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## ATTORNEY-CLIENT CONFIDENTIALITY: A NEW APPROACH

The lawyer's obligation of confidentiality protects communications between attorney and client. It has been a part of Anglo-American jurisprudence since the reign of Elizabeth I<sup>1</sup> and is, therefore, the oldest of the privileges against the disclosure of confidential communications.<sup>2</sup> Despite this long history, it has recently become the focus of heated scholarly debate. The debate stems from conflicts between confidentiality and other values which are important to our legal system. For example, a lawyer's nondisclosure can impede a court's ability to ascertain the truth about facts material to the disposition of a particular litigation.

Current theories consider conflicts between confidentiality and other values to be inherently irreconcilable. The proponents of the various theories disagree only over which conflicts, if any, require that the lawyer's obligation not to disclose a client's confidences be limited in order to foster other values. The theory that prevails in the current debate may determine not only the scope of confidentiality, but, to a significant extent, the role of the lawyer in our adversary system.

Contrary to current theories of confidentiality, conflicts between the lawyer's obligation of nondisclosure and the court's discovery of truth are not inherently irreconcilable. In some cases such conflicts can be resolved in a manner that protects the legitimate interests of the client without subordinating the conflicting values. An approach which reconciles competing interests will be explored here in the context of a hypothetical problem of criminal defense representation. In addition, this approach suggests an alteration in the theoretical framework within which issues of confidentiality generally should be analyzed.

### I. CONFIDENTIALITY VERSUS DISCLOSURE: THE CHOICE BETWEEN PUNISHING THE INNOCENT DEFENDANT AND BETRAYING THE CLIENT

What is the duty of a lawyer if he learns from a client that the client has committed a crime for which another person has

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1. For a concise history of the privilege see 8 J. WIGMORE, EVIDENCE § 2290 (McNaughton rev. 1961).

2. *Id.* Other privileges include those for marital communications, the privilege covering the physician-patient relationship, and the constitutional privilege against self-incrimination.

been tried, convicted, and sentenced? Professor Andrew L. Kaufman provides a hypothetical statement of the problem:<sup>3</sup>

A sensational murder case in your home town resulted in the conviction of the defendant for murder after a trial that turned solely on a question of identification. The conviction was affirmed and efforts at collateral attack have failed. A client of yours told you certain facts that have led you to conclude that he, not the defendant, was the murderer. Your conclusion has been verified by the client and some independent checking has led you to be as positive as you can be that he is telling the truth. Efforts to persuade your client to turn himself in have failed. What do you do next?

Current theories of confidentiality require a lawyer in these circumstances to choose between betraying the client's confidence and allowing the punishment of an innocent person. The values involved—confidentiality, truth, and the life or liberty of the innocent defendant—are brought into an irreconcilable conflict. The lawyer must decide which value is paramount.

There are four theories of confidentiality to which a lawyer can refer in deciding how to resolve Professor Kaufman's hypothetical:

- A. the theory contained in the ABA Code of Professional Responsibility;<sup>4</sup>
- B. the theory of absolute confidentiality;<sup>5</sup>
- C. the theory of truth as a paramount value;<sup>6</sup> or
- D. the theory of personal conscience.<sup>7</sup>

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3. Professor Kaufman is a member of the faculty at Harvard Law School. He has kindly made available this excerpt of the hypothetical which he intends to include in A. KAUFMAN, *PROBLEMS IN PROFESSIONAL RESPONSIBILITY*, ch. IV (forthcoming).

4. See notes 8-20 *infra* and accompanying text. The House of Delegates of the American Bar Association adopted the ABA Code of Professional Responsibility on August 12, 1969. It applied to ABA members as of January 1, 1970, and was amended by the House of Delegates in February 1970, February 1974, and February 1975. *Preface to ABA CODE OF PROFESSIONAL RESPONSIBILITY* at ii (1975). The Code consists of three parts: Canons, Ethical Considerations, and Disciplinary Rules. The Canons are statements of "axiomatic norms"; the Ethical Considerations (hereinafter referred to as EC) are aspirational guidelines; the Disciplinary Rules (hereinafter referred to as DR) are mandatory and subject violators to disciplinary action. *Id. Preliminary Statement* at 1c.

5. See notes 21-24 *infra* and accompanying text. For a thorough discussion of this theory see M. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* (1975) [hereinafter cited as *LAWYERS' ETHICS*].

6. See notes 25-32 *infra* and accompanying text. For a recent articulation of the theory see Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031 (1975). For an earlier discussion of this view see Noonan, *The Purposes of Advocacy and the Limits of Confidentiality*, 64 MICH. L. REV. 1485 (1966).

7. See note 33 *infra* and accompanying text.

### A. *The Code of Professional Responsibility*

The Code is not so much a theory of professional responsibility as it is a collection of often contradictory guidelines and rules. The obligation of confidentiality as set forth in the Code creates what one scholar calls a “trilemma”<sup>8</sup> for the criminal defense lawyer: “[he] is required to know everything about the client’s case, maintain that knowledge in the strictest confidence and, at the same time, be candid with the court.”<sup>9</sup> The lawyer who looks to the Code in order to resolve Professor Kaufman’s hypothetical can find justification for either a decision to remain silent or a decision to disclose.

The primary statement of the obligation of confidentiality is contained in DR 4-101(B) of the Code:<sup>10</sup>

[A] lawyer shall not knowingly:

- (1) Reveal a confidence or secret<sup>11</sup> of his client.
- (2) Use a confidence or secret of his client to the disadvantage of the client.
- (3) Use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure.

Disclosure by a lawyer who is faced with the hypothetical would violate each of these rules.

The Code, however, explicitly provides for exceptions to its rules against disclosure.<sup>12</sup> DR 4-101(C) allows the lawyer to reveal “[t]he intention of his client to commit a crime and the information necessary to prevent the crime.”<sup>13</sup> That rule also permits the lawyer to reveal the confidences or secrets of a client where disclosure is necessary for the lawyer “to collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct.”<sup>14</sup>

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8. *LAWYERS’ ETHICS*, *supra* note 5, at 27-42.

9. *Id.* *Preface* at vii.

10. *ABA CODE OF PROFESSIONAL RESPONSIBILITY*, DR 4-101(B) (1975).

11. For a discussion of the significance of the distinction between a “confidence” and a “secret” see note 43 *infra*.

12. Until recently DR 7-102(B)(1) required a lawyer to reveal a confidence or secret of his client if he received information clearly establishing that his client had perpetrated a fraud upon a person or tribunal and the client refused to rectify the fraud. In February 1974, the American Bar Association amended the rule to require a lawyer to reveal a client’s fraud “except when the information is protected as a privileged communication.”

13. *ABA CODE OF PROFESSIONAL RESPONSIBILITY*, DR 4-101(C)(3) (1975).

14. *Id.* DR 4-101(C)(4).

The Code also contains general considerations which, when read together, arguably provide lawyers with a basis for making additional exceptions to the obligation of confidentiality. Lawyers are officers of the court; the Code refers to their role in bringing about "just and informed" decisions.<sup>15</sup> Ethical Consideration 7-21 reminds the lawyer that "the criminal process is designed for the protection of society as a whole."<sup>16</sup> The Code states that "[w]hen explicit ethical guidance does not exist, a lawyer should determine his conduct by acting in a manner that promotes public confidence in the integrity and efficiency of the legal system and the legal profession."<sup>17</sup> Finally, the Code asserts that "[c]ontinuation of the American concept that we are to be governed by rules of law requires that the people have faith that justice can be obtained through our legal system."<sup>18</sup>

Can the Code, which justifies disclosure by a lawyer in order to collect a fee or to prevent an intended crime by a client, at the same time be read to prohibit a disclosure which saves the life or restores the liberty of an innocent defendant? As an amalgam of conflicting rules and policies, the Code enables the lawyer to justify disclosure or nondisclosure equally well in many circumstances. With regard to the hypothetical, whichever choice was made, the lawyer would not be subject to disciplinary action.<sup>19</sup> The Code provides no basis for the clear resolution of issues of confidentiality. Its ambiguity serves neither to foster public confidence in the legal system, nor in the profession.<sup>20</sup>

Under the Code, conflicts between confidentiality and other values are irreconcilable. One value must be chosen as paramount: either the client will be betrayed or the suffering of the innocent defendant will continue.

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15. *Id.* EC 7-24. "The characterization of a lawyer as an officer of the court is deeply rooted in history and warranted by the peculiar posture of the lawyer in society." ABA STANDARDS, THE DEFENSE FUNCTION § 1.1, Commentary a (1971). The Standards have not been examined here as a separate source of guidance for the lawyer faced with Professor Kaufman's hypothetical. The Standards conform to the Code, preserve the "trilemma" of the Code, and treat conflicts between confidentiality and other values as irreconcilable. See *LAWYERS' ETHICS*, *supra* note 5, at 36-38. See also *In re Griffiths*, 413 U.S. 717 (1973).

16. *Id.* EC 7-21. The Code states that the civil adjudicative process is, on the other hand, designed for the settlement of disputes between parties.

17. *Id.* EC 9-2.

18. *Id.* EC 9-1.

19. The Code was written in part to overcome the ineffectiveness of the original 32 Canons of Professional Ethics (adopted in 1908) as a basis for disciplinary enforcement. *Preface to ABA CODE OF PROFESSIONAL RESPONSIBILITY* at i (1975).

20. See text accompanying note 17 *supra*.

### B. *The Theory of Absolute Confidentiality*

The theory of absolute confidentiality resolves all conflicts between confidentiality and other values in favor of the lawyer's duty to preserve the client's confidences.<sup>21</sup> For example, if necessary to preserve the obligation of confidentiality, the lawyer has a duty to call the client to the witness stand and undertake direct examination despite knowledge that the client will commit perjury.<sup>22</sup> Similarly, the lawyer must attempt to impeach the credibility of a truthful witness if the witness' testimony is prejudicial to the client's case.<sup>23</sup>

The theory is based on the premise that confidentiality cannot be subordinated to other values without undercutting both the constitutional rights of the client and public confidence in the sanctity of the attorney-client relationship. Dean Monroe Freedman, a leading advocate of this theory, envisions one exception to the duty of confidentiality: the very life of an innocent third party must not be subordinated.<sup>24</sup> For example, if the innocent defendant in Professor Kaufman's hypothetical were to receive a death sentence, then Dean Freedman would disclose the client's confidence.

The theory recognizes conflicts between confidentiality and other values, considers them irreconcilable, and deems confidentiality the paramount value, with possibly the one exception. The lawyer faced with Professor Kaufman's hypothetical would find a clear mandate in this theory: remain silent. The lawyer, however, would not find a means of serving the client's interests without an obvious injustice to an innocent person.

### C. *The Theory of Truth as a Paramount Objective*

Several efforts have been made to develop rules which would subordinate the lawyer's obligation of confidentiality to the obligation to assist the court in the discovery of the true facts essential to the determination of guilt and innocence. Early efforts to make truth a paramount objective were confined to the articulation of such "black-letter" rules as: "[the lawyer] *may not en-*

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21. LAWYERS' ETHICS, *supra* note 5, at 1-8, 27-42 *passim*; Freedman, *Judge Frankel's Search for Truth*, 123 U. PA. L. REV. 1060 (1975). For one exception to the absolute rule of nondisclosure see note 24 *infra* and accompanying text.

22. LAWYERS' ETHICS, *supra* note 5, at 27-42; Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1569 (1966).

23. LAWYERS' ETHICS, *supra* note 5, at 43-49.

24. *Id.* at 6.

*gage in direct examination of his client to facilitate known perjury.*"<sup>25</sup> The proponents of such rules against absolute confidentiality recognized that their concern was based on a conception of what values generally were the most important to our legal system. For example, the author of the quoted rule on perjury offered this explanation for it: "This is a rule which is so basic and fundamental to the integrity of our system of justice and the legal profession that it can never admit of any exception, under any circumstances."<sup>26</sup>

Implicit, therefore, in such "black-letter" limitations on the scope of confidentiality is the assumption that truth is a paramount objective of our legal system. More recently, efforts to limit confidentiality have explicitly relied on the premise that truth is paramount: absolute confidentiality is "inimical to a system which has as its end rational decision-making";<sup>27</sup> the primary role of the advocate is "to assist the trier of fact in making [an] impartial judgment,"<sup>28</sup> and to "promote a wise and informed decision of the case";<sup>29</sup> confidentiality must end "when it leads to conduct which destroys the truth or presents perjury to the fact-finder."<sup>30</sup> Judge Marvin Frankel summarizes the thrust of this point of view when he advises lawyers to "make truth a paramount objective."<sup>31</sup>

Carried to its logical extreme, this theory provides a clear solution to Professor Kaufman's hypothetical: disclose the client's confidence to remedy the court's error in convicting and punishing an innocent defendant. Like the theory of absolute confidentiality, the theory of truth as a paramount objective avoids the ambiguities of the Code. Once again conflicts between

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25. Burger, *Standards of Conduct for Prosecution and Defense Personnel: A Judge's Viewpoint*, 5 AM. CRIM. L.Q. 11, 13 (1966) (emphasis in original). Chief Justice, then Judge, Burger also stated that a lawyer who would challenge this rule is "naive and inexperienced . . . lacking adequate training in his profession . . . [Direct examination producing known perjury] is a perversion and a prostitution of an honorable profession." *Id.* at 12.

26. *Id.*

27. Noonan, *The Purposes of Advocacy and the Limits of Confidentiality*, 64 MICH. L. REV. 1485, 1489 (1966).

28. *Id.* at 1487, citing *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A.J. 1160-61 (1958).

29. Noonan, *supra* note 27, at 1487.

30. *Id.* at 1492.

31. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1052 (1975).

confidentiality and other values are resolved by choosing between irreconcilable interests.

The advocates of this theory, however, cannot formulate a broad rule of disclosure which is compatible with the client's fifth amendment protection against self-incrimination and sixth amendment right to the effective assistance of counsel. Indeed, one of the advocates of the theory, Judge Frankel, concedes that constitutional protections of the criminal defendant are "bedrock principles" which must prevail over other values.<sup>32</sup> Disregarding these principles by sharply curtailing the scope of confidentiality also would undercut the public's willingness to disclose fully all potentially relevant facts to lawyers. Without such disclosure the lawyer cannot effectively advise the client or prepare for trial.

#### D. *The Conscience Theory of Professional Responsibility*

The last of the theories currently available to the lawyer faced with Professor Kaufman's hypothetical regards difficult issues of professional responsibility as matters of personal conscience.<sup>33</sup> Faced with the problem, the lawyer could choose to remain silent or to disclose, and in either case would be accountable to no one. The lawyer, however, would not escape the necessity of choosing either to betray the client's trust or to prevent the innocent defendant from gaining his or her liberty.

## II. RESOLVING THE HYPOTHETICAL: AN ALTERNATE APPROACH TO CONFIDENTIALITY

Professor Kaufman's hypothetical can be resolved in a manner which does not require the lawyer to subordinate other values in order to protect the legitimate interests of the client. Legislatures can make two procedures applicable: in camera review and use immunity. Together these devices will reconcile the otherwise conflicting values.

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32. *Id.* at 1037. Judge Frankel's recognition of the importance of these principles is reflected in his draft revision of DR 7-102. *Id.* at 1057-58. The draft states, in part: "In his representation of a client, *unless prevented from doing so by a privilege reasonably believed to apply*, a lawyer shall . . ." (emphasis added). *Id.* at 1057. By preserving the option of asserting "a privilege," Judge Frankel retained the very conflicts his draft attempted to resolve in favor of truth. For a forceful presentation on the consequences of making truth a paramount objective see Rifkind, *The Lawyer's Role and Responsibility in Modern Society*, 30 RECORD OF N.Y.C.B.A. 534 (1975).

33. This theory provides another way of characterizing the obligations of the Code. Given the ambiguity of the Code, the lawyer is free to decide issues of confidentiality according to his conscience. See text accompanying notes 19-20 *supra*.



Under an appropriate statute, the lawyer would be required to disclose to a court, *in camera*, information establishing a client's responsibility for a crime for which an innocent defendant has been convicted. If the court concluded that there had been a miscarriage of justice, it would be empowered to forward the information to the appropriate prosecutor, contingent on a grant of use immunity by the prosecutor to the lawyer's client. The innocent person would receive the benefit of the exculpatory information and the client would be in substantially the same position as if the lawyer had remained silent. Therefore, the procedure would not require the lawyer to choose between the client and the innocent defendant.

Would immunity provide the client with effective protection? The federal immunity statutes<sup>34</sup> provide an example that can be analyzed to determine whether immunity would protect against criminal liability stemming from an attorney's disclosure. The general immunity statute states:<sup>35</sup>

[T]he witness may not refuse to comply with the order [compelling the witness' testimony] on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, except a prosecution for perjury, giving a false statement, or otherwise failing to comply with the order.

The Supreme Court considered the constitutionality of this statute in *Kastigar v. United States*.<sup>36</sup> The case arose when two grand jury witnesses refused to answer questions and asserted their fifth amendment privilege against compulsory self-incrimination, notwithstanding the grant of immunity. They were held in contempt in the district court and raised the constitutional challenge on appeal.

The *Kastigar* Court held that the statute places a total prohibition on "use of compelled testimony as an 'investigatory lead'" and "use of any evidence obtained by focusing investigation on a witness as a result of his compelled disclosures."<sup>37</sup> Thus, the Court reasoned that the immunity provided by the statute—"by

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34. 18 U.S.C. §§ 6002, 6003 (1971). Every state has some form of immunity statute. See 8 J. WIGMORE, EVIDENCE § 2281 at 495-508 n.11 (McNaughton rev. 1961).

35. 18 U.S.C. § 6002 (1971).

36. 406 U.S. 441 (1972).

37. *Id.* at 460.

assuring that the compelled testimony can in no way lead to the infliction of criminal penalties”<sup>38</sup>—“leaves the witness and the prosecutorial authorities in substantially the same position as if the witness had claimed the Fifth Amendment privilege.”<sup>39</sup> The Court also reaffirmed the rule announced in *Murphy v. Waterfront Commission*<sup>40</sup> where it was held that immunity protects “a state witness against incrimination under federal as well as state law and a federal witness against incrimination under state as well as federal law.”

With regard to Professor Kaufman’s hypothetical, immunity would safeguard the client against criminal liability resulting from disclosure of a confidence. *Kastigar* rebuts any argument that the lawyer’s disclosure coupled with immunity for the client would not be consistent with the client’s constitutional rights.<sup>41</sup> The proposed solution leaves the client in a position analogous to that of the *Kastigar* witness: in “substantially the same position as if the witness had claimed the . . . privilege.”<sup>42</sup>

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38. *Id.* at 461. The petitioners argued that it would be impossible to identify, by testimony or cross-examination, the “subtle” ways in which testimony that the petitioners would be compelled to give under the statute might disadvantage them. *Id.* at 459. The Court answered this argument by stating that once a witness has demonstrated that he testified under a grant of immunity, the prosecution has the burden of showing that their evidence was gained from “an independent, legitimate source.” *Id.* at 460, quoting *Murphy v. Waterfront Comm’n*, 378 U.S. 52, 79 n.18 (1964). The Court added:

This burden of proof, which we reaffirm as appropriate, is not limited to a negation of taint; rather, it imposes on the prosecution the affirmative duty to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony.

*Kastigar v. United States*, 406 U.S. 441, 460 (1972). Therefore:

A person accorded this immunity under 18 U.S.C. § 6002, and subsequently prosecuted, is not dependent for the preservation of his rights upon the integrity and good faith of the prosecuting authorities.

*Id.*

39. *Id.* at 462.

40. 378 U.S. 52, 78 (1964); accord, *Kastigar v. United States*, 406 U.S. 441, 456-58 (1972).

41. Effective immunity also protects the interrelated safeguards of the presumption of innocence and the prosecutorial burden of proving guilt beyond a reasonable doubt.

42. *Kastigar v. United States*, 406 U.S. 441, 462 (1972). The Court’s use of the words “substantially the same position” indicates that the fifth amendment does not provide an absolute right to remain silent, but only an absolute right to be protected from criminal liability as a result of compelled testimony. The scope of the fifth amendment protection articulated by *Kastigar* affords a “rational accommodation between the imperatives of the privilege and the legitimate demands of government to compel citizens to testify.” *Id.* at 445-46. Dean Freedman failed to consider the court’s decision in *Kastigar* when he asserted that the fifth amendment grants an “‘absolute constitutional right to remain silent.’” Freedman, *Judge Frankel’s Search for Truth*, 123 U. PA. L. REV. 1060, 1064 (1975), quoting *Escobedo v. Illinois*, 378 U.S. 478, 491 (1964).

This solution to Professor Kaufman's hypothetical would, of course, invade the sanctity of the attorney-client relationship. Such disclosure arguably might embarrass or inconvenience the client.<sup>43</sup> Even so, disclosure is constitutionally sound. The rational accommodation of conflicting values achieved by the immunity statute upheld in *Kastigar* reflects the constitutional fabric as a balance of fundamental interests. Justice Frankfurter has stated: "[N]o constitutional guarantee enjoys preference, so none should suffer subordination or deletion."<sup>44</sup> Accordingly, the sanctity of the attorney-client relationship cannot be given preference to the interest of an innocent person in obtaining exculpatory information where both interests can be served by a rational accommodation.

In *Ullmann v. United States*<sup>45</sup> the Supreme Court rejected a challenge to the constitutionality of an immunity statute. The

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43. The obligation of confidentiality serves not only to protect the constitutional rights of the criminal defendant but also "to promote freedom of consultation of legal advisers by clients." 8 J. WIGMORE, EVIDENCE § 2291 (McNaughton rev. 1961). The Code serves this policy by requiring that the lawyer maintain the confidentiality of the client's secrets, as well as confidences. A "confidence" refers to that information protected by the attorney-client privilege as an evidentiary matter. A "secret" refers to other information gained in the attorney-client relationship which the client has expressly requested be held inviolate or the disclosure of which would be embarrassing or detrimental to the client. ABA CODE OF PROFESSIONAL RESPONSIBILITY, DR 4-101(A) (1975). The rule prohibits disclosure of either confidences or secrets. *Id.* DR 4-101(B). The Code also expressly mentions, however, that the scope of this obligation of confidentiality is broader than the scope of the attorney-client privilege, which does not embrace the "secrets" of the client. *Id.* EC 4-4. In short, because of the complex of values which bear upon the judicial resolution of disputes, the lawyer's obligation of confidentiality in court is narrowed. Protection against the client's inconvenience or embarrassment, preserved by the prohibition against the lawyer's disclosure of "secrets," yields to the accommodation of various interests made during a litigated case or controversy.

44. *Ullmann v. United States*, 350 U.S. 422, 428 (1956). In support of this statement, Justice Frankfurter quoted the following portion of an address by Senator Albert J. Beveridge to the American Bar Association in 1920:

If liberty is worth keeping and free representative government worth saving, we must stand for *all* American fundamentals—not some, but all. All are woven into the great fabric of our national well-being. We cannot hold fast to some only, and abandon others that, for the moment, we find inconvenient. If one American fundamental is prostrated, others in the end will surely fall. The success or failure of the American theory of society and government depends upon our fidelity to every one of those inter-dependent parts of that immortal charter of orderly freedom, the Constitution of the United States.

Beveridge, *The Assault upon American Fundamentals*, 45 A.B.A. REP. 188, 216 (1920) (emphasis in original), as quoted in *Ullmann v. United States*, 350 U.S. 422, 428 n.3 (1956).

45. 350 U.S. 422 (1956).

dissent argued that “the government brings infamy on the head of the witness when it compels disclosure.”<sup>46</sup> Justice Frankfurter, writing for the Court, stated:<sup>47</sup>

[A]s this Court has often held, the immunity granted need only remove those sanctions which generate the fear justifying invocation of the privilege: “The interdiction of the Fifth Amendment operates only where a witness is asked to incriminate himself—in other words, to give testimony which may possibly expose him to a criminal charge.”

The Ninth Circuit has held that where attorney and client have been granted use immunity prior to the attorney being instructed to testify before a grand jury, the attorney cannot refuse to answer on the grounds that such testimony would undercut the client’s residual expectation of privacy stemming from the confidentiality of the attorney-client relationship.<sup>48</sup> The court stated:<sup>49</sup>

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46. *Id.* at 454 (Douglas, J., dissenting). In English practice, a separate privilege applied to facts involving disgrace or infamy, irrespective of criminality. This privilege, however, has fallen into disuse. 8 J. WIGMORE, EVIDENCE § 2255 (McNaughton rev. 1961). Wigmore points out that arguments which attack immunity statutes as unconstitutional on the ground that there is a fifth amendment privilege against disgrace have been rejected whenever advanced in this country. Wigmore views such arguments as ignoring the independence in principle, and in history, of the distinction between the two privileges. *Accord*, *Ullmann v. United States*, 350 U.S. 422, 430-31 (1956); *In re Michaelson*, 511 F.2d 882, 891-92 (9th Cir.), *cert. denied*, 421 U.S. 978 (1975).

47. *Ullmann v. United States*, 350 U.S. 422, 430-31 (1956), *quoting Hale v. Henkel*, 201 U.S. 43, 67 (1906).

48. *In re Michaelson*, 511 F.2d 882 (9th Cir.), *cert. denied*, 421 U.S. 978 (1975).

49. *Id.* at 891 (emphasis in original). The court noted that an attorney-client relationship may generate an expectation of privacy which in the absence of immunity can support a fifth amendment claim of privilege. *Id.* The court reasoned, however, “if use immunity can constitutionally be used to invade a client’s privacy, to the extent of forcing him to testify to acts which may amount to legal and moral crimes, it certainly can be used to force disclosure of information [which would be protected only by considerations of the privacy of the attorney-client relationship].” *Id.* The court added that “[a]ny disclosure a party does not wish to make will entail some type of chilling effect. However, not all such ‘chills’ amount to an impairment of constitutional rights.” *Id.* at 892.

The court also rejected an argument that the invasion of the attorney-client relationship undercut the client’s sixth amendment right to counsel. *Id.* The issue was not discussed in detail. It is difficult to understand how a sixth amendment claim would, under these circumstances, affect the balance of values involved. It is unprecedented to argue a denial of the right to effective assistance of counsel in a setting where the client has been protected from any criminal liability as a result of the attorney’s actions. Claims of a denial of effective assistance of counsel arise in the context of appeal from conviction. In *Michaelson*, and in the solution proposed here to Professor Kaufman’s hypothetical, the right to counsel cannot have been ineffective given the protection against criminal liability afforded by use immunity.

Historically, the policy of promoting freedom of consultation with lawyers has been used to justify confidentiality only in circumstances where disclosure would expose the

In striking the delicate balance between the information needs of the courts in administering justice and a party's or witness's right to privacy, it is sufficient that testimony elicited from a person not be used against him without a valid waiver of his Fifth Amendment privilege or the granting of immunity. But a party's or witness's residual rights of privacy; that is, the discomfort *any* witness has in testifying against his wishes about matters within his knowledge, cannot outweigh the court's interest in getting the facts necessary to make a reasoned and informed decision. Were this not so, no immunity, indeed no subpoena, could stand—since both invade upon this residual right of privacy.

In a recent decision in the Southern District of New York, the court noted the need to balance the client's expectation of privacy against the court's and the public's interest in disclosure of relevant information.<sup>50</sup> Judge Pierce stated:<sup>51</sup>

The general purpose of this privilege is "to promote freedom of consultation of legal advisers by clients." [Citation omitted.] To this end the client must be assured that information conveyed in confidence to the attorney will not be ordinarily disclosed. Arrayed against this consideration is the public interest in obtaining disclosure of every man's evidence. [Citations omitted.] When these two principles clash a balance must be struck and an appropriate resolution will not be forthcoming by a wooden application of some general formula. The answer may lie, instead, in an analysis of the particular circumstances giving rise to the problem, ever mindful of the policy considerations which furnish a basis of the two principles.

In sum, the grant of immunity to a client whose confidences were disclosed by his lawyer in camera for the purpose of setting free an innocent person would fully protect the legitimate interests of the client. Disclosure of client confidences in camera, regardless of how incriminating the information may be, is a well-

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client to criminal liability. See, e.g., ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 287 (1953); LAWYERS' ETHICS, *supra* note 5, at 4-5; 8 J. WIGMORE, EVIDENCE § 2291 (McNaughton rev. 1961); cf. *In re Berry*, 521 F.2d 179, 183-84 (10th Cir. 1975), *cert. denied*, 96 S. Ct. 276 (1976) (*semble*). There is no support for the proposition that where there is no danger of liability, the expectation of privacy alone justifies a theory of *absolute* confidentiality. *But see* *People v. Lynch*, 23 N.Y.2d 262, 271-72, 244 N.E.2d 29, 34-35, 296 N.Y.S.2d 327, 334 (1968).

50. *In re Grand Jury Subpoena of Martin R. Stolar*, 397 F. Supp. 520, 524 (S.D.N.Y. 1975).

51. *Id.*

settled practice.<sup>52</sup> The grant of immunity would protect the client from criminal liability and a protective order would insure that the client's expectation of confidentiality was preserved in every practicable way consistent with the need to release the innocent defendant.<sup>53</sup> The solution provides a rational accommodation between the "imperatives of the privilege" and the legitimate demand of our criminal justice system that the innocent prisoner be afforded the benefit of exculpatory information.<sup>54</sup>

The suggested solution to Professor Kaufman's hypothetical differs from those provided under current theories of confidentiality in that it accommodates the interests in conflict rather than selecting one interest as paramount. Does such a solution suggest an alteration in the analysis of conflicts between confidentiality and other values generally?

### III. RECONCILING CONFLICTS IN OTHER CONTEXTS

Dean Freedman uses a recent controversial case to demonstrate that the obligation of confidentiality is absolute:<sup>55</sup>

[I]n Lake Pleasant, New York, a defendant in a murder case told his lawyers about two other people he had killed and where their bodies had been hidden. The lawyers went there, observed the bodies, and took photographs of them. They did not, however, inform the authorities about the bodies until several months later, when their client had confessed to those crimes.

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52. Confidences are furnished to the courts routinely for in camera determination of the legitimacy of an assertion of the attorney-client privilege. See, e.g., *In re Grand Jury Subpoena Duces Tecum*, 391 F. Supp. 1029, 1033 (S.D.N.Y. 1975).

53. Under the protective order the prosecution could not make the identity of the client or other information available to the public, or otherwise use such information to inconvenience or embarrass the client. No significant impediment to disclosure remains under the proposed procedure; the expectation of privacy and the privilege protecting it are only two factors in a balancing of interests. Wigmore states that one of the conditions precedent to sustaining claims of privilege is that "[t]he *injury* that would inure to the relation by the disclosure of the communications must be *greater than the benefit* thereby gained for the correct disposal of litigation." 8 J. WIGMORE, EVIDENCE § 2285 (McNaughton rev. 1961) (emphasis in original); cf. *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring): "[T]here is a twofold requirement, first that a person have exhibited an actual (subjective) expectation of privacy, and, second, that the expectation be one that society is prepared to recognize as 'reasonable.'"

54. Cf. *Kastigar v. United States*, 406 U.S. 441, 446 (1972). It is not suggested here that the attorney-client relationship may be invaded by courts or prosecutors whenever immunity is granted to the client. This comment has focused on situations where *compelling* interests—such as the innocence of a third party—conflict with the obligation of confidentiality. The state's interest in prosecution alone is not sufficiently compelling to compromise the sanctity of the attorney-client relationship.

55. LAWYERS' ETHICS, *supra* note 5, at 1.

In addition to withholding the information from police and prosecutors, one of the attorneys denied information to one of the victims' parents, who came to him in the course of seeking his missing daughter.

Despite the public outrage over the failure of the lawyers to disclose the location of the bodies and the efforts of the local prosecutor to indict the lawyers for failing to reveal knowledge of a crime,<sup>56</sup> Dean Freedman concludes that the lawyers not only acted properly but would have breached their professional responsibility had they disclosed the information.<sup>57</sup> He states:<sup>58</sup>

It must be obvious at this point that the adversary system, within which the lawyer functions, contemplates that the lawyer frequently will learn from the client information that is highly incriminating and may even learn, as in the Lake Pleasant case, that the client has in fact committed serious crimes. In such a case, if the attorney were required to divulge that information, the obligation of confidentiality would be destroyed, and with it, the adversary system itself.

Following the procedure suggested in this comment, the lawyers in the Lake Pleasant case would be required to disclose in camera their knowledge of where the bodies were buried. The court could then disclose the information to the prosecution, contingent on a grant of use immunity to the lawyer's client. The

56. *Id.* Dean Freedman reports that "[m]embers of the public were generally shocked at the apparent callousness on the part of the lawyers, whose conduct was considered typical of an unhealthy lack of concern by lawyers with the public interest and with simple decency." *Id.* Dean Freedman rests his theory that confidentiality must "upon all occasions be inviolable," *id.* at 5, quoting ABA COMM. ON PROFESSIONAL ETHICS AND GRIEVANCES, OPINION 150 (1936), quoting E. THORNTON, ATTORNEYS AT LAW § 94 (1914), in part on grounds that a restricted scope of the privilege would undercut public confidence in the sanctity of the lawyer-client relationship, making clients generally unwilling "to reveal to the lawyer all information that is potentially relevant." *Id.* Given the public reaction to the Lake Pleasant incident, it is speculative at best to suggest that the procedure presented here would result in a general loss of confidence in the sanctity of the attorney-client relationship:

[The privilege's] benefits are all indirect and speculative; its obstruction is plain and concrete. . . . It ought to be strictly confined within the narrowest possible limits consistent with the logic of its principle.

8 J. WIGMORE, EVIDENCE § 2291 (McNaughton rev. 1961). See cases cited *id.* at n.6; cf. *Zicarelli v. New Jersey Investigation Comm'n*, 406 U.S. 472, 478 (1972) ("[i]t is well established that the privilege protects against real dangers, not remote or speculative possibilities"); *In re Michaelson*, 511 F.2d 882, 892 (9th Cir.), cert. denied, 421 U.S. 978 (1975).

57. LAWYERS' ETHICS, *supra* note 5, at 2.

58. *Id.* at 5.

prosecution in turn would notify the parents and have the bodies recovered.<sup>59</sup>

This resolution of the Lake Pleasant case, which protects the interests of the client while accommodating the public interest and "simple decency,"<sup>60</sup> raises another conflict of values. The court would have to decide whether it is more important to recover the bodies or to leave the path of potential prosecution unfettered regarding an undiscovered crime. In camera disclosure shifts the locus of this conflict from the individual attorney to the courts. The interests of the client are no longer a part of the conflict; they are protected whether the court discloses the information to the prosecution—thus requiring the grant of immunity—or decides to retain the information in camera without further disclosure.

#### IV. CONCLUSION

The constitutional system is a complex of fundamental values and aspirations. In cases where these values conflict, rational accommodations must be reached whenever possible. The lawyer's obligation of confidentiality protects fundamental values but it is not an absolute obligation; the obligation must yield where disclosure serves other important values without undercutting the legitimate interests of the client. Contrary to current theories of confidentiality, conflicts between confidentiality and other values are not inherently irreconcilable. There are means available within our adversary system by which the lawyer can serve the client, the interests of justice, and the underlying policies of confidentiality despite disclosure of incriminating information.<sup>61</sup>

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59. The parents and the public, however, would not be informed of the source of the information. See note 53 *supra* and accompanying text.

60. LAWYERS' ETHICS, *supra* note 5, at 1.

61. A lawyer need not wait for legislation before attempting to use the proposed approach to resolve conflicts between confidentiality and other values. The lawyer faced with Professor Kaufman's dilemma, or that posed by the Lake Pleasant case, would be free to inform the court of the general nature of the problem faced and request in camera review of the information. The court, upon granting review, would be free to inform the prosecution of the nature of the information, contingent on a grant of use immunity to the client and subject to a protective order. A lawyer who attempts to invoke such procedures would perhaps create the impetus for appropriate legislation.



