court stated that the report's "existence and contents were made available to various agencies and to opposing counsel. Such public exposure of the information negates its 'secret' or 'confidential' character." *Id.* at 596.

232. *In re* Bryan, 61 P.3d 641, 645, 656 (Kan. 2003).

233. *Id.* at 656, 658. The court referenced two older cases as standing for the proposition that the ethical duty of confidentiality survives even if the information is available from other sources—*NCK Org. Ltd. v. Bregman,* 542 F.2d 128 (2d Cir. 1976) and *Kaufman v. Kaufman,* 405 N.Y.S.2d 79 (N.Y. App. Div. 1978). Both cases held that neither attorney-client privilege nor ethical duty are nullified where information is part of a public record. *Id.*

234. Steel v. Gen. Motors Corp., 912 F. Supp. 724, 727 (D.N.J. 1995).

lemon law cases.[235] The court stated that the former General Motor counsel made a

> strong argument that much of the information "relating to the representation" of GM is generally known. Advice and information about how to conduct lemon law litigation against various manufacturers, including GM, along with form pleadings and interrogatories, proliferate in legal periodicals, practice manuals, law review articles, textbooks, and through bar association conferences and publications . . . . The fact that this type of information is publicly available does not make "information relating to the representation" of GM "generally known."[236]

Ultimately, the court disqualified the firm, determining the screen was inadequate and that the former counsel had specialized confidential information ("playbook theory") about General Motors.[237] Then in a 2006 unreported disqualification case, the New Jersey federal district court specifically adopted the broad rule stating:

> Rule 1.9(c) does not apply to information that is "generally known[,]" [and] "[g]enerally known" does not only mean that the information is of public record . . . . The information must be within the basic understanding and knowledge of the public. The content of form pleadings, interrogatories and other discovery materials, as well as general litigation techniques that were widely available to the public through the internet or another source, such as continuing legal education classes, does not make that information "generally known" within the meaning of Rule 1.9(c).[238]

Similarly, a 2007 Ohio ethics opinion discussed the generally known exception in Ohio's Rule 1.9 in the context of a public defender cross examining a former client.[239] Recognizing the absence of a definition for "generally known" in the Ohio or Model Rules, it referenced the Restatement definition.[240] Specifically,

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235. *Id.*

236. *Id.* at 739.

237. *Id.* at 746.

238. Pallon v. Roggio, Nos. 04-3625 (JAP), 06-1068 (FLW), 2006 WL 2466854, at *7 (D.N.J. Aug. 24, 2006) (internal citation omitted). A 2019 disciplinary case involving a former client and Rule 1.9 concerning a negative online review, cited this 2006 case and determined that even though information in the review was available in the public record, it was not generally known. *In re* Calpin, No. DRB 19-172, (N.J. Dec. 17, 2019) Instead of referencing the Restatement (Third) of the Law Governing Lawyers, which is used in New Jersey's Rule 1.6 comment 3A, the opinion referenced ABA Formal Op. 479 and the notoriety standard. *Id.*

239. Ohio Sup. Ct. Bd. of Comm'rs on Grievances & Discipline, Formal Op. 2013-4 (2013).

240. *Id.* at 7 (citing 1 RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 59 cmt. d (A.L.I. 2001).

as to a former client's criminal conviction, the opinion stated that courts view a former client's criminal conviction as generally known because it is a matter of public record.[241] It provided as its rationale supporting non confidentiality, stating:

> In general, criminal convictions are matters of public record and are usually accessible through public databases not requiring any particular expertise to obtain the conviction information . . . . [T]he Board's view is that as long as the public defender's cross-examination of the former client is limited to the existence of the prior conviction for impeachment, the public defender can satisfy the "generally known" exception in Prof.Cond.R. 1.9(c)(1).[242]

As to other information in the public record, the opinion focused on the portion of the Restatement definition that states, "[T]he fact that information has become known to some others does not deprive it of protection if it has not become generally known in the relevant sector of the public."[243] After citing numerous cases, some of which determined that information in the public record does not lose its confidentiality, the opinion stated, "As evidenced by these cases, particularly in civil matters, whether information in a public record is generally known may require a review of the applicable facts and circumstances."[244]

But later, in a 2016 ethics opinion regarding whether a lawyer could testify against a criminal defendant, who had been a potential client of the lawyer and told a story with other potential clients present, the committee stated that "[t]he presence of information 'in the public record does not necessarily mean that the information is *generally known* within the meaning of Rule 1.9(c).'"[245] "As a result, a lawyer may only reveal information related to a prospective client if the client provides informed consent confirmed in writing or if the information is generally known," meaning that the information is known to the relevant sector of the public.[246] This subsequent opinion only mentioned the second part of the earlier opinion that quoted the Restatement definition regarding the continued

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241. *Id.* (citing *State v. Rogers,* 744 S.E.2d 315 (W. Va. 2013); *United States v. Valdez,* 149 F.R.D. 223 (D. Utah 1993); *State v. Sustaita,* 902 P.2d 1344 (Ariz. Ct. App. 1995); *State v. Mancilla,* No. A06-581, 2007 WL 2034241 (Minn. Ct. App. July 17, 2007)).

242. *Id.* at 7–8.

243. *Id.* at 8 (alteration in original) (quoting 1 RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 59 cmt. d (A.L.I. 2001)).

244. *Id.* at 9.

245. Ohio Bd. of Pro. Conduct, Formal Op. 2016-10 (2016) (quoting BENNETT, COHEN & WHITTAKER, *ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT* 175 (7th ed. 2011)) (citing Pallon v. Roggio, Nos. 04-3625 (JAP), 06-1068 (FLW), 2006 WL 2466854 (D.N.J. Aug. 24, 2006); Steel v. Gen. Motors Corp., 912 F. Supp. 724 (D.N.J. 1995); *In re* Anonymous, 932 N.E.2d 671 (Ind. 2010)).

246. *Id.* at 3.

confidentiality of information that becomes known to others. It made no mention of the earlier part of the decision regarding the public record.[247]

Consequently, in Ohio, as in Kansas and New Jersey, the more recent opinions indicate that there is no publicly available exception for Rule 1.9. Other states, including Indiana and Wisconsin, have reached the same conclusion.[248] These opinions give little guidance as to what constitutes generally known. Virginia has adopted the broad generally known standard,[249] and a judge, in a 2013 Eastern District of Virginia case, captured the vague nature of the notoriety standard, stating that a divorce settlement "file[d] in the courthouse where anyone could go, find it and read it," is not generally known; the court stated that "publication on the front page of a tabloid" is not required but generally known is "more than merely sitting in a file in the courthouse."[250]

Although Texas's confidentiality rule differs by combining the confidentiality of current and former clients in one rule, Texas now also interprets its confidentiality rule broadly. Texas Rule of Professional Conduct 1.05(b)(1) addresses confidentiality for both current and former clients and states that a lawyer shall not knowingly reveal "confidential information of a client or a former client . . . ."[251] Section 1.05(3) states that a lawyer cannot "[u]se confidential information of a former client to the disadvantage of the former client . . . unless . . . the confidential information has become generally

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247. *Id.*

248. *Anonymous*, 932 N.E.2d at 675 (prospective client information is protected even if it is known by third persons or in the public record). The Indiana Supreme Court stated that "the Rules contain no exception allowing revelation of information relating to a representation even if a diligent researcher could unearth it through public sources." *Id.* at 674. *See also* State Bar of Wis. Bar Comm. on Pro. Ethics, Formal Op. EF-20-02, at 6 n.17 (2020) (citing *In re* Petition to Modify SCR 20:1.9(c), No. 15-04 (Wis. July 21, 2016), *available at* https://wicourts.gov/sc/rulhear/DisplayDocument.pdf?content=pdf&seqNo=172500) (rejecting that information is generally known if previously disclosed or available in public record unless "widely disseminated and recognized"). This Wisconsin Formal Opinion quoted the petition, stating, "The Wisconsin Supreme Court rejected a request to expand the [generally known] exception to include information available to the public or that has been previously revealed and declined to modify the language of the rule and ABA Comment." *Id.*

249. Turner v. Commonwealth, 726 S.E.2d 325 (Va. 2012). The Virginia Supreme Court determined that the lower court's admission of the testimony of defendant's former counsel regarding what an unavailable witness had testified at a preliminary hearing was an abuse of discretion. *Id*. at 331. In a concurring opinion, Justice Lemons concluded as to former client information that "[w]hile testimony in a court proceeding may become a matter of public record . . . and may have been within the knowledge of anyone at the preliminary hearing, it does not mean that such testimony is 'generally known.' There is a significant difference between something being a public record and it also being 'generally known.'" *Id*. at 333 (Lemons, J. concurring).

250. *In re* Gordon Props., 505 B.R. 703, 707 n.6 (Bankr. E.D. Va. 2013) (citing Va. State Bar Comm. on Legal Ethics, Formal Op. 1609 (1994)) ("information regarding a judgment obtained by a law firm on behalf of a client, 'even though available in the public record, is a secret, learned within the attorney-client relationship.'").

251. TEX. DISCIPLINARY RULES OF PRO. CONDUCT r. 1.05(b)(1) (STATE BAR OF TEX. 2025).

known."[252] As to the generally known standard, in a 2010 ethics opinion where the lawyer was planning to sue a former client for an unpaid bill, the committee adopted the broad interpretation of "generally known," stating:

> Information that is a matter of public record may not be information that is "generally known." A matter may be of public record simply by being included in a government record . . . whether or not there is any general public awareness of the matter. Information that "has become generally known" is information that is actually known to some members of the general public and is not merely available to be known if members of the general public choose to look where the information is to be found.[253]

In a 2016 Texas breach of fiduciary duty case, a client sought disgorgement of fees from a former attorney because the attorney issued a press release, revealing some information that was in the pleadings but some information that was not public.[254] The court engaged in an in-depth discussion of confidentiality under the Texas Rules of Professional Conduct, and as to the issue of revealing a former client's confidential information that was publicly available, the court stated that Texas Rule 1.05(b)(1) does not contain an exception for generally known information.[255] Consequently, the attorney violated that rule by revealing both public and non-public information.[256] In support, the court stated, "Even if third parties might have found the information on their own, the Attorney had a continuing fiduciary duty not to be the conduit or source of others learning about that information."[257] The court characterized the attorney as revealing

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252. TEX. DISCIPLINARY RULES OF PRO. CONDUCT r. 1.05(3) (STATE BAR OF TEX. 2025).

253. State Bar of Tex. Comm. on Pro. Ethics, Formal Op. 595, at 1 (2010); *see also* State Bar of Tex. Comm. on Pro. Ethics, Formal Op. 693 (2022) ("Some of the client confidential information in this public entity context may be 'generally known' due to some members of the public attending these open session or from media accounts of the meetings; however, that fact does not make the entire body of client confidential information relating to the lawyer's representation of the public entity 'generally known.'").

254. Sealed Party v. Sealed Party, No. Civ.A.H-04-2229, 2006 WL 1207732, at *1, *8, *17 (S.D. Tex. May 4, 2006).

255. *Id.* at *15. In dicta and in a footnote, the court discussed the "generally known" exception. *Id.* at *16 n.51. It stated that there was no Texas authority relevant to whether information in a public record was generally known. *Id.* It quoted the Restatement (Third) definition that information is generally known if it can be obtained "through publicly available indexes and similar methods of access." *Id.* (quoting RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 59 cmt. d (A.L.I. 2000)). But the court determined that the attorney had not established that "a person could have learned of the existence of the State Suit from databases generally available to the public. Thus, the Court does not decide whether the information in the public record was 'generally known.'" *Id.*

256. *Id.* at *14.

257. *Id.*

confidential client information for the attorney's "self-promotion and potential financial gain."[258]

The attorney had argued that because the information was "generally known" he had not violated the rules.[259] The court stated that "generally known" only applies to use of client information, and the attorney had revealed client information in the press conference.[260] But in a footnote, in dicta, discussing the definition of generally known assuming it could apply to revealing information, the court stated that there was no Texas authority relevant to whether information in a public record was generally known but there was support for both parties' positions.[261] It quoted the Restatement (Third) definition that information is generally known if it can be obtained "through publicly available indexes and similar methods of access."[262] But the court stated that the attorney had not established that "a person could have learned of the existence of the State Suit from databases generally available to the public. Thus, the Court does not decide whether the information in the public record was 'generally known.'"[263]

However, subsequently the Texas Court of Appeals, in an unreported 2019 case, determined that marital status was confidential information because the rule protects all information learned during the representation even when that information is discoverable by third parties because "an attorney has a continuing fiduciary duty not to be the conduit or source of others learning about that information."[264] Consequently, under Texas law, publicly available information is not generally known.

Thus, several states have taken the position that client information that is publicly available is confidential under Rule 1.6, 1.9, and 1.18 and cannot be used or revealed. But interestingly, courts and ethics committees generally do not make a use versus reveal distinction and instead engage in a "generally known" analysis.[265] The court or ethics committee could take the position that there is no publicly available exception in Rule 1.9(c)(2) as to revealing former client information. Model Rule 1.9(c)(2) states that a lawyer cannot reveal

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258. *Id.* at *19.

259. *Id.* at *1, *15.

260. *Id.*

261. *Id.* at *16, n.51 (citing Ghidoni v. Stone Oak, Inc., 966 S.W.2d 573, 603 n.19 (Tex. App. 1998)) (Cantu, J. dissenting) ("[T]he fact that some of the documents may be public records does not necessarily make them 'generally known.'").

262. *Id.* (quoting RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 59 cmt. d (A.L.I. 2000)).

263. *Id*.

264. *In re* Liebbe, No. 12-19-00044-CV, 2019 WL 1416637, at *1, *5 (Tex. App. Mar. 29, 2019) (citing *Sealed Party*, 2006 WL 1207732, at *14). The marital status had been revealed to third parties in a "release of judgment lien, a general warranty deed, a special warranty deed, a Texas Home Equity Security Instrument, and a warranty deed with Vendor's lien," *id.* at *4, n.2, but the court stated that these documents were not presented to Respondent and thus the court could not consider them in this proceeding. *Id.* at *4.

265. See *supra* Part II.C.

former client information except as allowed or permitted in other rules.[266] Instead, a "generally known" analysis is used even though 1.9(c)(2) does not mention the words, "generally known."[267] Texas is the exception because the court recognized the use versus reveal distinction and did not apply the generally known exception to disclosure of confidential information.[268]

D. Use of Information to a Client's Detriment

As to current clients, Model Rule 1.8(b) allows use of information if it does not harm the client, and many states have the same or similar rule.[269] Specifically, Model Rule 1.8 comment five states, "The Rule does not prohibit uses that do not disadvantage the client."[270]

As to former clients, Model Rule 1.9(c)(1) prohibits use of information to the disadvantage of the former client or when the information is not generally known.[271] A Colorado ethics opinion stated:

> Neither Rule 1.9 nor any of its comments addresses a lawyer's use of information relating to the representation of a former client when the use of the information would not disadvantage the former client. The Committee construes this silence as signaling that a lawyer generally may use former client information, regardless of whether it is generally known, so long as the use of that information will not be harmful to the former client.[272]

Although mentioning the Restatement's definition of "generally known," the Montana Supreme Court determined that the attorney had violated Montana's Rule 1.9(c), when the attorney used former client information that was publicly known for self-enrichment to the client's detriment.[273] In this 2017 attorney discipline case, the attorney filed an attorney lien on clients' property for unpaid attorney's fees and subsequently obtained a writ of execution causing a sheriff's

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266. MODEL RULES OF PRO. CONDUCT r. 1.9(c)(2) (A.B.A. 2018).

267. *See, e.g.*, Ohio Bd. of Pro. Conduct, Formal Op. 2016-10 (2016). "As a result, a lawyer may only reveal information related to a prospective client if the client provides informed consent confirmed in writing or if the information is generally known." *Id.* at 3. Ohio Rules of Professional Conduct follow the Model Rule 1.9(c)(2) rule.

268. *See Sealed Party*, 2006 WL 1207732.

269. MODEL RULES OF PRO. CONDUCT r. 1.18(b) (A.B.A. 2018); *Jurisdictional Rules Comparison Charts, Rule 1.8*, A.B.A. (Mar. 2024), https://www.americanbar.org/groups/professional_responsibility/policy/rule_charts.

270. MODEL RULES OF PRO. CONDUCT r. 1.8 cmt. 5 (A.B.A. 2018).

271. MODEL RULES OF PRO. CONDUCT r. 1.9(c)(1) (A.B.A. 2018).

272. Colo. Bar Ass'n Ethics Comm., Formal Op. 130, at n.1 (adopted Apr. 3, 2017, revised Nov. 17, 2018) (citing Marshall Tucker Band, Inc. v. M T Indus., Inc., 209 F. Supp. 3d 854, 861–62 (D.S.C. 2016)).

273. *In re* Tennant, 392 P.3d 143 (Mont. 2017).

sale during which the attorney bid on the property.[274] The clients eventually redeemed the property.[275] The court cited the Restatement "generally known" definition under which publicly available information is generally known, but stated, "We will not interpret the 'generally known' provision of Rule 1.9(c) to allow Tennant [the attorney] to take advantage of his former clients by retroactively relying on public records of their information for self-dealing."[276] Thus, the Montana court was unwilling to allow the attorney self-enrichment despite the information being publicly available and not confidential under its rules.[277] A similar result was reached in a 2024 Tennessee attorney discipline case, where an attorney was charged with violation of Rule 1.9(c) because the attorney had filed a response to a motion for sanctions and in a footnote revealed that his former client had sent sexually graphic emails that were the subject of a previous lawsuit.[278] Tennessee has adopted the Restatement definition of "generally known."[279] Consequently, the attorney argued that this information was generally known because it came from a public record.[280] The Tennessee Supreme Court, in determining that the attorney had violated Rule 1.9(c), stated that information that is "publicly available is not necessarily 'generally known,' [and that] [t]he exception in Rule 1.9(c) is not intended to let lawyers reveal information relating to a former representation to the detriment of the former client simply because 'a diligent researcher could unearth it through public sources.'"[281] Instead, "[t]he information must be within the basic understanding and knowledge of the public."[282]

Similarly, in dicta, a Florida court, in a case concerning admissible testimony, recognized that under Rule 1.9 a lawyer could use information against a former client if the information is generally known,[283] but stated, "We are not prepared to state that all information contained in any public document

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274. *Id.* at 145, 148.

275. *Id.* at 145.

276. *Id.* at 148–49.

277. *Id.* at 149. The attorney was publicly censored. *Id.*

278. Manookian v. Bd. of Pro. Resp. of Sup. Ct. of Tenn., 685 S.W.3d 744, 793 (Tenn. 2024).

279. TENN. RULES. PRO. CONDUCT r. 1.9 cmt. 8a (TENN. BAR ASS'N 2023).

280. *Manookian*, 685 S.W.3d at 793.

281. *Id.* (quoting *In re* Anonymous, 932 N.W.2d 671, 674 (Ind. 2010)).

282. *Manookian*, 685 S.W.2d at 793 (quoting Pallon v. Roggio, Nos. 04-3625 (JAP), 06-1068 (FLW), 2006 WL 2466854 (D.N.J. Aug. 24, 2006)). The court also cited to Tennessee Rule of Professional Conduct Rule 1.9 comment 8a that states that a lawyer may not reveal or use former client information adversely "simply because the information has become known to third persons . . . . Even if permitted to disclose information relating to a former client's representation, a lawyer should not do so unnecessarily." *Id.* at 794 (quoting TENN. SUP. CT. r. 8; TENN. RULES OF PRO. CONDUCT r. 1.9(c) cmt. 8a).

283. Florida's Rule 1.9 comment defines generally known as "[i]nformation that has been widely disseminated by the media to the public, or that typically would be obtained by any reasonable prudent lawyer who had never represented the former client, should be considered generally known and ordinarily will not be disqualifying. The essential question is whether, but for having represented the former client, the lawyer would know or discover the information." FLA. RULES OF PRO. CONDUCT r. 1.9 cmt. (FLA. BAR 2025).

is 'generally known' within the meaning of the rule. It seems to us highly questionable that an attorney could attack, embarrass, and malign a former client with matters on which he represented and counseled that client . . . ." using publicly available information.[284] Thus, these states would discipline attorneys for using publicly available information to the client's detriment despite the information not being confidential under their rules.

Even where the information may not be detrimental to the client, a court determined that the attorney could not use public information without client permission.[285] The Alaska Bar Association Ethics Committee decided that even where settlement amounts are part of the public record, a lawyer must obtain client informed consent to use those amounts in an advertising campaign reasoning that "[a] final judgment may be public information, but the judgment amount may not be widely disseminated . . . ."[286]

In a New Hampshire case, the court distinguished between confidential information and nonconfidential information in meting out attorney discipline when an attorney used former client information for his own purposes.[287] The attorney was interviewed for a newspaper article and voiced his opinion against a former client's plan to build a shopping mall abutting the attorney's property.[288] The Supreme Court of New Hampshire did not define "generally known" under New Hampshire Rule 1.9 but determined that information such as "traffic and related impacts, and taxes and related benefits . . . are commonly known effects of any large commercial development," and were not confidential.[289] Further a petition filed with the city council indicating a former client's rezoning strategy was not confidential information.[290] However, the attorney received a public reprimand because even though the attorney did not name the developer in his comments, he gave the impression that he was referring to his former client as the developer and information regarding the developer's interest in a different site (which had been the basis of the attorney's work for the former client) was not generally known.[291] The court determined that the attorney used his law firm's prestige to the former client's disadvantage in the former client's desire to build a shopping mall abutting the attorney's property.[292] Thus, despite not using the former client's name, a technique that is

284. King v. Byrd, 716 So.2d 831, 835 (Fla. Dist. Ct. App. 1998).
285. Alaska Bar Ass'n Ethics Comm., Formal Op. 02 (2020).
286. *Id.*
287. Case of Wood, 634 A.2d 1340 (N.H. 1993).
288. *Id.* at 1341.
289. *Id.* at 1344.
290. *Id.*
291. *Id.*
292. *Id.*

generally seen as protecting confidentiality,[293] the committee concluded that discipline was warranted.[294]

Thus, even if the state has adopted the narrower confidentiality standard regarding publicly available information where an attorney uses client information to the client's detriment, a disciplinary committee or court may act contrary to its own rules, as in the Montana[295] or Florida[296] cases, or may stretch to find a reason to discipline, as in the New Hampshire case,[297] given the distaste for such behavior. Or as in the Alaska opinion, even if not detrimental to the client, a disciplinary committee might require consent before the attorney can use the information for personal reasons.[298] This distaste for attorneys using client information for personal gain might explain, although not stated specifically, why states, mentioned in the previous section, adopt a broad definition for "generally known." For example, in the 2016 Texas case mentioned above, the court characterized the attorney as revealing confidential client information for the attorney's "self-promotion and potential financial gain."[299] Although the court stated it was not deciding whether information in the public record was generally known,[300] it quoted the Restatement (Third) definition that information is generally known if it can be obtained "through publicly available indexes and similar methods of access"[301] but determined the attorney had not established that "a person could have learned of the existence of the State Suit from databases generally available to the public."[302] However, it seems that it would have been easy to determine whether, and in fact quite likely that, the state suit was in a public database. The result might be explained by the distaste for the attorney's use of the former client's information for personal gain.

E. Public Records and Rules 3.6 & 3.8

Model Rule 3.6(b)(2) public records safe harbor provision is consistent with the Restatement (Third) of the Law Governing Lawyers definition of

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293. MODEL RULES OF PRO. CONDUCT r. 1.6 cmt. 4 (A.B.A. 2018) (recommending a lawyer use hypotheticals if third persons could not learn confidential information); *See also* Alaska Bar Ass'n Ethics Comm., Formal Op. 1, at n.3 (1995) (public record documents can be exchanged for purposes of "shop talk" between lawyers if not harmful to clients, recommending names be removed).

294. Case of Wood, 634 A.2d 1340, 1345 (N.H. 1993).

295. *In re* Tennant, 392 P.3d 143 (Mont. 2017).

296. King v. Byrd, 716 So.2d 831, 835 (Fla. Dist. Ct. App. 1998).

297. *Wood*, 634 A.2d at 1340.

298. Alaska Bar Ass'n Ethics Comm., Formal Op. 02 (2020).

299. Sealed Party v. Sealed Party, No. Civ.A.H-04-2229, 2006 WL 1207732, at *19 (S.D. Tex. May 4, 2006).

300. *Id.* at *16, n.51.

301. *Id.* (quoting RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 59 cmt. d (A.L.I. 2000)).

302. *Id.*

confidential client information because client information that is publicly available is not confidential.[303] Information in public records is not confidential under the Restatement (Third) definition of confidential information if special expertise or expense is not required for access.[304]

The Model Rules do not define "public record." In a case concerning whether a prosecutor's statements fell within the public record safe harbor, the Maryland Court of Appeals grappled with how to define "information in a public record," in Maryland's Rule 3.6, which was identical to Model Rule 3.6 at the time.[305] The court determined that there was no settled definition of "information contained in a public record."[306] It opted to define it broadly for the case[307] but then limited the definition for future cases to best balance the interests of a fair trial with freedom of expression.[308] For future cases, the court defined "information contained in the public record" in Maryland's Rule 3.6 to apply only to "public government records—the records and papers on file with a government entity to which an ordinary citizen would have lawful access."[309] The court relied heavily on U.S. Supreme Court cases, in weighing "the most fundamental of all freedoms"[310]—a defendant's Sixth Amendment right to a fair trial guaranteed to the states by the Fourteenth Amendment juxtaposed with the First Amendment right to free expression.[311] In reaching its determination of the definition of "information in a public record," the court stated that the right to a fair trial incorporates the right to an impartial jury and requires that "the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print."[312] The court recognized that statements from attorneys involved in the case are more likely to influence the public and potential jury

303. MODEL RULES OF PRO. CONDUCT r. 3.6(b)(2) (A.B.A. 2018).

304. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 59 cmt. d (A.L.I. 2000).

305. Att'y Grievance Comm'n of Md. v. Gansler, 835 A.2d 548, 566 (Md. 2003).

306. *Id.* at 567.

307. The court stated that in its broadest form, "information in a public record" includes "anything in the public domain, including public court documents, media reports, and comments made by police officers." *Id.*

308. *Id.* at 569.

309. *Id.* (stating that this limited public record exception prevents the exception from "swallowing the general rule of restricting prejudicial speech").

310. *Id.* at 559 (quoting Estes v. Texas, 381 U.S. 532, 540 (1965)).

311. *Id.* at 561–63.

312. *Id.* at 558 (quoting Patterson v. Colorado, 205 U.S. 454, 462 (1907)).

members[313] and therefore attorney speech can be regulated more stringently than ordinary citizen speech.[314]

Subsequently, the Indiana Supreme Court adopted the Maryland court's limited definition of "public record," stating however that "'on file' does not mandate such formalities as file stamping or entry on a case docket."[315] The court determined that a probable cause affidavit would be a public record but that a prosecutor must clearly state that the information is the content of the probable cause affidavit or otherwise identify the public document.[316] However, the court stated, "A more expansive concept of a public record that includes the unfiltered and untested contents of all publicly accessible media would permit the public record safe harbor to swallow the general rule of restricting prejudicial speech."[317] Similarly, in a 2011 case involving whether an attorney should be granted pro hac vice, the Massachusetts Supreme Court stated that there was no violation of Rule 3.6 when an attorney's remarks that were quoted in the National Law Journal were "words generally identical to those used in the complaint,"[318] and where other public court filings contained the information the attorney gave, stating that the "court filings are matters of 'public record.'"[319] This decision that information in public records can be revealed under Rule 3.6 is contrary to Massachusetts Rule of Professional Conduct 1.6 comment 3A, which states that information in public records remains confidential unless it has received wide spread publicity.[320]

Perhaps in recognition of this disparate treatment of information in the public record under the rules, a 2019 Colorado ethics opinion limited disclosure of information under its Rule 3.6. The committee stated, "Even when the public statements or posting of materials is allowed under Colo. RPC 3.6(b) or (c), a lawyer must comply with Colo. RPC 1.6 and 1.9 when the statements or posting

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313. *Id.* at 561 (quoting Sheppard v. Maxwell, 384 U.S. 333, 362–63 (1966)) ("Due process requires that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused . . . ."). *Sheppard* was the leading case to initially address this issue and as recognizing that the trial court has the power to minimize prejudicial publicity.

314. *Gansler*, 835 A.2d at 564 (citing Gentile v. State Bar of Nev., 501 U.S. 1030, 1071 (1991)).

315. *In re* Brizzi, 962 N.E.2d 1240, 1247 (Ind. 2012). *See also* People v. Stanley, 559 P.3d 697, 740 (Colo. 2024), where the Colorado Supreme Court also adopted the *Gansler* definition of public record.

316. *Brizzi*, 962 N.E.2d at 1247. *See also* Muex v. State, 800 N.E.2d 249, 252 n.5 (Ind. Ct. App. 2003), where the Court did not decide whether the probable cause affidavit was a public record but noted that the Indiana Supreme Court had stated that "[w]hen the prosecutor files an affidavit or obtains an indictment it becomes a public record, unless in the case of an indictment, the person has not yet been taken into custody or given bail." *Id.* at 252 n.5 (alteration in original) (quoting State *ex rel.* Atkins v. Juv. Ct. of Marion Cnty., 247 N.E.2d 53, 56 (Ind. 1969)).

317. *Brizzi*, 962 N.E.2d at 1247.

318. PCG Trading, LLC v. Seyfarth Shaw, LLP, 951 N.E.2d 315, 321 (Mass. 2011).

319. *Id.*

320. MASS. RULES OF PRO. CONDUCT r. 1.6 cmt. 3A (MASS. SUP. JUD. CT. 2025).

would reveal information related to the representation of a client or former client."[321] Colorado has broadly interpreted Rule 1.6 to protect publicly available information.[322] Consequently, Colorado's Rule 3.6(b) disclosures would be limited.

Other states have not limited the Rule 3.6 public record exception. In a 2018 Montana case concerning the Rule 3.6 public record exception, the defendant challenged statements in newspaper articles attributed to plaintiff's law firm and other sources that discussed "the Montana Supreme Court's new Asbestos Claims Court, as well as general information regarding asbestos claims and the course of litigation."[323] The defendant argued that the statements prevented a fair trial while the plaintiff argued that the statements did not concern the current litigation and therefore, there was no material prejudice to the defendant.[324] The court determined that the information fell within the safe harbors of Rule 3.6, including the public record, and that because the information was published in remote newspapers and fifteen months before trial, a protective order was not needed.[325] This ruling is consistent with Montana's narrow confidential rule but inconsistent with the Montana case mentioned above that refused to allow the attorney to use former client information that was in the public record for the attorney's self-benefit.[326]

In a 2013 Missouri case, the court recognized that the prosecutor's Twitter posts concerned facts "contained in the felony complaint and probable cause statement and, as such, are part of the public record."[327] But the court was concerned about the posts during the trial stating:

> [E]xtraneous statements on Twitter or other forms of social media, particularly during the time frame of the trial, can taint the jury and result in reversal of the verdict. We doubt that using social media to highlight the evidence against the accused and publicly dramatize the plight of the victim serves any legitimate law enforcement purpose or is necessary to inform the public of the nature and extent of the prosecutor's actions. Likewise, we are concerned that broadcasting that the accused is a "child rapist" is likely to arouse heightened public condemnation. We are especially troubled by the timing of Joyce's Twitter posts, because broadcasting such statements immediately before and during trial greatly magnifies the risk that a jury will be tainted by undue extrajudicial influences.[328]

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321. Colo. Bar Ass'n Ethics Comm., Formal Op. 130 (adopted Apr. 3, 2017, revised Nov. 17, 2018).

322. See *supra* Part II.C.1.

323. Underwood v. BNSF Ry. Co., 359 F. Supp. 3d 953, 955 (D. Mont. 2018).

324. *Id.* at 957.

325. *Id.* at 958.

326. *See supra* Part II.D and discussion of *In re* Tennant, 392 P.3d 143 (Mont. 2017).

327. State v. Polk, 415 S.W.3d 692, 695 (Mo. Ct. App. 2013).

328. *Id.* at 695–96.

The court, however, did not determine whether these posts violated Rule 3.8 because the defendant could not prove that they caused substantial prejudice as to warrant the defendant's motion to strike the jury panel.[329] Thus, despite the public record exception in Rules 3.6 and 3.8, some courts have limited this exception or will also consider the timing of the publication of the information to help safeguard a defendant's constitutional right to a fair trial.

A manual published by the Prosecutor Center for Excellence, which gives practical advice to help prosecutors stay within ethical boundaries, recognizes that prosecutors can only comment on matters that are in the public record.[330] The manual advises that "[i]f a prosecutor intends to comment about particular facts in an investigation or arrest, those facts should be included in the charging document."[331] It points out that in Rule 3.6, "[t]he comment to ABA Rule 3.6 specifically states that the prosecutor cannot mention a statement made by the defendant. However, if a public document references the statement, then the prosecutor can call attention to that document without repeating the statement."[332] The manual is replete with advice cautioning prosecutors to think carefully about public statements, but the point is that Model Rules 3.6 and 3.8 allow prosecutors or other attorneys to make statements regarding the defendant when that information is in the public record even if it is the prosecutor who created the public record.

F. Part II Summary

The research in Part II shows that although it may be possible to predict how one state will treat the confidentiality of client information that is publicly available information or perhaps how a state might treat it consistently under one rule yet treat it differently but consistently under another, there is a lack of consistency among states. Further, in some states, it is not possible to predict whether client information that is publicly available remains confidential, and it may depend on whether the issue is decided by a court as opposed to being concluded at the disciplinary stage. Given limited case law in some states and given that ethics opinions often cite other state ethics opinions,[333] the difference among states creates uncertainty for attorneys even in states that have consistently ruled one way.

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329. *Id.* at 696.

330. Kristine Hamann & KC Steckelberg, *Prosecutors and the Press: Ethical and Practical Guidance*, PROSECUTOR'S CTR. FOR EXCELLENCE 47 (2022), https://pceinc.org/wp-content/uploads/2022/10/20221013-Prosecutors-and-the-Press-Ethical-and-Practical-Guidance-PCE-and-PAAM.pdf [https://perma.cc/2BKP-UHFS].

331. *Id.*

332. *Id.* at 48.

333. *See supra* notes 220–21 discussing the Wyoming Supreme Court quoting and relying upon a Massachusetts's case despite Wyoming and Massachusetts having different versions of Rule 1.6.

Several states have concluded that client information that is publicly available is not confidential under Rule 1.6.[334] Some states that reach this conclusion follow the narrower confidences and secrets format for Rule 1.6, but not all of them. So, retention of the confidence and secret format for Rule 1.6 does not definitively explain why these states have adopted a narrow interpretation for their Rule 1.6 equivalent. In some states, the ethical code, opinions, or court decisions reference the Restatement rule,[335] but others have simply concluded that if the information is public, it is not confidential.[336]

As to Rule 1.9, Model Rule 1.9 comment three states that publicly available information will generally not be disqualifying.[337] Part of the rationale in the conflicts analysis is that Model Rule 1.9 should not be read with rigor to allow attorneys to move freely to new firms and for client choice of counsel.[338] Given that some cases have stated that the conflict must be serious to overcome a client's choice of counsel,[339] possession of publicly available client information can be seen as not creating a serious conflict. However, based on the above research, states generally do not rely on comment three in their conflict analysis. Instead, a Rule 1.9(c) "generally known" analysis is used.[340] In doing so, the states that adopt the ABA "generally known" definition that protects client information that is publicly available information and use it in the Rule 1.9(a) conflicts analysis are rigorously applying Rule 1.9. Interestingly, states that have adopted the narrower confidentiality rule mainly rely on the Restatement definition of "generally known" or the idea that publicly available information is not confidential as opposed to using either Rule 1.9 comment three or the Rule 3.6 exception for public records to support this conclusion.[341] Also, states tend to ignore the use/reveal distinction in Rule 1.9(c) and engage in a "generally known" analysis, even in situations that clearly involve the revelation of client information governed by Rule 1.9(c)(2), which does not mention the "generally known" standard.[342]

As to the public record exception in Rules 3.6 and 3.8, prosecutors can put client information into the public record and subsequently discuss it, but some courts have limited what constitutes a public record or will also consider the timing of the publication of the information to help safeguard a defendant's

334. *See supra* Part II.A.1.

335. *See, e.g.*, N.J. RULES OF PRO. CONDUCT r. 1.6, official cmt. (N.J. STATE BAR ASS'N Sep. 1, 2018); *supra* Part II.A.1.

336. *See, e.g.*, *In re* Murawski, No. 6243546, 2010 WL 2007961, at *1 (Ill. Att'y Registration & Disciplinary Comm'n May 12, 2010); *supra* Part II.A.1).

337. MODEL RULES OF PRO. CONDUCT r. 1.9 cmt. 3 (A.B.A. 2018).

338. MODEL RULES OF PRO. CONDUCT r. 1.9 cmt. 4 (A.B.A. 2018).

339. *See, e.g.*, State *ex rel.* Youngblood v. Sanders, 575 S.E.2d 864, 893 (W. Va. 2002).

340. *See supra* Parts II.A.2 and II.C.2.

341. *See supra* Part II.A.2.

342. *See, e.g.*, Ohio Bd. of Pro. Conduct, Formal Op. 2016-10, at 3 (2016); *See supra* Part II.C.2.

constitutional right to a fair trial.[343] But other than Colorado,[344] these opinions do not consider how client information that is publicly available is treated under the state's confidentiality rules in their analysis.

As to the "use" of client information that is publicly available, even if the state has adopted the narrower confidentiality standard determining that publicly available information is not confidential, where an attorney uses public client information for the attorney's benefit at the client's expense, disciplinary committees or courts have ruled against the attorney given the distaste for this behavior. They have done so even if it is contrary to their own confidentiality rules, as in the Montana[345] or Florida[346] cases; or they may stretch to find a reason to discipline, as in the New Hampshire[347] or Texas[348] cases; or they may require consent as in the Alaska ethics opinion even when the use may not be detrimental to the client. [349]

The next section looks at the policy rationales stated in the rules or opinions and the arguments given to possibly explain the state's disparate treatment of publicly available information.

III. POLICY RATIONALES

A. Frank Communication

Model Rule 1.6 comment two states the reason for client attorney confidentiality—"The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct."[350] The Restatement similarly states that "[t]he law is molded on the premise that a greater good inheres in encouraging all clients, most of whom incline toward complying with the law, to consult freely with their lawyers under the protection of confidentiality in order to gain the benefit of frank communication."[351] This rationale applies equally under Model Rule 1.9 as most current clients at some point become former clients who want their confidential information to stay confidential, and equally under Model Rule

343. *See supra* Part II.E.

344. Colo. Bar Ass'n Ethics Comm., Formal Op. 130 (adopted Apr. 3, 2017, revised Nov. 17, 2018).

345. *In re* Tennant, 392 P.3d 143 (Mont. 2017).

346. King v. Byrd, 716 So.2d 831, 835 (Fla. Dist. Ct. App. 1998).

347. Case of Wood, 634 A.2d 1340 (N.H. 1993).

348. Sealed Party v. Sealed Party, No. Civ.A.H-04-2229, 2006 WL 1207732, at *1, *19 (S.D. Tex. May 4, 2006).

349. Alaska Bar Ass'n Ethics Comm., Formal Op. 02 (2020).

350. MODEL RULES OF PRO. CONDUCT r. 1.6 cmt. 2 (A.B.A. 2018).

351. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS ch. 5, intro. note (A.L.I. 2000).

1.18(b) regarding prospective clients because these clients would also want their confidential information to remain confidential.

This policy rationale is premised on the information being confidential. If the client does not believe that the information is confidential, then the client would not be concerned about the protection of confidentiality before revealing it.[352] This conclusion is evident in the attorney-client privilege where generally the client waives the privilege if the client reveals information to a third party.[353] The privilege is waived because if a client divulges the information to a third party, it is likely that the client would have also divulged the information to the attorney, "even without the protection of the privilege."[354] The reason supporting a broad confidentiality rule is absent when the information is not confidential. It seems unlikely that individuals believe that information easily accessible to the public, for example, through an internet search, is confidential.[355] Thus, where the individual does not believe the information is confidential because it is publicly available, this rationale is irrelevant.[356] Further, studies have shown that individuals would confide information to a lawyer "even if secrecy were limited,"[357] and that the effect of confidentiality on client disclosure to attorneys "may not be as strong as most lawyers believe."[358]

Of course, not all information that is publicly available is easily accessible. The Restatement rule states that information that requires special skill, knowledge, or expertise remains confidential.[359] "Special knowledge" is defined as "information about the whereabouts or identity of a person or other source from which the information can be acquired, if those facts are not themselves generally known."[360] But where a client's name is known and an internet search provides information about the client representation, that information is not

352. *But see* State Bar of Nev. Comm. on Ethics & Pro. Resp., Formal Op. 41 (2009) (even if the client does not consider the information confidential, Rule 1.6 applies automatically).

353. *See* Blattman v. Scaramellino, 891 F.3d 1, 4 (1st Cir. 2018); Bittaker v. Woodford, 331 F.3d 715, 719 (9th Cir. 2003) ("[W]aiver occurs when a party . . . shows disregard for the privilege by making the information public.").

354. *In re* Pac. Pictures Corp., 679 F.3d 1121, 1126–27 (9th Cir. 2012).

355. *See generally*, Lever, *supra* note 55 (discussing popular opinion that publicly available information is generally known).

356. Food Mktg. Inst. v. Argus Leader Media, 588 U.S. 427, 428 (2019) ("[I]t is hard to see how information could be deemed confidential if its owner shares it freely.").

357. Nancy Leong, *Attorney-Client Privilege in the Public Sector: A Survey of Government Attorneys*, 20 GEO. J. LEGAL ETHICS 163, 176–79 (2007) (citing Fred C. Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 351, 378 (1989) ("[W]hile a preference for nondisclosure rules exists, a substantial majority of laypersons would continue to use lawyers even if secrecy were limited.")). Ms. Leong's paper discusses a 1962 Yale study. *Id.* at 176–79.

358. Susan R. Martyn, *In Defense of Client-Lawyer Confidentiality . . . And Its Exceptions . . .*, 81 NEB. L. REV. 1320, 1325 (2003) (citing Note, *Functional Overlap Between the Lawyer and Other Professionals: Its Implications for the Privileged Communications Doctrine*, 71 YALE L.J. 1226, 1261–73 (1962)); Fred C. Zacharias, *supra* note 358, at 352).

359. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 59 cmt. d (A.L.I. 2000).

360. *Id.*

confidential and likely not considered to be so by a client. Arguably, such information meets the notoriety standard as anyone can know it. As stated by one court concerning information in the public record, it "is known to the whole world,"[361] and several states have concluded that publicly available information is not confidential.[362]

However, many other states have determined that client information that is publicly available is confidential unless it meets the notoriety standard.[363] This requirement that someone else must disseminate the information widely, for example, through the evening news, as dictating whether there was an expectation of confidentiality ignores the person whose expectation drives the policy rationale behind the broad confidentiality rule. Also problematic, the rationale is premised on the idea that if confidentiality is ensured, the client will fully divulge all relevant embarrassing information. No one likes to rehash poor choices, and people forced into the judicial system often do not trust the system or their lawyers; consequently, people lie to their lawyers.[364] Often, people do not divulge information to their attorneys for various reasons, even when they believe such information would be confidential. The issue is what is the optimal level of confidentiality for publicly available information when there are other valid and competing policy concerns and the policy reason given in support of a broad confidentiality rule falters.

As detailed by the Maryland Supreme Court, commentators have discussed the unnecessary breadth of Rule 1.6 and Rule 1.9, stating that "read literally and in isolation, the rule [1.6] is so stringent as to approach the unworkable and the unrealistic."[365] The court also stated:

> [T]o prohibit innocuous talk about a client would be senseless, would create morbid secretiveness among overscrupulous lawyers, and, by trivializing it, would detract from the soundness of the confidentiality

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361. *Ex parte* Taylor Coal Co., Inc., 401 So.2d 1, 9 (Ala. 1981); *see also* Ohio Sup. Ct. Bd. of Comm'rs on Grievances & Discipline, Formal Op. 2013-4, at 7 (2013) ("In general, criminal convictions are matters of public record and are usually accessible through public databases not requiring any particular expertise to obtain the conviction information.").

362. *See supra* Part II.A.

363. *See supra* Part II.C.

364. Dru Stevenson, *Against Confidentiality*, 48 U.C. DAVIS L. REV. 337, 347 (2014) (arguing that clients withhold information and lie to their attorneys regularly diluting this stated policy purpose). Stevenson cited to many sources for the proposition that clients lie to their attorneys. *Id.* at 347, n.40. *See, e.g.*, Harry I. Subin, *The Lawyer as Superego: Disclosure of Client Confidences to Prevent Harm*, 70 IOWA L. REV. 1091, 1164 (1985) ("It also is highly debatable whether the rule of confidentiality results in fuller disclosure than would occur without it. Lawyers have reported both client reluctance to tell the lawyer all, and client lying."); Harry I. Subin, *The Criminal Lawyer's "Different Mission": Reflections on the "Right" to Present a False Case*, 1 GEO J. LEGAL ETHICS 125, 152 (1987) ("[T]hat clients lie to their lawyers is well-known now, as the great volume of literature on client perjury reflects.").

365. Harris v. Baltimore Sun Co., 625 A.2d 941, 946–48 (Md. 1993) (quoting 1 G. HAZARD, JR. & W. HODES, *THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT* 96 (1985)).

> principle. Instead, MR 1.6 should be read to prohibit those needless revelations of client information that incur some risk of harm to the client.[366]

Consequently, the Maryland Supreme Court held, "There must be the potential for some harm to the client's interest before an attorney will be considered to have violated the prohibition of MR 1.6(a) and to be subject to discipline, for having revealed 'information relating to representation of a client.'" [367] "Whether there is a risk or potential for harm to the client's interests turns on the facts and circumstances of the particular case."[368] The court then remanded the case for a determination of whether revelation of the information requested by the newspaper would harm the client.[369] Preventing harm to the client from dissemination of publicly available information is discussed next.

B. Harm

Harm should be a concern, but only the Model Rules concerning use take harm to the client into consideration. Under Model Rules 1.6(a), 1.9(c)(2), and 1.18(b), as to disclosure, all information related to the representation from any source cannot be revealed without regard to whether its disclosure will be harmful to the client. Model Rule 1.8(b), as to current clients, only prevents use that is harmful to the client,[370] and Model Rule 1.9(c)(1), as to former clients, prevents use only when it is harmful to the client. But a harm standard does not apply to the public record exception in Rule 3.6(b), where there can be serious harm.

Specifically, a prosecutor can put information in a probable cause affidavit or other pre-trial documents and then that information is part of the public record.[371] When the information is part of the public record, then under Rule

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366. *Id.* at 947 (quoting CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 6.7.2, at 301 (1986)).

367. *Id.*; *see also* Alaska Bar Ass'n Ethics Comm., Formal Op. 1 (1995) (Rule 1.6 should be limited by whether harm occurs).

368. *Harris*, 625 A.2d at 947.

369. *Id.* at 948.

370. MODEL RULES OF PRO. CONDUCT r. 1.8(b) (A.B.A. 2018).

371. Consider this continuing legal education information suggested for prosecutors in Massachusetts:

> When addressing the court for the first time, take the opportunity to outline the strength of the Commonwealth's case, and provide as much detail about the allegations and the nature of the Commonwealth's evidence as possible. Include any of the defendant's statements, as well as the results of any scientific evidence. The defendant's criminal history, past incarcerations, and defaults are relevant to the issue of bail and become part of the public court proceedings. Remember: If you did not say it in open court, you should not say it later if it is barred by Mass. R. Prof. C. 3.6 . . . . Do not agree to delay bail hearings . . . because you will lose your opportunity to create a public record . . . . The press is often present only for the arraignment and the verdict, so consider

3.6(b), the prosecutor can discuss it. Probable cause affidavits, by their nature, contain damaging information regarding the alleged criminal defendant. For example, the Indiana Supreme Court discussed information that was in the filed probable cause affidavit.[372] It stated that the defendant was suspected of killings in other jurisdictions and "that 'the evidence found in his truck including a .22 caliber weapon, all point to Mendenhall [the defendant] as the killer.'"[373] It discussed "DNA testing and the law enforcement officials' discovery of such a large amount of blood that they were able to determine that Ms. Purpura [the victim] was no longer alive."[374] The court concluded that statements reiterating this information "were based on publicly available information and protected by the safe harbor provision in Rule 3.6(b)."[375] The potential harm is obvious and likely the goal of the prosecutor's disclosure. And although an attorney is allowed to counter such information under Model Rule 3.6's retaliatory exception, a lawyer must tread carefully against the confidentiality presumption.[376]

Corporate defendants, on the other hand, as more sophisticated users of legal services, routinely obtain protective orders, stipulations, and/or other tools to maintain secrecy, including secret settlements. An infamous example is the Ford/Firestone litigation, during which protective orders protected information learned in discovery, and the parties agreed to a secret settlement.[377] One scholar stated as to the Firestone/Ford litigation that "it seems obvious that the secrecy agreements and orders worked to delay the recall of these tires for years. In those years, 271 people died in accidents linked to Explorer/Firestone tire failure, and more than 800 people were seriously injured."[378] Further, in the clergy sexual misconduct cases, dioceses settled lawsuits involving members of the church who allegedly sexually abused minor plaintiffs, "conditioned upon the parties agreeing that the settlements and any information regarding the claims would

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> preparing, prior to the defendant's arraignment, a statement of the case to be filed with the court. This statement may completely outline the nature of the Commonwealth's case against the defendant, as well as refer to any other matters that would be appropriate to argue at a bail hearing. Filing this statement with the court will permit you to create a "public record" should defense counsel succeed in preventing a bail argument.

Mitchell, *supra* note 5, at § 10.8.1.

372. *In re* Brizzi, 962 N.E.2d 1240 (Ind. 2012).

373. *Id.* at 1246.

374. *Id.*

375. *Id.* at 1246–47.

376. *See, e.g.*, United States v. McGregor, 838 F. Supp. 2d 1256 (M.D. Ala. 2012). In this case, a religious organization had sent out a mass-mailing criticizing gambling, discussing its corruptive effects, and referencing the trial, the court determined that although defense counsel had a right to respond, the "comment that government witnesses could not be rehabilitated by 'God himself,' . . . [was] an opinion [and] not the type of factual information protected by Rule 3.6 . . . ." *Id.* at 1265–66.

377. Susan P. Koniak, *Are Agreements to Keep Secret Information Learned in Discovery Legal, Illegal, or Something in Between?*, 30 HOFSTRA L. REV. 783 (2002).

378. *Id.* at 785.

remain confidential, [while] [t]he defendant priests were sometimes transferred to another parish without informing parishioners, law enforcement authorities, or the communities in which they reside."[379] Thus, perhaps the harm analysis should not just focus on harm to the client, as Model Rule 1.8(b) and 1.9(c) regarding use do, but a broader harm analysis weighing harm to the client from disclosure or use against the harm to others if the information remains secret. This article takes no position on the contested issue of secret settlements other than to recognize that public record information can prevent harm to people outside of the litigation and that secret settlements are generally only available to defendants who have financial leverage to engineer them.

Thus, some defendants can better protect themselves from information being made public while others cannot protect themselves from disclosure and attenuating harm. There is a disparity in the treatment of publicly available information in the Model Rules that cannot be accounted for based on harm to the client, which is the only harm that is considered. Instead, disclosure is allowed under the Rule 3.6(b) public records exception, where the most harm can occur, because incarceration and perhaps even death are a possibility, while public records are protected in Model Rules 1.6, 1.9 and 1.18(b) from disclosure even if disclosure would result in no harm to the client. Further, the Model Rules do not consider harm to people other than the client.

C. Transparency

As discussed, Model Rule 3.6 has been the subject of Supreme Court litigation, and unlike Model Rules 1.6 and 1.9, contains detailed commentary regarding the weighing of the public policy interests. The interests implicated by Model Rule 3.6 concern the right to a fair trial versus the right to freedom of expression, which can promote transparency in and information about the legal system as well as the safety of the public.[380] Transparency in the judicial process can guard against the miscarriage of justice by police, prosecutors, and the judiciary.[381] Therefore, there is a cost to protecting information in the public record. As stated by the Seventh Circuit in regard to civil suits:

> [I]n our present society many important social issues became entangled to some degree in civil litigation. Indeed, certain civil suits may be instigated for the very purpose of gaining information for the public. Often actions are brought on behalf of the public interest on a private attorney general theory. Civil litigation in general often exposes the need for governmental action or correction. Such revelations should not

379. Walter W. Heiser, *Public Access to Confidential Discovery: The California Perspective*, 35 W. ST. U. L. REV. 55, 57 (2007).

380. MODEL RULES OF PRO. CONDUCT r. 3.6 cmt. 1 (A.B.A. 2018).

381. Gentile v. State Bar of Nev., 501 U.S. 1030, 1035 (1991) (Kennedy, J.) (plurality opinion).

> be kept from the public. Yet it is normally only the attorney who will have this knowledge or realize its significance. Sometimes a class of poor or powerless citizens challenges, by way of a civil suit, actions taken by our established private or semi-private institutions or governmental entities. Often non-lawyers can adequately comment publicly on behalf of these institutions or governmental entities. The lawyer representing the class plaintiffs may be the only articulate voice for that side of the case. Therefore, we should be extremely skeptical about any rule that silences that voice.[382]

Transparency in criminal cases is equally important. As the D.C. Circuit Court recently stated in a case concerning President Trump's comments outside of the court proceedings, "To sum up, the Constitution requires robust protection of speech about criminal trials and the government's effort to deprive a defendant of liberty."[383] However, the court also recognized that the litigant's right to a fair trial must be protected and stated, "At the same time, the Constitution requires courts to ensure that outside speech and influences do not derail or corrupt the criminal trial process."[384]

But as to publicly available information, the United States Supreme Court has stated, in case concerning whether newspaper employees could be punished for contempt, that

> [a] trial is a public event. What transpires in the court room is public property. If a transcript of the court proceedings had been published, we suppose none would claim that the judge could punish the publisher for contempt. And we can see no difference though the conduct of the attorneys, of the jury, or even of the judge himself, may have reflected on the court. Those who see and hear what transpired can report it with impunity.[385]

The Court recognized that

> [c]ourts must have power to protect the interests of prisoners and litigants before them from unseemly efforts to pervert judicial action. In the borderline instances where it is difficult to say upon which side the alleged offense falls, we think the specific freedom of public

382. Chi. Council of Laws. v. Bauer, 522 F.2d 242, 258 (7th Cir. 1975).

383. United States v. Trump, 88 F.4th 990, 1007 (D.C. Cir. 2023), *reh'g denied*, No. 23-3190, 2024 WL 252746 (D.C. Cir. Jan. 23, 2024).

384. *Id.* ("The Supreme Court has instructed courts that when they are imposing orders restricting speech about judicial proceedings, they must in all cases consider both 'the imminence and magnitude of the danger' to the judicial process that flows from the speech and 'the need for free and unfettered expression.'") (quoting *Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829, 843 (1978)).

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

> comment should weigh heavily against a possible tendency to influence pending cases. Freedom of discussion should be given the widest range compatible with the essential requirement of the fair and orderly administration of justice.[386]

However, the Court also stated that "the press should not be impaired through the exercise of that power, unless there is no doubt that the utterances in question are a serious and imminent threat to the administration of justice."[387]

Further, other mechanisms in judicial proceedings that limit transparency, such as gag orders, protective orders, and closed courtrooms, are preferable to a broad attorney confidentiality rule because a judge exercises discretion and balances the numerous interests involved before employing them. In discussing the need for protective orders to protect litigant confidentiality and as a counter to the point that protective orders can keep confidential information about a public hazard or danger, it has been argued that because "the complaint and all subsequent pleadings, filings, and court proceedings are open, and the public and the press can therefore obtain more information about the alleged danger as the litigation progresses," protective orders need not be limited.[388] Instead, protective orders should remain within the court's discretion without a public access to information presumption preventing them.[389] Where the information has not been sealed and is publicly available, there is a presumption that this information is available to the public. If confidentiality is needed, these tools wielded using a judge's discretion to balance the issues reduce the need for a broad confidentiality rule.

Thus, transparency in the judicial and other government processes is a valid policy rationale against a broad confidentiality rule. Reasons supporting transparency include protecting against corruption and allowing the public access to information concerning matters of general public concern. Trials are public events, and the information belongs to the public. Secrecy in the judicial process is the antithesis to transparency.[390] Despite the recognized importance of transparency, as to disclosure of information under the Model Rules 1.6, 1.9, and 1.18(b), there is no balancing of transparency concerns or consideration of other mechanisms available that judges can implement when needed to protect information. The only policy rationale considered is the one regarding full and frank communication. But even if transparency was considered, it must be balanced against the litigant's right to a fair trial.

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386. *Id.* at 373 (quoting Pennekamp v. Florida, 328 U.S. 331, 347 (1946)).

387. *Craig*, 331 U.S. at 373. Elsewhere the Court had used the "clear and present danger" to the administration of justice standard. *Id.* at 371.

388. Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427, 479 (1991).

389. *Id.* at 490–94.

390. Stevenson, *supra* note 364, at 343. Professor Stevenson argues for eliminating confidentiality rules. This paper argues instead for amending the rules to more closely reflect the policy concerns and to do so equitably in light of the imbalance of resources. *See infra* Part IV.B.2.

D. Freedom of Speech & The Right to a Fair Trial

In 2013, the Virginia Supreme Court delved into the competing interests, with a focus on freedom of speech, in a case concerning an attorney using public information to blog about completed cases.[391] The court stated, "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."[392] The court stated that the Virginia State Bar concern that allowing an attorney to post truthful public information would stifle client communications and reduce public confidence in the legal profession had no evidentiary support.[393] The court held that the Virginia State Bar's interpretation of Rule 1.6 violated the First Amendment and 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."[394] The court had concluded that the blogs were commercial speech and that because the blog posts could be potentially misleading, the Virginia State Bar could require that the attorney include disclaimers on his blog post.[395]

In a 2024 case, the Tennessee Supreme Court distinguished between information in a public record and information stated in the courtroom concluding that when information is discussed in a courtroom, it becomes generally known.[396] It further distinguished the Virginia case by stating that the

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391. Hunter v. Va. State Bar *ex rel.* Third Dist. Comm., 744 S.E.2d 611, 620 (Va. 2013). This case concerned "blog posts [of] cases that had been concluded . . . . [A]ll of the information that was contained [in the] blog was public information and would have been protected speech had the news media or others disseminated it." *Id.* The dissent characterized the blog posts as follows:

> Hunter's blog contains articles about legal and policy issues in the news, as well as detailed descriptions of criminal trials, the majority of which are cases where Hunter was the defense attorney. The articles also contain Hunter's commentary and critique of the criminal justice system. He uses the case descriptions to illustrate his views.

Id. at 622 (Lemons, J., McClanahan, J., dissenting in part).

392. *Id.* at 619 (citing Gentile v. State Bar of Nev., 501 U.S. 1030, 1076 (1991)). The court further stated, "At the very least, [the] cases recognize that disciplinary rules governing the legal profession cannot punish activity protected by the First Amendment, and that First Amendment protection survives even when the attorney violates a disciplinary rule he swore to obey when admitted to the practice of law." *Id.* at 620 (alteration in original) (quoting *Gentile*, 501 U.S. at 1054).

393. *Id.*

394. *Id.*

395. *Id.* at 618–19. The dissent characterized the blog posts as political speech protected by the First Amendment and as such, the Virginia State Bar should not have been able to require a disclaimer. *Id.* at 622 (Lemons, J., McClanahan, J., dissenting in part).

396. Manookian v. Bd. of Prof. Resp. of Sup. Ct. of Tenn., 685 S.W.3d 744, 790 n.65 (Tenn. 2024).

Virginia case concerned commercial speech while the Tennessee attorney acted to embarrass a previous client "to gain unfair tactical advantage."[397]

There is much to a First Amendment protection discussion. As to this paper, attorney freedom of expression as commentary on the judicial system and other related government processes, particularly on the need for reform in the judicial system, is an important policy consideration balanced against the equally important need for fair trials.

In summary, the policy rationale for a broad confidentiality rule and a broad interpretation of the term "generally known"—that unless confidentiality is protected, clients will not divulge information to their attorneys—does not withstand scrutiny when applied to publicly available information. This policy rationale is premised on clients believing that the information is confidential. Most people do not believe that information that can easily be found on the internet or in public records is confidential and consequently would divulge the information to their attorneys even if they knew that the attorney could reveal it.[398] The broad confidentiality standard regarding public information does not account for the client's expectations and study results challenging the premise that broad confidentiality rules are needed to ensure clients will tell their attorneys needed information.[399]

Further, the failure to consider other valid policy reasons that compete with a broad confidentiality rule is equally problematic. The United States Supreme Court and other courts have commented on the need for transparency of government processes, including trials and matters leading up to trial to prevent corruption.[400] "A trial is a public event," often concerning matters of interest to the public. [401] Mandating confidentiality of public records decreases transparency of the judicial system at a cost. Additionally, an attorney is an expert who is a witness to these judicial matters of public interest and is uniquely positioned to comment on them. The attorney's right to freedom of speech should not be curtailed absent a compelling reason, such as the defendant's right to a fair trial. There are mechanisms in place for limiting the dissemination of information, such as protective orders that are issued by a judge who weighs the competing interests. The constitutional issue of competing fundamental rights has its own analysis honed over many years of weighing those competing interests in a litigation setting.[402]

In Model Rules 1.6(a), 1.9(c)(2), and 1.18(b), there has been no weighing of competing interests concerning the reveal of information. Confidentiality is protected broadly based on a false narrative. No consideration is given as to the client's expectations or whether the client is harmed by the disclosure. No

397. *Id.*
398. *See supra* Part III.A.
399. *See supra* notes 358–59.
400. *See supra* Part III.C.
401. Craig v. Harney, 331 U.S. 367, 374 (1947).
402. *See, e.g.*, Gentile v. State Bar of Nev., 501 U.S. 1030 (1991).

consideration is given as to whether cloistering the information, although perhaps protecting the client, harms the public either directly or through a lack of transparency.

A weighing of public policy interests has occurred in other Model Rules. In Model Rule 3.6, a retaliation exception, which allows an attorney to retaliate to respond to information that others have publicized, was added after the *Gentile* case.[403] Further, Model Rule 3.6 comment one discusses the competing policy interests and mentions public safety.[404] So, a weighing of public policy concerns occurred as to the Rule 3.6 public records exception concerning the public's need for information regarding criminal defendants' or other defendants' actions that may affect the community versus the defendant's right to a fair trial.

The rationale that the public should have broad access to legal representation was weighed against the need for confidentiality in Model Rules 1.9(a), 1.9(b), and 5.6. Model Rule 1.9 comment three states that "[i]nformation that has been disclosed to the public or to other parties adverse to the former client ordinarily will not be disqualifying,"[405] in a Rule 1.9(a) analysis. This policy is mentioned in Model Rule 1.9 comment four that Model Rule 1.9(b) "should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel [and] . . . the rule should not unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association."[406] Model Rule 5.6 prevents settlement agreements that restrict a lawyer's right to practice based on limiting the lawyer's availability to other clients.[407] Thus, where a weighing has occurred as in Model Rules 3.6, 1.9(a), 1.9(b) and 5.6, the result has been less secrecy.

As to use in Model Rule 1.8(b) and Rule 1.9(c), an attorney can only use client information where there is no disadvantage to the client. The Model Rules do not define disadvantage.[408] Under the Restatement rule, confidential information cannot be revealed if "there is a reasonable prospect that doing so will adversely affect a material interest of the client . . . ."[409] The Restatement states that whether there is an adverse effect "depends on the circumstances," but that "the relevant inquiry is whether a lawyer of reasonable caution, considering only the client's objectives, would regard use or disclosure in the circumstances as creating an unreasonable risk of adverse effect either to those objectives or to other interests of the client."[410] The Model Rules do not require the use to impact a client's material interest as the Restatement does. Further,

403. MODEL RULES OF PRO. CONDUCT r. 3.6(c) (A.B.A. 2018).
404. MODEL RULES OF PRO. CONDUCT r. 3.6 cmt. 1 (A.B.A. 2018).
405. MODEL RULES OF PRO. CONDUCT r. 1.9 cmt. 3 (A.B.A. 2018).
406. MODEL RULES OF PRO. CONDUCT r. 1.9 cmt. 4 (A.B.A. 2018).
407. MODEL RULES OF PRO. CONDUCT r. 5.6 (A.B.A. 2018).
408. MODEL RULES OF PRO. CONDUCT r. 1.8 cmt. 5 (A.B.A. 2018) provides an example of harm to the client, which indicates that acting in competition with the client would be considered acting to the client's disadvantage.
409. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 60 cmt. (c)(i) (A.L.I. 2000).
410. *Id.*

the Model Rules do not state the policy reasons behind the limitation, other than in Model Rule 1.9, that the rules are for the benefit of the former client.[411] Protecting client information promotes goodwill towards the profession. But again, there has been no weighing of other policy concerns. For example, disclosure may cause limited harm to the client, especially where the information is publicly available, while secrecy may cause greater harm to many people.[412]

A balancing of competing and valid policy rationales as to publicly available information supports a change in the Model Rules.

IV. ANALYSIS AND SOLUTIONS

A. Analysis of Arguments and Policy

The internet has equalized access to information, while cell phones and other small electronic devices have made this information readily available. Despite the availability of information, the ABA and most states, either in court or ethics opinions, take the position that lawyers may not reveal prospective, current, or former client information learned during the representation or potential representation even if the information is publicly available, unless it falls under a different stated exception.[413]

1. Rhetoric over Reality.—

a. Rhetoric.—This position puts rhetoric over reality. It has been stated that "client confidentiality is sacrosanct,"[414] an "absolute, critical value," and "a nonnegotiable element of our judicial system that must not be overridden except in cases so dramatic that reporting should occur in spite of any rule."[415] A dissenting judge in the 2013 Virginia First Amendment case discussed previously, which held that an attorney can post truthful public trial information, referenced the comment to Virginia's Rule 1.6, which states that "[a] fundamental principle in the client-lawyer relationship is that the lawyer

411. MODEL RULES OF PRO. CONDUCT r. 1.9 cmt. 9 (A.B.A. 2018).

412. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 60 cmt. b (A.L.I. 2000) (There is a cost to secrecy when a person whose "personal plight and character are much more sympathetic than those of the lawyer's client or who could accomplish great public good or avoid great public detriment if the information were disclosed.").

413. *See supra* Part II.C. *See also* A.B.A. Comm. on Ethics & Pro. Resp., Formal Op. 480 (2018) (Information "contained in a public document or record is *not* exempt from the lawyer's duty of confidentiality under Model Rule 1.6.").

414. Jan L. Jacobowitz & Kelly Rains Jesson, *Fidelity Diluted: Client Confidentiality Gives Way to the First Amendment & Social Media in Virginia State Bar, ex rel. Third District Committee v. Horace Frazier Hunter*, 36 CAMPBELL L. REV. 75, 82 (2013).

415. *Id.* at 85 (quoting Irma S. Russell, *Cries and Whispers: Environmental Hazards, Model Rule 1.6, and the Attorney's Conflicting Duties to Clients and Others*, 72 WASH. L. REV. 409, 448–49 (1997)).

maintain confidentiality of information relating to the representation."[416] The judge then stated, "I fear the consequence of the majority's weakening of the attorney's obligation of confidentiality may be a substantial undermining of the attorney-client relationship, as well as the further erosion of the respect and esteem accorded attorneys by their clients and the public." [417] When confidentiality is the desired result, this type of rhetoric is invoked without mention of the many exceptions that allow an attorney to extinguish client confidentiality without client consent.[418]

b. Reality.—The reality is there are numerous exceptions to the confidentiality rule with some that benefit attorneys.[419] Many of the exceptions available in Model Rule 1.6 concern situations where the public would benefit from disclosure, such as Rule 1.6(b)(3), which allows the lawyer to reveal confidential client information that

> rela[tes] to the representation of a client to the extent the lawyer reasonably believes necessary . . . to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services.[420]

This exception is similar to others in the rule regarding client wrongdoing is purposefully narrow with numerous elements that must be met.[421]

However, some exceptions concern the attorney's self-interest. For example, the attorney may reveal information:

> to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client . . . .[422]

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416. Harris v. Baltimore Sun Co., 625 A.2d 941, 952–53 (Md. 1993) (Chasanow, J., concurring in part and dissenting in part) (alteration in original) (quoting MD. RULES OF PRO. CONDUCT r. 1.6 cmt.).

417. *Id.* at 953 (Chasanow, J., concurring in part and dissenting in part).

418. *See, e.g.*, the exceptions in ABA Model Rule 1.6, Model Rule 3.3, and Model Rule 3.6.

419. *See, e.g.*, MODEL RULES OF PRO. CONDUCT r. 1.6(b)(7) (A.B.A. 2018) (allowing an attorney to reveal client information "to detect . . . conflicts of interest arising from the lawyer's change of employment . . . .").

420. MODEL RULES OF PRO. CONDUCT r. 1.6(b)(3) (A.B.A. 2018).

421. *Id.* Rightfully, a lawyer might question whether the whistleblowing activity the lawyer wishes to engage in will meet all the elements in the narrow exception, deterring the lawyer from divulging the information.

422. MODEL RULES OF PRO. CONDUCT r. 1.6(b)(5) (A.B.A. 2018). The comment states that the lawyer may respond to the extent reasonably necessary. MODEL RULES OF PRO. CONDUCT r. 1.6 cmt. 10 (A.B.A. 2018).

Where the lawyer can protect against a claim;[423] secure legal advice regarding the lawyer's compliance with professional conduct rules;[424] and detect and resolve conflicts from an employment change[425] using information that the client expected to remain confidential, the argument against an exception allowing revelation of information that is already public makes little sense, especially if there is no harm to the client. Thus, a valid analysis requires looking beyond the confidentiality rhetoric to assess whether publicly available information should be kept confidential.

2. Arguments for a Broad Confidentiality Rule.—

a. Gossip about and humiliation of clients.—An argument against allowing attorneys to use or reveal publicly available information is that lawyers could "embarrass and humiliate former clients with impunity as long as they use confidential information that is in the public records"[426] and lawyers can "freely gossip about their clients at cocktail parties and entertain dinner companions with amusing stories about their clients, identifying the clients by name, as long as they believe their anecdotes have no risk or potential for harm to their clients' interests."[427] This concern does not consider that much attorney business comes from former clients through repeat business or referrals and attorneys who embarrass former clients are cutting off a source of potential income and would be acting against their own self-interest. Further, it does not take into consideration that the listeners, whether an individual, group, or larger audience through social media or the press, would likely not hire or recommend an attorney who spills former client secrets. A deterrent is already in place to limit this concern.

b. Difference between information being available and being known.—Another argument advanced is that there is a difference between information being available to the public and the public knowing it is there. The argument is that the attorney should not be the conduit for publicizing the client's information.[428] A helpful example concerns negative online reviews of an attorney's services.

An ABA opinion stated that an attorney may not divulge any confidential client information to respond to negative online reviews, even if the information

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423. MODEL RULES OF PRO. CONDUCT r. 1.6(b)(5) (A.B.A. 2018).

424. MODEL RULES OF PRO. CONDUCT r. 1.6(b)(4) (A.B.A. 2018).

425. MODEL RULES OF PRO. CONDUCT r. 1.6(b)(7) (A.B.A. 2018).

426. Jacobowitz & Jesson, *supra* note 414, at 93 (quoting David L. Hudson, Jr., *Commercial Ahead: Virginia Supreme Court Holds that Advertising Rules May Be Applied to a Lawyer's Blog*, 99 A.B.A. J. 20, 21 (2013)).

427. Harris v. Baltimore Sun Co., 625 A.2d 941, 952 (Md. 1993) (Chasanow, J., concurring in part and dissenting in part).

428. Sealed Party v. Sealed Party, No. Civ.A.H-04-2229, 2006 WL 1207732, at *14 (S.D. Tex. May 4, 2006).

is in the public record.[429] Instead, the ABA and other states recommend a response that states that the lawyer is prevented from responding substantively because of professional obligations.[430] However, as has been demonstrated through U.S. Supreme Court decisions, there is a strong public policy favoring public information regarding attorney services.[431] In this situation, a disgruntled client is allowed to provide one side of the story and dissuade the public from using an attorney who may be the best attorney. Online negative reviews are one example that show there are competing policy reasons justifying an attorney revealing publicly available information and being the conduit to that information.

However, a disgruntled attorney, as a matter of revenge, could further disseminate embarrassing client secrets that are publicly available generally or beyond what is needed to respond to a negative online review.[432] Recognizing that if the information is publicly available, it might already be known, but for argument's sake, perhaps the attorney is the conduit bringing this information to the public's attention. Even so, for the reasons stated above, that attorney would be alienating the former client and many potential clients with such behavior. Where attorneys respond to a negative online review or otherwise

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429. A.B.A. Comm. on Ethics & Pro. Resp., Formal Op. 496 (2021). Such an approach ignores the substantial harm to the attorney. Negative online reviews can have a substantial effect on an attorney. *In re* Conduct of Conry, 491 P.3d 42, 51 (Or. 2021) (citing Angela Goodrum, *How to Maneuver in the World of Negative Online Reviews: The Important Ethical Considerations for Attorneys, and Changes Needed to Protect the Legal Profession*, 24 INFO. & COMM. TECH. L. 164, 168–71 (2015), which cited a 2014 study that concluded that 83% of respondents first looked to online feedback when searching for an attorney).

430. A.B.A. Comm. on Ethics & Pro. Resp., Formal Op. 496 (2021). *See, e.g.*, Pa. Bar Ass'n Comm. on Legal Ethics & Pro. Resp., Formal Op. 200 (2014) (recommending that "A lawyer's duty to keep client confidences has few exceptions and in an abundance of caution I do not feel at liberty to respond in a point-by-point fashion in this forum. Suffice it to say that I do not believe that the post presents a fair and accurate picture of the events."); *but see* Ariz. Sup. Ct. Att'y Ethics Advisory Comm., Formal Op. EO-19-0010 (2019) (allowing in certain circumstances a response with confidential information to online comments stating that "the lawyer acted incompetently or dishonestly or refused to follow instructions.").

431. *See, e.g.*, the seminal case of Bates v. State Bar of Ariz., 433 U.S. 350 (1977).

432. A recent Oregon disciplinary case listed egregious attorney behavior from a professional responsibility textbook:

> Professor Wolfram cites as examples an attorney who reported a client for tax violations after a fee dispute arose. (*In re Nelson*, 327 N.W.2d. 576, 578–79 (Minn. 1982); an attorney who threatened to report a client for having received payments "under the table" unless the client withdrew a bar complaint against him (*Bar Assn. of Greater Cleveland v. Watkins*, 68 Ohio St. 2d 11, 12, 427 N.E.2d 516, 517 (1981)); and an attorney representing adoptive parents who threatened to reveal his clients' identity to the natural mother unless they paid the mother's hospital bill (*In re Strobel,* 271 S.C. 61, 244 S.E.2d 537 (1978)).

In re Conduct of Conry, 491 P.3d 42, 51 (Or. 2021) (citing Charles W. Wolfram, *MODERN LEGAL ETHICS* § 6.7.5, at 303 (1986) (footnote omitted). However, these cases did not involve information that was already publicly available. Further, they are older cases, where unlike in today's information-rich environment, it would be difficult to publicly let others know what the attorney did.

bring attention to embarrassing client information as opposed to more measured responses, the attorneys act contrary to their own financial interests. An attorney's choice to respond in this matter could escalate the situation and the client could then write a negative online review (or another) or otherwise easily publicize the attorney's behavior with additional true or even false information. It is quite a reputational risk to take.

c. Collusion with the press.—Perhaps, recognizing these disincentives, it has also been argued that a publicly available exception would encourage attorneys to collude with the press to publish client secrets.[433] Currently, prosecutors can similarly work the system, and no alarm bells have been sounded.[434] In the Massachusetts Superior Court Criminal Practice Manual, it was recommended that attorneys

> [w]hen addressing the court for the first time, take the opportunity to outline the strength of the Commonwealth's case, and provide as much detail about the allegations and the nature of the Commonwealth's evidence as possible. Include any of the defendant's statements, as well as the results of any scientific evidence. The defendant's criminal history, past incarcerations, and defaults are relevant to the issue of bail and become part of the public court proceedings.[435]

As an example mentioned above, in a 2012 Indiana case, the probable cause affidavit included damaging statements, such as that the defendant was suspected of killings in other jurisdictions, and "that 'the evidence found in his truck including a .22 caliber weapon, all point to Mendenhall as the killer.'"[436] Under Model Rule 3.6, the defendant attorney can retaliate after the prosecutor's use of public information, but such a path has pitfalls. First, any mitigation response must be limited.[437] Attorneys have faced discipline for retaliating with too much information.[438] Second, the attorney must consider whether bringing more attention to the information is in the defendant's best interest or whether it will further taint the jury pool or defendant's trial.

Thus, as to criminal defendants, prosecutors can strategically place information in the pretrial documents so that it fits into the Rule 3.6(b) public record exception. Further, in the states where it was determined that information in the public record was not confidential, it was often regarding criminal

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433. Harris v. Baltimore Sun Co., 625 A.2d 941, 952–53 (Md. 1993) (Chasanow, J., concurring in part and dissenting in part).

434. *See* Mitchell, *supra* note 5, at § 10.8.1.

435. *Id.*

436. *In re* Brizzi, 962 N.E.2d 1240, 1246 (Ind. 2012).

437. MODEL RULES OF PRO. CONDUCT r. 3.6(c) (A.B.A. 2018) ("A statement made pursuant to this paragraph shall be limited to such information as is necessary to mitigate the recent adverse publicity.").

438. United States v. McGregor, 838 F. Supp. 2d 1256, 1265–66 (M.D. Ala. 2012).

convictions.[439] Notably absent from the discussion regarding the disclosure of criminal defendant information is the rhetoric regarding keeping client information confidential as a pillar and foundation of the attorney-client relationship. Additionally, Model Rule 3.6(b)(2), regarding trial publicity, applies to all clients, not just criminal defendants. As such, where the information is in the public record, attorneys can work with the press to provide this information. No collusion is necessary. A narrow confidentiality rule would not change the information that can be provided to the press.

3. Arguments Against the Broad Confidentiality Rule: Policy Concerns.— The risk of attorneys acting against their own self-interest or covertly scheming with the press to reveal publicly available information should be balanced against other competing policy considerations. Several policy concerns discussed earlier weigh against broad confidentiality rules.[440] Summarily treated here, information in the public record belongs to the public.[441] Further, the ability to use information in the public record can help identify failings or needed reform in the legal system[442] and can be used for lawyer education.[443] Lawyers' expert opinions on these and other legal matters are particularly relevant and suppressing them is a detriment to the public.[444] Further, secrecy of client information can harm others outside of the litigation.[445]

Additionally, where client information is available with a couple of keystrokes to anyone who has the client's name and access to a computer and the internet, clients do not expect this information to be kept confidential. Instead, the focus should be on attorneys having conversations with the client regarding what confidential information must remain confidential,[446] and obligating attorneys to attempt to protect the information that clients want protected through avenues available in the judicial system because judges have discretion to facilitate such requests and weigh competing policy concerns. Instead, the current rules operate as if it is the attorney's obligation to put the cat back in the bag by not being able to reveal information that is publicly

439. *See supra* Part II.A.

440. *See supra* Part III.

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

442. Chi. Council of Laws. v. Bauer, 522 F.2d 242, 258 (7th Cir. 1975).

443. Alaska Bar Ass'n Ethics Comm., Formal Op.1, at n.3 (1995) (public record documents can be exchanged for purposes of "shop talk" between lawyers if not harmful to clients, recommending names be removed).

444. Cicchini, *supra* note 60, at 100–02.

445. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 60 cmt. b (A.L.I. 2000).

446. Where a client requests that an attorney keep client information confidential, the attorney must do so. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 60(1)(a) (A.L.I. 2000); D.C. Bar Legal Ethics Comm., Formal Op. 335 (2006) ("We emphasize, however, that if a client withholds permission for her lawyer to disclose public information, the lawyer should comply with his client's wishes."); Md. State Bar Ass'n Comm. on Ethics, Formal Op. 07 (2016) ("This conclusion, however, focuses solely on what an attorney may agree to or request in a settlement agreement. To the extent that Rule 1.6 otherwise may permit a client to require that an attorney maintain certain information in confidence, Rule 5.6 does not limit a client's ability to do so or an attorney's obligation to abide by such a request."); *see supra* Part I.E.

available or use it unless it is notorious. Broad confidentiality rules protecting public information ignore these available mechanisms and policy concerns.

Beyond not considering these policy concerns or judicial protections, broad confidentiality rules have been subject to criticisms due to their breadth because they create an unworkable standard.[447] Also, studies have shown that this breadth is unnecessary because clients would share information with the attorney under a narrower confidentiality standard.[448]

4. Arguments Against a Narrow Generally Known Exception.—

a. Vagueness of the notoriety standard for generally known.—An argument can be made that where anyone can access the information, the information satisfies the generally known standard. However, no state has taken that position, and instead, where the generally known standard is used, the standard can only be reached where the information gains public notoriety. The argument could be that the notoriety standard does take the information-rich environment into consideration because with more information available to more people, it is more likely that information will gain notoriety standard. But the notoriety standard is vague and varies between states and sometimes within a single state. For example, a 2011 Massachusetts's ethics opinion, interpreting what was not confidential under Massachusetts Rule 1.6, determined that a probate proceeding easily obtainable as a matter of public record and an obituary in a newspaper were not confidential.[449] But then recently, a 2024 ethics opinion stated that "a lawyer must have evidence other than the fact of publication to show that the [judicial] opinion was widely known in the local community . . . ."[450] But court decisions do not answer the question as to what beyond publication is needed. They instead give unhelpful parameters. For example, a judge, in a 2013 Eastern District of Virginia case, stated that a divorce settlement "file[d] in the courthouse where anyone could go, find it and read it," is not generally known,[451] and as a way of supposed clarification, stated that "publication on the front page of a tabloid" is not required but generally known "is more than merely sitting in a file in the courthouse."[452]

Beyond prolonged media attention through various media outlets (but perhaps that is not enough where the media coverage was in a different city or state), what type of publication is required? If the information is covered for ten minutes on one news channel, does that establish notoriety? If it is published in one local newspaper? Determining notoriety based on social media presents even more of a challenge. If a non-attorney with a hundred followers publishes the information on social media, does that reach the notoriety standard? 1,000

447. *See, e.g.*, Harris v. Baltimore Sun Co., 625 A.2d 941, 946–48 (Md. 1993).
448. *See supra* Part III.A.
449. Mass. Bar Ass'n Comm. on Pro. Ethics, Formal Op. 04 (2011).
450. Mass. Bar Ass'n Comm. on Pro. Ethics, Formal Op. 2 (2024).
451. *In re* Gordon Props., 505 B.R. 703, 707 n.6 (Bankr. E.D. Vir. 2013).
452. *Id.* (citing Va. State Bar Comm. on Legal Ethics, Formal Op. 1609 (1994)).

followers, 5,000 followers, 50,000 followers, 100,000, a million followers? No useful standard has been given.[453]

b. Impeding clients' choice of counsel.—An additional competing policy concern is mentioned in Model Rule 1.9 comment four that Model Rule 1.9

> should not be so broadly cast as to preclude other persons from having reasonable choice of legal counsel [and] . . . the rule should not unreasonably hamper lawyers from forming new associations and taking on new clients after having left a previous association . . . . If the concept of imputation were applied with unqualified rigor, the result would be radical curtailment of the opportunity of lawyers to move from one practice setting to another and of the opportunity of clients to change counsel.[454]

Thus, as a general matter, Rule 1.9 should not be applied with "unqualified rigor" where it would inhibit lawyers' ability to change jobs.[455] As applied, however, interpreting "generally known" to require notoriety does just that because in most of the disqualification cases mentioned in Part II states engaged in a "generally known" analysis,[456] and where the state has adopted the notoriety definition of generally known, it results in a rigorous application of Rule 1.9(a) because the attorney would be disqualified even when the information the attorney knew was publicly available, limiting clients' choice of counsel where the conflict is illusory or not severe because the information that the lawyer has is publicly available.

5. Summary.—The rhetoric often espoused when confidentiality is the desired result does not reflect reality, as there are numerous exceptions to the confidentiality rule. Further, this rhetoric clouds the complex issue of whether publicly available information should be confidential, preventing a discussion of other valid and competing policy concerns. As to revealing client information, the policy rationale offered that there must be broad confidentiality to support clients communicating with their lawyers is weak at best regarding publicly available information.[457] It does not consider whether the client believes that the information is confidential[458] or recognize the studies that show that if clients were to disclose information to the attorney, which they might choose not to do for various reasons, the disclosure would occur even with a narrow confidentiality standard.[459] Further, there is no balancing of other valid

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453. Cicchini, *supra* note 60, at 81 (asking similar questions and concluding that the standard is so indefinite as to be impossible to satisfy, resulting in "an absolute ban on speech").

454. MODEL RULES OF PRO. CONDUCT r. 1.9 cmt. 4 (A.B.A. 2018).

455. *Id.*

456. *See supra* Part II.C.2.

457. *See supra* Part III.A.

458. Cicchini, *supra* note 60, at 93 (arguing that clients do not believe that an attorney must keep public information confidential).

459. *See supra* Part III.A.

competing policy considerations, such as whether the client would be harmed by the disclosure of the information, whether others are harmed by the information remaining confidential, the attorney's right to freedom of expression, and the need for transparency in the legal system. These policy considerations, along with ensuring that clients have access to attorneys of their choice and fair trials, are equally applicable to an attorney's use of information. Harm to the client is considered in the "use" of current client information but again there is no balancing of other policy considerations, such as whether the secrecy, although harmful to the client, would cause a greater harm to others.

As to the attorney's use of information of former clients, more of a balancing occurs. Harm is required (likely to protect people's choice of counsel) or if the former client would be harmed, the information could be used if it had gained notoriety.[460] The notoriety standard, however, is vague. Further, the arguments asserted against a standard that allows public information to be used do not recognize that there are already financial disincentives in place to prevent attorneys from revealing or using public information to the detriment of their clients.

B. Potential Solutions to End the Disparate Treatment of Publicly Available Information

Distilled, there is a disagreement between states and sometimes within a state as to whether publicly available information is confidential and whether publicly available information is generally known. Arguably, this disparity exists because the policy rationale supporting a broad confidentiality rule falters when applied to publicly available information and because there are other competing policy concerns that have not been addressed. Although not stated, perhaps the underlying rationale for this broad protection of confidentiality is the distaste for, and the need to protect against, attorneys who reveal client information either for their own financial gain or to otherwise harm or disparage the client.

1. Broad Protection of Publicly Available Information.—One way to protect against attorneys using client information for financial gain or to otherwise harm or disparage a client is to adopt broad confidentiality rules consistently across the Model Rules. The Model Rules could explicitly state in the rules or comments to Model Rules 1.6(a), 1.8(b), 1.9, and 5.6 that there is no public record or publicly available exception. It would also require eliminating the public record exception in Model Rule 3.6(b). Eliminating this exception in Model Rule 3.6(b) would address concerns regarding a defendant's right to a fair trial. The public record exception in Model Rule 3.6(b), which carries over to Model Rule 3.8, is particularly problematic where prosecutors put the damaging information in the public record so that they can then later use it to bolster their case to the detriment of the defendants, at the expense of the

460. MODEL RULES OF PRO. CONDUCT r. 1.9(c)(1) (A.B.A. 2018).

defendant's reputation and freedom.[461] Eliminating the public document exception in comment three to Rule 1.9(a) may not be problematic because courts do not rely on it and instead focus on whether the information is generally known as embodied in Rule 1.9(c).[462] Consistency between Model Rule 1.9(a) and 1.9(c) would help eliminate uncertainty and reduce differing opinions on the treatment of publicly available information. However, Rule 1.9 comment eight, which implies that former client information can be revealed if it is not harmful to the client, should be fixed because, under the current rules, the information cannot be revealed even if it would not harm the client.[463] Modifying Model Rule 5.6 would also appease commentators who have argued for eliminating the public document exception in Rule 5.6[464] because the rule is "an anachronism, illogical and bad policy."[465]

This approach would come at a cost to the public. It would curtail transparency of the judicial system. Attorneys, as experts in the judicial system, with a right to freedom of speech would not be allowed to speak of the inequities, failures, and corruption that they witness, which often requires revealing client information. Further, it would disregard the presumed weighing of the public's need for information regarding criminal defendants that occurred in Model Rule 3.6. However, these changes would create consistency regarding publicly available information in the Model Rules, and certainly, there is much rhetorical support for such a position,[466] such that these changes for consistency would likely be met with little resistance.

2. Narrow Protection of Confidential Information.—Instead of doubling down based on rhetoric that clouds the complexity of whether publicly available information should be confidential, another option is to recognize the current ease of access to information and create consistency in the Model Rules based on valid policy rationales. The Restatement (Third) of the Law Governing Lawyers' position is that publicly available information is not confidential and can be used or revealed.[467] The relevant Restatement provision states that confidential information "includes information that becomes known by others, so long as the information does not become generally known."[468] It defines "generally known" as information that is in the public domain and can be acquired without special knowledge or substantial difficulty or expense.[469]

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461. *See supra* Part IV.A.2.c.

462. *See supra* Parts II.A.2 & II.C.2.

463. MODEL RULES OF PRO. CONDUCT r. 1.9 cmt. 8 (A.B.A. 2018); *see supra* Part I.D.

464. *See, e.g.*, Yvette Golan, *Restrictive Settlement Agreements: A Critique of Model Rule 5.6(B)*, 33 SW. U. L. REV. 1 (2003) for an in-depth critique.

465. Stephen Gillers, *A Rule Without Reason: Let the Market, Not the Bar, Regulate Settlements that Restrict Practice*, 79 A.B.A. J. 118, 118 (1993).

466. *See supra* Part IV.A.1.a.

467. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 59 cmt. d (A.L.I. 2000).

468. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 59 cmt. b (A.L.I. 2000).

469. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 59 cmt. d (A.L.I. 2000).

The policy behind the Restatement's confidentiality rules is a balancing of the attorney's free speech interests along with the costs of the secrecy to society versus the need for lawyers to have client information to accomplish the client's lawful objectives.[470] The policy reason in the Model Rules focuses only on the attorneys' interest versus the clients' interests, determining that the clients' interests in protecting their information outweigh attorneys' interest in use or disclosure. Balancing additional valid policy rationales lends support to the Restatement's narrow confidentiality rules that do not protect client information that is publicly available. Thus, a solution is to recognize other valid policy concerns by adopting the Restatement's confidentiality position.

Similar to what some states have done, a method to incorporate the Restatement's narrow confidentiality position into the Model Rules is to create a definition for confidential information, either in Model Rule 1.6 or in Model Rule 1.0, exempting publicly available information or at a minimum information that is in the public record.[471] The word, "confidential" would then need to be added before the word "information" in Model Rules 1.6(a) and 1.8(b). Further consistent with the Restatement's narrow confidentiality position, a material harm limitation should be added to Model Rule 1.6(a).[472] For example, Model Rule 1.6(a) could be changed to state: "A lawyer shall not reveal *confidential* information relating to the representation of a client *to the material disadvantage of the client* unless . . . ." Then material harm would be a limitation to both use in Model Rule 1.8(b) and disclosure in Model Rule 1.6(a), as it is under the Restatement's confidentiality position.

As to Model Rule 1.9, the beginning of Model Rule 1.9(c) would stay the same and state, "A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter . . . ."[473] But then the following phrase could be added: *use or reveal confidential information relating to the representation to the material disadvantage of the former client except as these Rules would permit or require with respect to a client.* This suggested rule combines Model Rule 1.9(c)(1) and (2) and adds the word "confidential" before the word "information." It also adds the material harm requirement to both disclosure and use, consistent with the Restatement position.[474]

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470. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 60 cmt. b (A.L.I. 2000). As to the cost of secrecy, the Restatement states that a situation could occur where a person whose "personal plight and character are much more sympathetic than those of the lawyer's client or who could accomplish great public good or avoid great public detriment if the information were disclosed." *Id.*

471. Limiting public records to public government records would be consistent with court decisions in Maryland, Indiana, and Colorado. *See supra* Part II.E.

472. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 60(1) (A.L.I. 2000).

473. MODEL RULES OF PRO. CONDUCT r. 1.9(c) (A.B.A. 2018).

474. *See, e.g.*, Harris v. Baltimore Sun Co., 625 A.2d 941 (Md. 1993). There must be harm to the client before an attorney will violate Rule 1.6. *Id.* at 947.

If the word, "confidential" is added before the word, "information," in Model Rule 1.9(c), then Model Rule 1.9 comment eight, which states that the information can be used or revealed if it is not disadvantageous,[475] would then be accurate and no longer confusing. Further, Model Rule 1.9 comment three concerning 1.9(a) and public information not being disqualifying[476] would also be accurate. Model Rule 1.18(b) would follow accordingly as it states that it incorporates Model Rule 1.9 by stating "a lawyer who has learned information from a prospective client shall not use or reveal that information, except as Rule 1.9 would permit with respect to information of a former client."[477]

Under these changes to both Rule 1.6(a) and Rule 1.9(c), publicly available information (or it could be limited to information in the public record) could be disclosed or used regardless of detriment to the client, but confidential client information could only be used or disclosed if it was not detrimental to the client.

As to Model Rules 3.6 and 3.8 under the Restatement's confidentiality position, if the information was not confidential, it could be revealed under Model Rules 3.6 and 3.8 if it was in the public record.[478] Model Rule 5.6 would also stay the same. This method of incorporating the Restatement's confidentiality rules into the Model Rules creates consistency among the rules and considers other public policy concerns advanced beyond the need for client disclosure to the attorney.

However, it does not fix the problem in Model Rules 3.6 and 3.8 regarding prosecutors putting information in the public record so that they can later reveal it to a defendant's detriment with loss of freedom and fair trial implications. The *Gentile* court stated that the extent to which the information was already circulated was a significant factor in determining the likelihood of prejudice and that in the case, "[m]uch of the information . . . had been published in one form or another, obviating any potential for prejudice."[479] However, when freedom of expression is balanced against a defendant's right to a free trial, the U.S. Supreme Court has stated that the balance should "never [be] weighed against the accused." [480] Where prosecutors are allowed to purposefully publish derogatory information to later publicize against accused individuals who often do not have the resources to protect the information, the balancing has been weighed against the accused.

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475. MODEL RULES OF PRO. CONDUCT r. 1.9 cmt. 8 (A.B.A. 2018).

476. MODEL RULES OF PRO. CONDUCT r. 1.9 cmt. 3 (A.B.A. 2018).

477. MODEL RULES OF PRO. CONDUCT r. 1.18(b) (A.B.A. 2018).

478. MODEL RULES OF PRO. CONDUCT r. 3.6(a) (A.B.A. 2018).

479. Gentile v. State Bar of Nev., 501 U.S. 1030, 1042–47 (1991) (Kennedy, J.) (plurality opinion).

480. Sheppard v. Maxwell, 384 U.S. 333, 362 (1966) ("Due process requires that the accused receive a trial by an impartial jury free from outside influences. Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the minds of the jurors, the trial courts must take strong measures to ensure that the balance is never weighed against the accused.").

A possible solution to this Model Rule 3.6 and Rule 3.8 problem is to view all disclosures of public information under Model Rule 3.6(b) under the Model Rule 3.6(a) requirement, which prohibits disclosures that would have a substantial likelihood of materially prejudicing an adjudicative proceeding.[481] The same result could be achieved by adding the "materially prejudicing an adjudicative proceeding" standard to the public record exception in Model Rule 3.6(b). Then, the timing of the public record disclosure could be considered as it was in *Gentile*[482] and other cases.[483]

Incorporating the Restatement's confidentiality scheme also does not prevent an attorney from using public information for the attorney's personal use, such as financial gain, which can be distasteful. But, arguably no more distasteful than exceptions for attorney self-preservation already available in the Model Rules. Not all uses for personal gain are distasteful. For example, an attorney could use this information to rebut a negative online review. This ability prohibits a one-sided story against an attorney who might be the best attorney for a subsequent client.[484] Lastly, in ABA Formal Op. 18-480, it was stated that although "Rule 1.8(b) could be read to suggest that a lawyer may use client information if it *does not* disadvantage a client. The lawyer, nevertheless, has a common-law fiduciary duty not to profit from using client information even if the use complies with the lawyer's ethical obligations."[485] Thus, perhaps there is a fiduciary requirement that could be enforced to deter lawyers from profiting at the expense of the client.

CONCLUSION

The Restatement confidentiality scheme incorporated into the Model Rules is a preferable option because it considers other valid policy concerns, creates consistency among the Model Rules, and considers the modern information

481. MODEL RULES OF PRO. CONDUCT r. 3.6(a) (A.B.A. 2018).

482. *Gentile*, 501 U.S. at 1042–47 (Kennedy, J.) (plurality opinion).

483. *See, e.g.*, State v. Polk, 415 S.W.3d 692 (Mo. Ct. App. 2013).

484. Negative online reviews can have a substantial effect on an attorney. *In re* Conduct of Conry, 491 P.3d 42, 51 (Or. 2021) (citing Goodrum, *supra* note 430, at 168–71, which cited a 2014 study that concluded that 83% of respondents first looked to online feedback when searching for an attorney)).

485. A.B.A. Comm. on Ethics & Pro. Resp., Formal Op. 480 (2018) (citing RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 60(2) (A.L.I. 1998)). The opinion cited to the Restatement, which is problematic under the current Model Rules because the Model Rules and the Restatement define confidential information differently. But if the rules are changed as suggested to align with the Restatement, then the position in this ABA Formal Opinion would hold more weight. Perhaps the standard in Rule 1.8(b), because it relies on the Restatement (Third) section 60(2), is that information easily accessed by the public can be used if does not disadvantage the client, which is this paper's position. Section 60(2) states that "a lawyer who uses confidential information of a client for the lawyer's pecuniary gain other than in the practice of law must account to the client for any profits made." RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 60(2) (A.L.I. 1998).

landscape. When the recommended solution to Model Rule 3.6 is added, the disproportionate impact of a public record exception on defendants is reduced while still protecting disclosures necessary for public safety.