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## THE ELEPHANT IN THE ROOM IN CLINICAL SCHOLARSHIP: ETHICAL GUARDRAILS AND CASE HISTORIES

THEO LIEBMANN and STEFAN H. KRIEGER\*

Lawyers know how to tell a good story and are expected, encouraged, and even ethically required to use that skill on behalf of their clients. More and more, lawyers and legal academics are now using their clients' stories to advance goals that go far beyond achieving a client's objectives: exposing inequities with regard to access to justice; educating the public about the functioning and limitations of the legal system; raising the quality of lawyering; and improving our system of legal education. Unfortunately, the increase in the use of case histories to achieve such laudable goals has not been paired with an increase in the self-reflection and deep analysis required to ensure case histories are used in a responsible and ethical manner. In this article, we identify the benefits to the legal profession and the public of the use of client stories in legal scholarship and highlight the ethical issues raised by such publication. It is the interplay between these values—the improvement of the legal system versus the protection of client confidentiality—that is the focus of this paper. We begin by describing how case studies are invaluable to the development of the law, the improvement of the practice of law and the legal system, and advances in legal education, but also identify how the restrictions of the ethical rules quite possibly have a chilling effect on the publication of those studies. We then describe a survey conducted of scholars who have included case histories in their publications and the methods they used or did not use in addressing these issues. Finding that the approach by scholars has been troublingly inconsistent and often cursory, we examine how the medical and mental health professions approach the ethics of publishing patient and client case studies. Based on the practices in these professions and the legal rules of

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professional responsibility, we propose a detailed protocol to be used both by scholars and scholarly journals to address the ethical issues in publication of client case studies.

## INTRODUCTION

In 2016, after a successful eight-year housing discrimination case in federal court,<sup>1</sup> one of this paper's authors embarked on an oral history project to document both the saga of the Clinic's litigation and the struggles of the nine immigrant plaintiffs who challenged a local redevelopment plan which targeted the Latinx population. The project's goal was to assist other lawyers and law teachers in considering methods for representing clients in discrimination cases. Together with professors in the Hofstra University Sociology Department and Communications School, the researchers envisioned interviewing each of the tenants, several students who worked on the case, Clinic supervisors, and some of the advocates in the community who stood with the plaintiffs throughout the case. They also planned on reviewing the Clinic's case files to identify key documents, deposition transcripts, interoffice memos, and media reports that would help them develop a thorough narrative.

In preparation for the project, the researchers examined the Principles and Best Practices of the Oral History Association.<sup>2</sup> A primary focus of those standards is obtaining the informed consent of the subject being interviewed. These Principles and Best Practices from another discipline sparked an issue for both of us: To what extent do the ethical rules of the legal profession guide the consent necessary for publishing this case study?

Both of us have published a number of articles describing cases our clinics have handled. Indeed, the germ for the majority of our publications, like that of most clinical teachers and practicing attorneys, has been our experiences litigating our cases. Regrettably, in publishing these articles, we never seriously considered the issue of informed consent of the clients. Like many other authors of case studies, we assumed that since the cases were concluded, no client names

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<sup>1</sup> *Rivera v. Inc. Vill. of Farmingdale*, No. 06-2613 (E.D.N.Y. 2016).

<sup>2</sup> See generally ORAL HIST. ASS'N, OHA PRINCIPLES AND BEST PRACTICES (2018), <https://www.oralhistory.org/wp-content/uploads/2020/06/OHA-Principles-and-Best-Practices-Original-and-Archives-updated-Oct-2019.pdf>. While for previous empirical studies, we were aware of the Department of Health and Human Services guidelines for human subject research, see, e.g., Stefan H. Krieger *The Development of Legal Reasoning Skills in Law Students: An Empirical Study*, 56 J. LEGAL EDUC. 332, 337 n.16 (2006), before our research for this article, we were unaware of the vast literature in the areas of medicine and mental health regarding confidentiality and conflicts of interest issues. See *infra* notes 90-152 and accompanying text.

were disclosed, and the data considered were in the public record, these studies did not raise significant ethical problems. One of the authors, for example, wrote an article on a “pop-up” clinical program representing clients on Election Day 2008 who were denied the right to vote because of purported problems with their voter registration.<sup>3</sup> The purpose of this piece was to demonstrate through the stories of the students’ representation of multiple clients on that day the educational benefits of repetitive practice of similar, one-issue cases. The other author wrote an article urging change to the family court system to account for the needs of children and families who lack lawful immigration status, and used disguised excerpts of multiple clients’ affidavits to highlight those needs.<sup>4</sup>

We are, unfortunately, but two of the many clinical teachers who have published articles containing detailed case studies without apparent serious consideration of the informed consent issue. In publishing the articles discussed and surveyed throughout this paper, many authors have apparently assumed that obtaining informed consent was not necessary because they neither disclosed client names nor used nonpublic records.<sup>5</sup> That assumption overlooks the clear language of the ethical rules. American Bar Association (“ABA”) Model Rule of Professional Conduct 1.6 provides:

- a) A lawyer shall not reveal information *relating to the representation of a client* 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).<sup>6</sup>

Paragraph (b) of the rule does not permit the disclosure of such information for publication in a law journal, either for current or former clients.<sup>7</sup> Thus, the rules seem quite broad: even for former clients, cli-

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<sup>3</sup> See generally Stefan H. Krieger & Serge A. Martinez, *A Tale of Election Day 2008: Teaching Storytelling Through Repeated Experiences*, 16 LEGAL WRITING: J. LEGAL WRITING INST. 117 (2010) (discussing the clinical program established by the author for the 2008 election).

<sup>4</sup> Theo Liebmann, *Family Court and the Unique Needs of Children and Families Who Lack Immigration Status*, 40 COLUM. J.L. & SOC. PROBS. 583, 591-97 (2007).

<sup>5</sup> See *infra* notes 54, 75-82 and accompanying text. See also *infra* Appendix A.

<sup>6</sup> MODEL RULES OF PRO. CONDUCT r. 1.6(a) (AM. BAR ASS’N 2021) (emphasis added).

<sup>7</sup> See *id.* r. 1.6(b). The rule provides,

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

- (1) to prevent reasonably certain death or substantial bodily harm;
- (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer’s services;
- (3) 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

nicians are apparently prohibited from revealing information in their case studies relating to the representation in their clinic cases without the informed consent of their clients.<sup>8</sup>

While case studies are invaluable to the development of the law, the improvement of the practice of law and the legal system, and advances in legal education, the restrictions of the ethical rules quite possibly have a chilling effect on the publication of those studies. It is the interplay between these values—the improvement of the legal system versus the protection of client confidentiality—that is the focus of this paper. In this article, we will first discuss the important role of case studies in the development of an improved legal system. We will then address the nature of the confidentiality rules in regard to the publication of case studies, present the findings of a survey of clinicians on their consideration of the ethical rules in their publication of case studies, and examine the current scholarship on obtaining in-

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services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) 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;

(6) to comply with other law or a court order; or

(7) to detect and resolve conflicts of interest arising from the lawyer's change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

*Id.* See also Rule 1.9 providing that:

(c) 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:

...

(2) reveal information relating to the representation except as these Rules would permit or require with respect to a client.

*Id.* r. 1.9.

<sup>8</sup> Many, but not all, states have adopted the ABA's broad language. Compare TEX. DISCIPLINARY R. PRO. CONDUCT 1.05 (2021) (protecting both privileged communications as well as all information "acquired by the lawyer during the course of or by reason of the representation of a client"), and 204 PA. CODE §1.6 (2021) (protecting all information "relating to the representation of the client"), with N.Y. R. PRO. CONDUCT 1.6 (2021) ("[c]onfidential information" only includes information "protected by attorney-client privilege, [information] likely to be embarrassing or detrimental to the client if disclosed, or information that the client has requested be kept confidential"), and ME. R. PRO. CONDUCT 1.6 (2021) (protected information is privileged information, or information relating to the representation "if there is a reasonable prospect that revealing the information will adversely affect a material interest of the client or if the client has instructed the lawyer not to reveal such information"). Some states also have broader protection of confidential information than the Model Rules due to having fewer exceptions to the general protective rule. See CAL. RULE PRO. CONDUCT, 1.6 & CAL. BUS. & PROF. CODE §6068(e). For a full description of the confidentiality rules for each state, see *Jurisdictional Rules Comparison Charts*, A.B.A., [https://www.americanbar.org/groups/professional\\_responsibility/policy/rule\\_charts](https://www.americanbar.org/groups/professional_responsibility/policy/rule_charts) (last visited Feb. 12, 2022).

formed consent before the use of case studies in legal journals. Next, we will describe the confidentiality rules used in other professions for the publication of case studies. Finally, balancing the competing policies involved in the publication of case studies, we will propose a recommended protocol for obtaining informed consent by clients for the publication of studies of their cases.

## I. THE ROLE OF CASE HISTORIES IN ADVANCING PUBLIC CITIZEN GOALS

Although the use of case histories in advancing broad public goals is championed far less explicitly in the legal field than in other professions,<sup>9</sup> broader aspirations embedded in the legal field unmistakably lend themselves to the practice of making case histories public. Lawyers' ethics codes, value statements by professional organizations and leaders in legal education, and a number of influential academic articles, articulate broad "public citizen" duties that provide a compelling basis for the publication of legal case histories. In this section, we take a close look at those duties, where they come from, and how case studies have been used to advance them.

### A. *Public Citizen Values in Ethics Rules*

The Model Rules emphatically endorse the concept of a lawyer as a public citizen with responsibilities beyond case-related and representation-related duties.<sup>10</sup> The Preamble focuses on three broad cate-

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<sup>9</sup> Medical academics, practitioners and other experts, for example, celebrate how case studies can bring attention to areas where further research is required, enrich understanding of fundamental concepts and difficult treatment challenges, and in general, broaden and deepen knowledge and understanding "in a way that might not be available otherwise." See *infra* Section III.A. See also John C. Carey, *The Importance of Case Reports in Advancing Scientific Knowledge of Rare Diseases*, in 686 RARE DISEASES EPIDEMIOLOGY: ADVANCES IN EXPERIMENTAL MED. AND BIOLOGY 77 (Posada de la Paz & Groft eds. 2010). ("Case reports are defined as the scientific documentation of a single clinical observation and have a time-honored and rich tradition in medicine and scientific publication . . . the observation of a single patient can add to our understanding of etiology, pathogenesis, natural history, and treatment of particularly rare diseases."); Steven L. Kanter, *Case Studies in Academic Medicine*, 85 ACAD. MED. 567 (2010) ("[C]ase studies that are analytic and penetrating, that illuminate fundamental precepts and concepts, and that reveal new avenues for research or theory development have the potential to broaden and deepen knowledge and understanding in a way that might not be available otherwise."); Ian R. McWhinney, *The Value of Case Studies*, 7 EUROPEAN J. GEN. PRAC., no. 3, at 88, 88-89 (2001).

<sup>10</sup> MODEL RULES OF PRO. CONDUCT Preamble Par. 6 (AM. BAR ASS'N 2021).

As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education. In addition, a lawyer should further the

gories of non-representational responsibilities: (1) improving the legal system by bringing public attention to how it works, exposing its deficiencies, and proposing and implementing solutions to those deficiencies, especially those related to access to justice; (2) improving the quality of lawyering; and (3) improving legal education.

The Preamble is explicit that, with regard to the first category, the public's understanding, participation, and confidence in the law and legal system are essential components of a functioning constitutional democracy, and equally explicit that lawyers have a corresponding duty to ensure the public's understanding and confidence through more than just their representation of clients.<sup>11</sup> When the provisions related to this "public education" duty were added to the Preamble in 2000, there was widespread recognition among the drafters that the transparency of how the legal system works, and trust in that system, are crucial to the public's respect for, and compliance with, the rule of law. The drafters put special responsibility on lawyers to ensure transparency, and to build public trust and understanding,<sup>12</sup> referring to lawyers as "guardians and caretakers" of the judicial system and legal institutions.<sup>13</sup>

The second public citizen duty articulated in the Preamble—the duty to improve the quality of lawyering—also serves the purpose of ensuring public trust in the legal system.<sup>14</sup> If lawyers are performing their advocacy and counseling tasks with diligence, competence, loyalty, and candor, then not only will the quality of client representation

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public's understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority. A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.

*Id.*

<sup>11</sup> *Id.* (stating that a lawyer should cultivate knowledge of the law *beyond its use for clients*) (emphasis added).

<sup>12</sup> Proceedings for the Annual Meeting of the ABA House of Delegates, 7/10/2000, p. 23; Testimony submitted by ABA Standing Committee on Public Education, Public Hearing, 2/10/2000, p. 3.

<sup>13</sup> Testimony submitted by ABA Standing Committee on Public Education, Public Hearing, 2/10/2000, p. 3.

<sup>14</sup> Note that this duty to improve the quality of lawyering by the profession overall differs from the rules which relate to quality of representation on specific cases or within a firm or agency. MODEL RULES OF PRO. CONDUCT r. 1.1 (duty to provide competent representation to clients); r. 5.1 (duty of supervisory lawyers to ensure members of firm provide, *inter alia*, competent representation to clients).

improve, but presumably the public's faith in the law and the legal process increases. Similarly, the third articulated duty—to improve legal education—aims to improve the legal system by ensuring law students and lawyers are trained to be ethical, skilled, and informed practitioners and client representatives.

At the same time that the Preamble exhorts lawyers to educate the public about the legal system, it also cautions that lawyers have a duty to be clear-eyed and transparent about the inequities or other deficiencies of the legal system, and to take steps—as *public citizens with a special expertise, and not just client representatives*—to bring attention to, and address those problems;<sup>15</sup> and to use “civic influence” to improve access to justice and to reform the legal system when necessary.<sup>16</sup>

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<sup>15</sup> *Id.*; Cf. Matthew E. Meany, “Lawyer as Public Citizen” – A Futile Attempt to Close Pandora’s Box, 35 CAMPBELL L. REV. 119, 144 (2012) (arguing that the Model Rules and legal education should place greater emphasis on lawyers’ public citizen duties); Eli Wald, *Loyalty in Limbo: The Peculiar Case of Attorneys’ Loyalty to Clients*, 40 ST. MARY’S L.J. 909, 966 (2009) (writing that lawyers must “strick[e] a balance between loyalty to clients and loyalties to the legal system and the public”).

<sup>16</sup> The Rules themselves rarely reflect this broader duty, leaving the Preamble’s exhortations as the primary source for understanding what responsibilities are encompassed. Broad duties that are mentioned in the Rules typically are either closely confined to the context of client representation, not a general duty, or are framed as prohibitions, not as affirmative responsibilities. See MODEL RULES OF PRO. CONDUCT r. 3.3 (the duty of candor); r. 3.4 (fairness to opposing party and counsel), r. 3.8, cmt. 1 (duty of prosecutor as “minister of justice”); r. 8.4(c)&(d) (prohibitions against dishonest, fraudulent and deceitful conduct, as well as conduct prejudicial to the administration of justice). The Model Rules, like the Model Code before them, do however encourage lawyers to include considerations beyond the law itself when advising a client, and they encourage counsel to remind the client of the moral, ethical, and practical consequences of an intended action. MODEL RULES OF PRO. CONDUCT r. 2.1 (AM. BAR. ASS’N 2021); MODEL CODE OF PRO. RESP. CANON 7-8 (AM. BAR ASS’N 1980). See also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 94(3) (2000) (stating that a lawyer may address non-legal aspects of client’s situation, including “moral, reputational, economic, social, political, and business aspects”). However, these rules are typically cited for situations where a lawyer is providing advice about a client’s case, not broader considerations about the legal system. See CONN. INFORMAL ETHICS OP. 89-10 (1989) (showing that Rule 2.1 does not bar lawyer from rendering investment advice since, in many situations, some degree of investment advice is necessary for adequate representation of client); W. VA. ETHICS OP. 2005-02 (2005) (stating that when advising clients about the possibility of taking out a loan to fund litigation expenses, a “relevant factor which [per Rule 2.1] should be clearly and thoroughly discussed with the client is the economic impact upon the client of the company’s service or interest charges”); see generally W. Bradley Wendel, *Legal Ethics and the Separation of Law and Morals*, 91 CORNELL L. REV. 67, 104 (2005) (writing that under rule [2.1], lawyers should refer only “to moral considerations . . . [that] are relevant to the interpretation of law and are not simply extralegal moral reasons that the lawyer thinks are important”).



*B. Public Citizen Values Articulated in Academic Scholarship and Legal Education*

The importance of the three public citizen duties of the lawyer—to improve the legal system; to improve the quality of lawyering; and to improve legal education—is reflected outside of the Model Rules as well, including in academic scholarship, and in value statements by legal education leaders and bar organizations. Among academics, there has been robust debate over many years on how broader societal considerations should be weighed in determining what constitutes ethical lawyering, particularly with respect to concepts of client loyalty and zealous advocacy. Those arguments typically revolve around questions of what role the “public good,” a fair legal system, and the promotion of justice should play in decision-making by lawyers.<sup>17</sup> Academics and ethicists have addressed these concerns from at least as far back as the inception of the Model Rules, when there was a real battle about how highly to elevate public good as an ethical value,<sup>18</sup> as well as in current day controversies such as the role of Twitter in exposing systemic problems in the criminal justice system.<sup>19</sup> Though the proper balance between public citizen duties and client-centered duties continues to be hotly debated, there is little question that the public-citizen duty plays some significant role in a lawyer’s ethical responsibilities. For example, the American Bar Association and the American Association of Law Schools unequivocally espouse broader professional ideals that include advocating for improvements in the law and the legal system, the pursuit of “social justice,” and increasing broader knowledge of the law.<sup>20</sup> Other organizations for legal profes-

<sup>17</sup> *E.g.*, Meany, *supra* note 15, at 144 (arguing that the Model Rules and legal education should place greater emphasis on lawyers’ public citizen duties); Wald, *supra* note 15, at 966 (stating that lawyers must “strik[e] a balance between loyalty to clients and loyalties to the legal system and the public”); Sean J. Griffith, *Ethical Rules and Collective Action: An Economic Analysis of Legal Ethics*, 63 U. PITT. L. REV. 347, 376-77 (2002) (suggesting Model Rules should be re-conceived from the “perspective of social welfare” and the public good); William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1090 (1988) (proposing that “promotion of justice” be the primary consideration for lawyers when taking actions); Nicole Smith Futrell, *Please Tweet Responsibly: The Social and Professional Ethics of Public Defenders Using Client Information in Social Media Advocacy*, THE CHAMPION: NACDL, Dec. 2019, at 12.

<sup>18</sup> Michael Ariens, *The Last Hurrah: The Kutak Commission and the End of Optimism*, 49 CREIGHTON L. REV. 689, 698-9, 724-33 (2016).

<sup>19</sup> Futrell, *supra* note 17, at 12.

<sup>20</sup> *E.g.*, *Statement on the Value of a Legal Education*, ASS’N OF AM. L. SCHS., <https://www.aals.org/wp-content/uploads/2014/09/Statement-on-the-Value-of-a-Legal-Education.pdf> (last visited Dec. 4, 2021) (asserting that law schools should teach students about the “rule of law” as the foundation of our society, our political system, and our economic system); *Statement on Prelaw Preparation*, A.B.A., [https://www.americanbar.org/content/dam/aba/administrative/legal\\_education\\_and\\_admissions\\_to\\_the\\_bar/Statement\\_on\\_Prelaw\\_Preparation.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_education_and_admissions_to_the_bar/Statement_on_Prelaw_Preparation.authcheckdam.pdf) (last visited Dec. 4, 2021) (“Each mem-

sionals, such as state bar associations, the Society of American Law Teachers, and the Clinical Legal Education Association, similarly endorse the improvement of legal education and the legal system, as well as the pursuit of broader justice, in their mission statements.<sup>21</sup> And some states include explicit language about fairness and access to justice among required continuing legal education categories.<sup>22</sup> The overall message, consistently articulated by leaders and regulators in the legal field, is that lawyers have a duty as a public citizen that is separate from their duties to individual clients.

### C. *How Case Studies Are Currently Used to Advance “Public Citizen” Duties in the Legal Profession*

Legal academics and practitioners, like their counterparts in the medical profession, have used case studies to advance broader professional and societal goals. Clinical law professors in particular have taken advantage of their dual role as practitioners and academics to use case studies in important and influential ways, especially in legal journals—often peer-reviewed publications, rather than student-run law reviews.<sup>23</sup> Some journals, such as the *Clinical Law Review*<sup>24</sup> or the

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ber of the legal profession should be dedicated both to the objectives of serving others honestly, competently, and responsibly, and to the goals of improving fairness and the quality of justice in the legal system.”); American Bar Association (@ABAesq), TWITTER (June 5, 2020 3:26 PM), <https://twitter.com/abaesq/status/1268987625752481794> (showing a statement by former ABA president on the ABA website, in response to George Floyd’s killing, that “Lawyers have a special duty to address injustices done in the name of law”); *Law Deans Antiracist Clearinghouse Project*, ASS’N OF AM. L. SCHS., <https://www.aals.org/about/publications/antiracist-clearinghouse> (last visited Dec. 4, 2021) (establishing AALS project to, among other things, “transform our institutions into ones that reflect the power and the promise of the rule of law to do equity in service to the principle of equal protection of the law”).

<sup>21</sup> *Mission*, CLINICAL LEGAL EDUC. ASS’N, <https://www.cleaweb.org/mission> (last visited Nov. 29, 2021) (“CLEA and its members seek to . . . pursue and promote justice and diversity as core values of the legal profession.”); *Working Within and Beyond Law School*, SOC’Y OF AM. L. TCHRS., <https://www.saltlaw.org/about-salt/> (last visited Nov. 29, 2021) (“SALT has been working for more than 40 years to improve the legal profession, the law academy and expand the power of law to under-served communities. SALT engages in work within and beyond the law school to advance social justice.”).

<sup>22</sup> See, e.g. N.Y. COMP. CODES R. & REGS. tit. 22 §1500(c), (g) (“Ethics and Professionalism” category includes “the promotion of fairness, justice and morality” as a topic; “Diversity, Inclusion and Elimination of Bias” category includes “equal access to justice” as a topic); WASH. ST. ADMISSION & PRAC. R. 11(f) (“Improving the legal system” category includes “access to justice” as a topic).

<sup>23</sup> See generally Nicole Smith Futrell, *Vulnerable, Not Voiceless: Outsider Narratives in Advocacy Against Discriminatory Policing*, 93 N.C. L. REV. 1597 (2015); Leigh Goodmark, *Telling Stories, Saving Lives: The Battered Mothers’ Testimony Project, Women’s Narrative, and Court Reform*, 37 ARIZ. STATE L.J. 709 (2005) (emphasizing the importance of individual narratives to achieve broader justice goals in criminal justice and domestic violence law reform).

<sup>24</sup> See *A Journal of Lawyering and Legal Education*, N.Y.U. L., <https://>

Journal on Legal Education,<sup>25</sup> tend to focus on legal system or legal education issues, and others, such as the Family Court Review or American Criminal Law Review, concentrate on specific subject-matter areas.<sup>26</sup>

Clinical professors have used case studies in legal journals to pursue the Model Rule's exhortations to improve the legal system, the quality of lawyering, and legal education in multiple ways.<sup>27</sup> The case study is often, for example, employed to provide support for arguments about improving the legal system, particularly as it relates to underserved or ignored client populations. Clinical professors have given a highly detailed description of their work on behalf of a domestic abuse survivor to highlight the need to provide holistic services along with a full range of legal services;<sup>28</sup> discussed a former client in an emancipation proceeding to support a call to action to provide better services for children in New Mexico;<sup>29</sup> and offered details of a case on behalf of a parent accused of neglect to demonstrate the need for ". . . a new vision and promise for families enmeshed in the child welfare and family court systems."<sup>30</sup>

Case studies also illustrate vividly how certain strategies and methodologies improve the quality of lawyering. Clinical professors have "draw[n] upon their own experiences as practitioners supporting indigenous communities in the Amazon struggling against multinational oil companies, and the lessons of the critical methodologies, to then present a practical and detailed guide for implementing an effective model of 'transnational collaborative lawyering'";<sup>31</sup> used their experience with a client to illustrate that lawyers serving the urban poor should presumptively adopt a trauma-informed practice approach regardless of the subject matter of the representation;<sup>32</sup> and offered three specific case studies to powerfully illustrate "the centrality of

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www.law.nyu.edu/journals/clinallawreview (last visited Nov. 29, 2021).

<sup>25</sup> See *About this Journal*, J. LEGAL EDUC., <https://jle.aals.org/home/about.html> (last visited Nov. 29, 2021).

<sup>26</sup> See FAMILY COURT REVIEW, ASS'N OF FAM. AND CONCILIATION CTS., <https://www.afccnet.org/Publications/Family-Court-Review> (last visited Nov. 29, 2021); AMERICAN CRIMINAL LAW REVIEW, GEO. L., <https://www.law.georgetown.edu/american-criminal-law-review> (last visited Nov. 29, 2021).

<sup>27</sup> See *infra* notes 28-49 and accompanying text.

<sup>28</sup> Camille Carey & Robert A. Solomon, *Impossible Choices: Balancing Safety and Security in Domestic Violence Representation*, 21 CLIN. L. REV. 201, 253 (2014).

<sup>29</sup> Tara Ford, *Pegasus Legal Services for Children*, 23 CLIN. L. REV. 107, 123-24 (2016).

<sup>30</sup> Kara R. Finck, *Applying the Principles of Rebellious Lawyering to Envision Family Defense*, 23 CLIN. L. REV. 83, 105 (2016).

<sup>31</sup> Benjamin Hoffman & Marissa Vahlsing, *Collaborative Lawyering in Transnational Human Rights Advocacy*, 21 CLIN. L. REV. 255, 255 (2014).

<sup>32</sup> Sara E. Gold, *Trauma: What Lurks Beneath the Surface*, 24 CLIN. L. REV. 201, 201-23 (2018).

religion as a cross-cultural factor” in ensuring effective client representation.<sup>33</sup>

And, finally, academics regularly use examples of cases they worked on with students to highlight the specific ways that work has informed their teaching methodologies and training of students. Articles have used details from a child and spousal support case to illustrate the importance of teaching “trauma-informed practice” to law students and young lawyers;<sup>34</sup> discussed a prospective client who wanted to establish a media production company to produce documentaries in order to explore “the phenomenon of ‘stuckness’ . . . and the authors’ endeavors to develop teaching methods to address it.”;<sup>35</sup> and related the authors’ experiences working with an organizational client to showcase the legislative lawyering opportunities it provided students and “to contribute to the ongoing conversation about how best to train effective social justice advocates and how to improve clinical legal education.”<sup>36</sup>

The use of case studies to advance broader goals also occurs beyond academic journals. Trade journals, for example, provide a venue for achieving broader goals—especially in the areas of improving the legal system and lawyering—through examining specific cases with which the authors have been involved. Practitioners have used case studies to bring attention to problems encountered by undocumented abuse survivors;<sup>37</sup> highlight the need for more involvement by lawyers and policymakers to address the issue of food insecurity;<sup>38</sup> illustrate the benefits of and need for more pro bono work;<sup>39</sup> provide instruction on litigation techniques related to dealing with jurors;<sup>40</sup> explain how advocating client “interests” rather than “positions” is beneficial in the context of family law;<sup>41</sup> and discuss the importance of active

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<sup>33</sup> James A. Sonne, *Cross-Cultural Lawyering and Religion: A Clinical Perspective*, 25 CLIN. L. REV. 223, 233, 247-58 (2018).

<sup>34</sup> Sarah Katz & Deeya Haldar, *The Pedagogy of Trauma-Informed Lawyering*, 22 CLIN. L. REV. 359, 360-63, 369-383 (2016).

<sup>35</sup> Laurie Morin & Louise Howells, *The Reflective Judgment Project*, 9 CLIN. L. REV. 623, 623 (2003).

<sup>36</sup> Marcy L. Karin & Robin R. Runge, *Toward Integrated Law Clinics that Train Social Change Advocates*, 17 CLIN. L. REV. 563, 566 (2011).

<sup>37</sup> Sophie Feal & Emma Buckthal, *Finding Protection Under US Immigration Law*, 31 CRIM. JUST., no. 1, 2016, at 4.

<sup>38</sup> Nikki Clark, Susan Duell & Trevor Hawkins, *Hunger and Food Insecurity: What Challenges do Arkansans Face Due to the Lack of Access to Nutritious Food?*, 55 ARK. LAW., no. 2, 2020, at 18.

<sup>39</sup> Wm. Kerry Skaggs, *Why Do Pro Bono?*, 7 NEV. LAW., no. 4, 1999, at 14.

<sup>40</sup> Roger K. O'Reilly, *Defending a Doctor Against All Odds*, 72 A.B.A. J., no. 5, 1986, at 44.

<sup>41</sup> Joseph T. McElveen Jr., *The Ten Commandments of Family Law Negotiation*, 2 COMPLEAT LAW., no. 3, 1985, at 51.

listening and empathizing in interactions with clients.<sup>42</sup> Even social media is increasingly being used as a method of publicizing specific cases in service of broader justice goals. In an effort to bring attention to the conditions of the criminal justice system, for example, some public defenders tweet publicly about the situations and conditions that their clients are enduring.<sup>43</sup>

## II. ETHICAL CONSIDERATIONS IN THE USE OF CASE HISTORIES

In this section we look at the ethical rules that create significant limitations to the use of case histories. We then review a survey of how twenty-seven authors who recently used legal case histories attempted to navigate those ethical guardrails.

### A. Confidentiality Concerns

#### 1. General Confidentiality Requirements

The ethical duty to keep case-related information confidential creates enormous challenges to the use of case histories for public citizen goals. Under the Model Rules, confidential information includes all information relating to the representation of a client.<sup>44</sup> The duty of confidentiality covers information that comes from any source, not just the client; it includes disclosures of information that, although not itself confidential, could lead to the discovery of protected information; and it includes previously disclosed or publicly available information.<sup>45</sup> These broad disclosure prohibitions serve as a crucial touchstone for effective client representation. They reassure clients that they can disclose all relevant information to their lawyers without fear that it will be revealed to anyone else without the clients' permission. In turn, the full disclosure by the clients allows lawyers to provide fully informed advice and advocacy.

It is not difficult to see the challenge this poses to the use of case histories, which disclose material that unambiguously falls under the definition of confidential information. Among the academic articles that have used case studies in recent years, for example, authors have

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<sup>42</sup> Ellen C. Brotman, *How to Get Clients to Eat Their Spinach*, 35 LITIG., no. 4, 2009, at 32.

<sup>43</sup> See Janet Manley, *Should Public Defenders Be Tweeting?*, VICE (Feb. 18, 2021, 11:15 AM), <https://www.vice.com/en/article/qjpa7q/should-public-defenders-be-tweeting>.

<sup>44</sup> MODEL RULES OF PRO. CONDUCT r. 1.6, 1.9, 1.18 (AM. BAR ASS'N 2021).

<sup>45</sup> *Id.* r. 1.6, cmt 3 (showing that the confidentiality rule applies to "all information relating to the representation, whatever its source"); *Id.* r. 1.6, cmt. 4 (showing that the confidentiality rule applies to disclosures that "do not in themselves reveal protected information but could reasonably lead to the discovery of such information"); ABA Comm. on Ethics & Pro. Resp., Formal Op. 480 (2018) (stating that confidentiality protections apply to all case-related information, "including information contained in a public record").

illustrated the needs for trauma-informed practice by disclosing the abuse experienced by child clients;<sup>46</sup> demonstrated the benefits and drawbacks of handling complex cases in a law school clinic by presenting the struggles of clients with disabilities to avoid becoming wards in guardianship cases;<sup>47</sup> explained strategies for effective termination of a lawyer-client relationship by discussing a client with HIV and a major depressive disorder;<sup>48</sup> and analyzed the benefits of zealous criminal defense with a detailed description of the background of a client's drug history and motivations in coming forward to confess a crime.<sup>49</sup> All of these studies address highly sensitive subjects about which clients would likely not want the details revealed.

Not all confidentiality rules are as broad as the Model Rules. Many states define confidential information as information that is covered by the attorney-client privilege, that the client has requested be kept confidential, or that the client is likely to find detrimental or embarrassing.<sup>50</sup> And under the Restatement, information that is "generally known" is not considered confidential, even if learned in the course of representation.<sup>51</sup> Even the limitations posed by these more relaxed rules, however, impinge on many of the benefits of using case histories. The public citizen duty to expose the deficiencies of the legal system, for example, is much more challenging to attain if only generally known information can be used. It is precisely the specific details of such cases that often expose the most deeply ingrained problems. One article, for example, uses a series of descriptions of clients, including not just their legal proceedings, but their disability status, professional occupations, financial status, domestic abuse history, and hobbies, to illustrate why the right to counsel should extend to eviction cases.<sup>52</sup> The detailed descriptions of the clients paint a far more compelling picture of the real-life impact of legal representation than a mere reference to information contained in a public court order or court filing.

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<sup>46</sup> Julie Marzouk, *Ethical and Effective Representation of Unaccompanied Immigrant Minors in Domestic Violence-Based Asylum Cases*, 22 CLIN. L. REV. 395 (2016).

<sup>47</sup> Nancy M. Maurer, *Handling Big Cases in Law School Clinics, or Lessons from My Clinic Sabbatical*, 9 CLIN. L. REV. 879 (2003).

<sup>48</sup> Gail E. Silverstein, *All's Well that Ends Well: The Importance of Full and Effective Closure in Lawyer-Client Relationships*, 19 CLIN. L. REV. 555 (2013).

<sup>49</sup> Abbe Smith, *The Difference in Criminal Defense and the Difference It Makes*, 11 WASH. U. J. L. & POL'Y 83 (2003).

<sup>50</sup> See, e.g. ALASKA R. PRO. CONDUCT 1.6 (2021); CAL. R. PRO. CONDUCT 1.6 (2021); D.C. R. PRO. CONDUCT 1.6 (2021); HAW. R. PRO. CONDUCT 1.6 (2021); MICH. R. PRO. CONDUCT 1.6 (2021); VA. R. PRO. CONDUCT 1.6 (2021).

<sup>51</sup> RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 59.

<sup>52</sup> See generally Risa E. Kaufman, Martha F. Davis & Heidi Wegleitner, *The Interdependence of Rights: Protecting the Human Right to Housing by Promoting the Right to Counsel*, 45 COLUM. HUM. RTS. L. REV. 772 (2014).

The prohibition against the disclosure of confidential information, even in the strict Model Rule version, is not absolute. Under certain conditions, lawyers are permitted to use hypotheticals based on actual cases, so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.<sup>53</sup> For case histories, this approach might allow for a nuanced form of “hypothetical,” where certain facts are altered in order to disguise the identity of the client and prevent even the possibility of identifying the client from the non-altered facts. This form of disguised case history/hypothetical is frequently used by writers who use case histories, and includes the use of pseudonyms, mixing facts from more than one case, and the alteration of other key identifying facts.<sup>54</sup> The limitations imposed in the use of a disguise and alteration—creating a case history sufficiently different from the actual facts, or simply a hypothetical devoid of many details, to avoid the possibility of client identification—can of course obviate many of the most important benefits of case histories.<sup>55</sup>

The most client-centered and most promising ground for permissive disclosure of confidential information in a case history is obtaining informed consent from the client.<sup>56</sup> Getting informed consent is generally a heavy lift. The lawyer must make reasonable efforts to ensure that the client possesses the information necessary to make an informed decision.<sup>57</sup> The lawyer must fully explain the context of the proposed action, the risks and benefits, as well as any options or alter-

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<sup>53</sup> MODEL RULES OF PRO. CONDUCT r. 1.6, cmt. 4 (AM. BAR ASS'N 2021). See also ABA Comm. on Ethics & Pro. Resp., Formal Op. 480 (2018) (using hypotheticals in lawyer blogs and public commentary); ABA Comm. on Ethics & Pro. Resp., Formal Op. 98-411 (1998) (stating that a lawyer may consult another lawyer who is not associated with him for advice on a client matter by using a hypothetical that does not reveal client's identity); ILL. ETHICS OP. 12-15 (2012) (opining that a lawyer may post a hypothetical to an online bar association discussion group for guidance on a client matter without the client's informed consent if no information relating to the representation is disclosed and inquiry would not risk identifying the client); N.Y. STATE ETHICS OP. 1026 (2014) (finding that a lawyer may not publish work of fiction based on real client if a reasonable chance exists that the reader might thereby ascertain client's identity).

<sup>54</sup> E.g., Ann Juergens, *Practicing What We Teach: The Importance of Emotion and Community Connection in Law Work and Law Teaching*, 11 CLIN. L. REV. 413, 419-20 n. 18 (2005); Peter Margulies, *Re-Framing Empathy in Clinical Legal Education*, 5 CLIN. L. REV. 605, 626 (1999); Anjum Gupta, *The New Nexus*, 85 U. COLO. L. REV. 377, 379 n. 1 (2014); Morin & Howells, *supra* note 35, at 623; Silverstein, *supra* note 48, at 555; Kaufman et al., *supra* note 52, at 772.

<sup>55</sup> See *infra* note 106 and accompanying text.

<sup>56</sup> MODEL RULES OF PRO. CONDUCT r. 1.6(a) (AM. BAR ASS'N 2021). Lawyers may also reveal confidential information if it is impliedly authorized to carry out the representation, or if it falls under one of certain specifically enumerated exceptions, such as a reasonable likelihood of death or substantial physical injury if the information is not revealed. *Id.* None of those, however, apply to the use of case histories. See *id.*

<sup>57</sup> *Id.* r. 1.0, cmt. 1.

native courses of action.<sup>58</sup> And, in seeking consent, the lawyer must account for the client's sophistication: the less experience the client has in legal matters or in the types of decisions being made, the more the lawyer is required to provide a thorough explanation of the context, risks, benefits, and options. In addition, informed consent typically requires an affirmative response by the client, rather than a silent "non-objection."<sup>59</sup>

The diligence required to obtain informed consent properly in the context of public dissemination of confidential information, as in the use of case histories, is especially challenging. The risks that need to be disclosed are numerous, and not necessarily obvious. For instance, others might be able to determine the identity of a client even when a case history does not use the client's name; the client might gain unwanted attention; others might use the information for their own purposes or the client's story may be further re-produced and disseminated by all who see it. For current clients, the risk that the client's case might be jeopardized could be particularly significant, and particularly difficult to determine. The benefits are even more difficult to explain concretely. Even sophisticated clients will often find it hard to understand a lawyer's quantification of the value and potential impact of one case history in a law review article. And in explaining reasonably available alternatives, the lawyer would certainly want to cover the options of using a hypothetical based on the case history, removing certain details, and of course simply not using the case history.

In some instances with particularly vulnerable clients or particularly sensitive issues, even asking for consent from a client is problematic. Clients might understandably feel they "owe" the lawyer something, especially in cases when the lawyer's services were provided for free, or situations when the client might otherwise be easily manipulated. Many of the most compelling articles that use case histo-

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<sup>58</sup> *Id.*

<sup>59</sup> *Id.* r. 1.0, cmt. 7; see ABA Comm. on Ethics & Pro. Resp., Formal Op. 01-421 (2001) (stating that "disclosure to the client . . . in order to obtain informed consent within the meaning of Rule 1.6 must adequately and fairly identify the effects of disclosure and non-disclosure on the client's interests," including risk that information may then be disclosed to others, that lawyer-client privilege may be waived, and that information could be used to the client's disadvantage). In the context of a lawyer's suggestion that he might write a book about her, for example, the client's "exclamation of approval" did not constitute informed consent. *In re Smith*, 991 N.E.2d 106, 108-10 (Ind. 2013) (holding that a client's exclamation of approval in response to lawyer's suggestion that he might write a book about her did not constitute informed consent). See also *Commonwealth v. Downey*, 842 N.E.2d 955, 960-62 (Mass. App. Ct. 2006) (holding that murder defendants did not give informed consent for lawyers to wear body microphones during trial at request of television production company; neither lawyer explained arrangement's potential pitfalls).



ries involve clients who are children, domestic violence survivors, asylum applicants, evicted tenants, or individuals with mental illness and mental retardation. In order to ensure that consent is truly informed and truly voluntary with such client populations, lawyers must frame the informed consent explanation so that the client feels truly vested with the authority to make the decision.

## 2. Confidentiality Requirements for Former Clients

In many situations when a lawyer wishes to use a case history publicly, the case is over and the client has therefore likely become a “former client” for purposes of confidentiality protections. Although the lawyer’s duty to preserve client confidences continues after the lawyer-client relationship has concluded, and even after the client dies, it is more relaxed, though only slightly so.<sup>60</sup> In addition to the limited exceptions to confidentiality requirements that apply for current clients, lawyers are also permitted to “use” (but not “reveal”) confidential information relating to the representation of the former client if it has become “generally known.”<sup>61</sup> Information is “used” rather than “revealed” when the lawyer uses knowledge she has acquired in the former representation in a manner that does not reveal the information itself. In the context of case histories, this exception might allow the crafting of a “hypothetical” that is based on generally known information relating to the representation.<sup>62</sup> Some authors cite to the “publicly available” nature of information they are using as part of the ethical basis for disclosing confidential matter in a case history.<sup>63</sup> The definition of “generally known” is, however, quite limited, and will typically not be applicable to the level of detail or the type of information disclosed in most case histories. Information that is

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<sup>60</sup> See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 60 cmt. e (2000); State *ex rel.* Counsel for Discipline v. Tonderum, 840 N.W.2d 487, 490-91 (Neb. 2013) (revealing confidential information after being fired by client); *In re* Parrinello, 156 A.D.3d 1216, 1217 (N.Y. App. Div. 2017) (revealing confidential information about deceased client); ME. ETHICS OP. 213 (2016) (stating that a law firm may not donate ancient, inactive client files with possible historical value to library or educational institution or allow files to be reviewed by outside party unless exception to Rule 1.6 applies or firm reasonably ascertains that original client consented; waiver from family or personal representative of deceased client’s estate is insufficient); N.Y. STATE ETHICS OP. 1084 (2016) (opining that criminal defense lawyer may not reveal deceased convicted client’s statements potentially exonerating co-defendant absent direct or implied authorization by client).

<sup>61</sup> MODEL RULES OF PRO. CONDUCT r. 1.9 (AM. BAR ASS’N 2021).

<sup>62</sup> See *id.* r. 1.6, cmt. 4.

<sup>63</sup> Karin & Runge, *supra* note 36, at 602-08; Michael Millemann, Rebecca Bowman Rivas & Elizabeth Smith, *Digging Them Out Alive*, 25 CLIN. L. REV. 365, 395-96 (2019); Jane C. Murphy, *Revitalizing the Adversary System in Family Law*, 78 U. CIN. L. REV. 891, 905-06 (2010).

merely in a public record is not necessarily fair game; it is generally known only “if it is widely recognized by members of the public in the relevant geographic area or it is widely recognized in the former client’s industry, profession, or trade.”<sup>64</sup> Information that has been revealed or 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.”<sup>65</sup> Courts also tend to deem filings not “generally known” even when available to the public, because they are not “within basic understanding and knowledge of the public.”<sup>66</sup>

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<sup>64</sup> ABA Comm. on Ethics & Pro. Resp., Formal Op. 479 (2017).

<sup>65</sup> *Id.* See also *Pallon v. Roggio*, Nos. 04-3625 (JAP), 06-1068 (FLW), 2006 WL 2466854, at \*7 (D.N.J. Aug. 24, 2006) (holding that information must be within the basic understanding and knowledge of the public; discovery materials widely available to the public through the internet or other source are not “generally known” within meaning of rule); *Steel v. Gen. Motors Corp.*, 912 F. Supp. 724, 733-34 (D.N.J. 1995) (holding that defendant company’s litigation techniques and trial strategies and content of its form pleadings, while widely known to lawyers involved in similar cases against the company, are not generally known); *In re Anonymous*, 932 N.E.2d 671, 673-74 (Ind. 2010) (showing that no evidence that information relating to a husband’s accusations against former client, or even divorce filing, was generally known); *In re Tennant*, 392 P.3d 143, 148-49 (Mont. 2017) (showing that lawyer used knowledge derived from representation to bid on former clients’ property; lawyer not permitted to take advantage of former clients “by retroactively relying on public records of their information for self-dealing”); see also N.Y. STATE ETHICS OP. 1128 (2017) (“information is not ‘generally known’ simply because it is in the public domain or available in a public file”). *But see* *State v. Mancilla*, No. A06-581, 2007 WL 2034241, at \*3 (Minn. Ct. App. July 17, 2007) (holding that lawyer’s cross-examination of former client regarding prior convictions would not have violated Rule 1.9(c) because “prior convictions were matters of public record and, therefore, fall within the generally-known-information exception”). The Restatement, however, considers information that is easily accessible to the public through public libraries, government offices, or publicly accessible electronic-data storage, to be “generally known.” RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §59 cmt. (d) (2000). In contrast, information is not generally known where obtaining it requires special knowledge or substantial effort. *Id.*

<sup>66</sup> See, e.g., *Pallon*, 2006 WL 2466854, at \*7 (“‘Generally 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).”) (citations omitted); *Turner v. Commonwealth*, 726 S.E.2d 325, 333 (Va. 2012) (Lemons, J., concurring) (“While testimony in a court proceeding may become a matter of public record even in a court denominated as a ‘court not of 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.’”). Prior convictions have been deemed public because they are “matters of public record.” *Mancilla*, 2007 WL 2034241, at \*3 (showing that prior convictions are “generally known” and can be used by lawyer to cross-examine former client because they are matters of public record).

### B. Conflict of Interest Concerns

Conflict rules also pose limitations on a lawyer's use of her clients' stories. Lawyers cannot represent a client when there is a significant risk that the representation will be materially limited by a personal interest of the lawyer.<sup>67</sup> Even a noble personal or political motivation for representing a client can create a conflict.<sup>68</sup> Accordingly, clinicians or other practitioners who plan to use case histories need to engage in a clear-eyed reflection on whether their interest in using their client's story interferes with their duty to pursue the client's goals diligently, or give independent and candid advice. That kind of conflict could arise in numerous ways, especially with current clients. Factors to be considered include whether the lawyer's advice would be influenced by what makes a more compelling story; and whether the decisions the lawyer makes about the means of achieving a client's goal—such as how aggressively to pursue a settlement—would be affected by the fact that wider public scrutiny will be given

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<sup>67</sup> MODEL RULES OF PRO. CONDUCT r. 1.7 (AM. BAR. ASS'N 2021). In addition, Rule 1.8(d) prohibits a lawyer from making an agreement with a client for literary or media rights to a "portrayal or account based in substantial part on information relating to the representation" until after the representation has ended. *Id.* r. 1.8(d).

<sup>68</sup> Michelle N. Meyer, *The Plaintiff as Person: Cause Lawyering, Human Subject Research, and the Secret Agent Problem*, 119 HARV. L. REV. 1510, 1511 (2006) (recognizing the inherent conflict when engaging in "cause lawyering" without full informed consent of client); *In re Maternowski*, 674 N.E.2d 1287, 1290-92 (Ind. 1996) (holding that a conflict of interest existed where a lawyer with a personal moral objection to representing cooperating defendants was assigned to represent such a defendant). Many ethicists and social justice lawyers have argued for a broader ethical duty to "serve the public good" that goes beyond zealous pursuit of client goals. See Gerald J. Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L. REV. 63 (1980); DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION (2000); Heidi Li Feldman, *Codes and Virtues: Can Good Lawyers Be Good Ethical Deliberators?*, 69 S. CAL. L. REV. 885, 887-89 (1996); Purvi Shah, *Rebuilding the Ethical Compass of Law*, 47 HOFSTRA L. REV. 11, 11-12 (2018). In the context of using a story for personal profit, Rule 1.8(d) prohibits a lawyer, while representing a client, from acquiring the client's literary or media rights to a portrayal or account based in substantial part upon information relating to the representation. MODEL RULES OF PRO. CONDUCT r. 1.8(d) (AM. BAR ASS'N 2021); see RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 36(3) (2000). Similar to Rule 1.8(d)), Comment [9] explains that a lawyer's acquisition of such rights creates a conflict between the interests of the client and the personal interests of the lawyer. See *In re Henderson*, 78 N.E.3d 1092, 1093 (Ind. 2017) (disciplining of a prosecutor for a book deal about scandalous murder case); *Downey*, 842 N.E.2d at 957 (showing defense counsel's agreement to wear concealed microphone for purpose of television program during murder trial, without client's consent, required new trial); *Harrison v. Miss. Bar*, 637 So. 2d 204, 223-24 (Miss. 1994) (agreeing with film producer for rights to lawyer's life story, including representation of current client, violated rule); cf. D.C. ETHICS OP. 334 (2006) (rule not applicable to lawyer's agreement to sell own story about pending case). See also Manley, *supra* note 43 (discussing the increased use of tweeting about their cases by public defenders to bring about criminal justice reform). For an excellent critique of that practice, see Futrell, *supra* note 17, at 12.

to that decision.<sup>69</sup>

### III. HOW ETHICAL GUIDELINES ARE (OR ARE NOT) CURRENTLY CONSIDERED IN THE USE OF LEGAL CASE STUDIES

#### A. *A Survey of Legal Academics Who Use Case Histories*

Given this context of the ethical rules impacting the publication of legal case studies, we sought to survey clinicians who have included case studies of their clients in their scholarship to give us a basic understanding of the current practices in regard to obtaining informed consent. We also designed the survey to elicit information regarding lawyers' viewpoints on the topic. The full survey questions and results are set forth in Appendix A.<sup>70</sup>

#### 1. *Survey Methodology*

##### a. *Survey Content, Design and Structure*

The survey consisted of ten questions, starting with, "Did you seek consent for the case study in your article?" Depending on the participants' answer, we asked them to complete different sets of follow-up questions. Most of the questions asked in this survey requested a "yes" or "no" response. A few questions allowed participants to select multiple answers from a provided list of options, or gave them liberty to specify their answer in writing. In light of the sensitive nature that this survey entails, participants had the option to skip questions.

##### b. *Survey Participants and Procedures*

Potential participants of the surveys were selected using two methods. First, our research assistant conducted an article-by-article search through academic legal journals that publish scholarship re-

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<sup>69</sup> Though seeking consent for the use of a case history to achieve a public citizen goal is not identical to procuring media rights to that case history, the conflict rules related to the latter nevertheless provide some helpful guidance. Model Rule 1.8, which addresses specific types of conflicts with current clients, prohibits making any agreement for literary or media rights to a case history with a *current* client. MODEL RULES OF PRO. CONDUCT r. 1.8(d) (AM. BAR ASS'N 2021). For the reasons stated in Part V, we believe the same should be true for seeking the use of case histories for public citizen goals.

<sup>70</sup> To ensure the survey would accurately reflect our design intention of eliciting information on common practices of authors obtaining informed consent for case studies from clients, we consulted with David Kaufman, a Clinical Associate Professor at State University of New York Downstate Health Sciences University, who has conducted extensive experience in conducting cognitive research. See *About David Kaufman*, DOWNSTATE.EDU, <https://www.downstate.edu/faculty/health-professions/medical-informatics/kaufman.html> (last visited Apr. 15, 2021). Professor Kaufman assisted us in developing the methodology for the survey and language for the questionnaire.

lated to clinical education. He searched through every issue published between 2010 and 2020 for articles containing cases studies of author(s)'s past or present clients.<sup>71</sup>

Second, in order to identify a wide range of potential participants, our research assistant ran several database searches for articles containing terms such as "our client," "my client," and "our case study." Similar to the first method, he confined the search to articles published between 2010 and 2020, and searched through the result list, article-by-article, for scholarship containing case studies. For this search, however, he expanded our search to include publications from all U.S. academic legal journals.

By utilizing these two methods, our research assistant compiled an initial list of forty-two scholars and practitioners.<sup>72</sup> Our goal was to collect at least twenty-five survey responses. We sent all prospective participants an email informing them of the purpose of our research, requesting their participation in the study, and providing them with a link to the survey. A copy of the email sent to the potential participants is contained in Appendix A.

Falling short of our initial goal of twenty-five responses, we compiled a list of eighteen additional prospects.<sup>73</sup> These participants were selected using the same search criteria as the first group of participants, but we expanded our search parameters to include articles published before 2010. Of these prospects, eleven returned surveys, yielding a response rate of approximately 61%.<sup>74</sup>

We ultimately received twenty-seven responses in total over the course of eighteen days, bringing the overall response rate to 45%. All participants were assured of the confidentiality of their responses.

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<sup>71</sup> We limited our date range on the assumption that authors of newly-published articles would have a relatively fresh recollection of the procedures that were taken when obtaining informed consent. In addition, we intended to analyze the most recent information that could be gathered. We also expected a faster and higher response rate from authors who published an article between 2010 and 2020. Our research assistant's identification of potential participants for the survey was independent of our research for the case studies described *infra* notes 31-40 and accompanying text. Accordingly, our citation of these case studies does not suggest that the authors of those studies were participants in the survey.

<sup>72</sup> The forty-two prospects were drawn from thirteen U.S. law journals published on Hein Online.

<sup>73</sup> Prospects from this group were drawn from twelve U.S. law journals published on Hein Online. Of these twelve journals, three were used in drawing the first group of participants.

<sup>74</sup> Prior to contacting these prospects, we revised one question due to technical issues in the original survey. We had a technical issue with Question 7, and only eleven responses were collected as a result. Please note the graphic illustration in the Appendix reflects that the respondents were allowed to select multiple answers. See *infra* Appendix A.

## 2. *Survey Findings*

### a. *Breakdown of Participants Who Did and Did Not Receive Consent*

There was a near-even split between respondents who obtained consent (13; 48.15%) and those who did not obtain consent (14, 51.85%).<sup>75</sup> Among the thirteen people who obtained informed consent from their clients, about eight of them obtained both written and oral consent. In regard to the information that the attorney provided clients before obtaining consent, seven respondents disclosed the risks to the client of the publication of the article, and about the same number of people told the clients the benefits of the publication of the article. Eleven of the respondents told their clients that they had the right to decline consent. Ten respondents indicated that their clients did not ask any questions before giving consent.

### b. *Consent and Participants' Concealment Methods*

For the fourteen respondents who did not obtain informed consent from their clients, thirteen of them indicated that they did so because they disguised the identity of the client, and nine of them revised the circumstance of the case.<sup>76</sup> We then asked all respondents what method they used when describing their case in the article. About 47% of respondents who obtained informed consent still used some kind of concealment, whereas 85% of the respondents who did not receive informed consent used concealment.<sup>77</sup> Here, the data shows that despite having received consent from clients, some attorneys still chose to disguise their clients' identity or modify the circumstance of the case, and the majority of respondents who did not obtain informed consent used at least one method of disguising to protect the privacy of their clients. We found that attorneys who did not obtain informed consent are more likely to use concealment in the case history compared to those who have received consent from clients.

### c. *Consent and the Sensitivity of Material Used*

When asked about what kind of materials respondents would use in their case studies, only one of four respondents who received consent revealed material that was not in the public record,<sup>78</sup> whereas five of seven respondents, without receiving consent from clients, still

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<sup>75</sup> See *infra* Appendix A.

<sup>76</sup> See *infra* Question 3.

<sup>77</sup> See *infra* Question 6.

<sup>78</sup> Note that lawyers should not automatically deem information in the public record as "generally known" information that they can use without obtaining consent. ABA Comm. on Ethics & Pro. Resp., Formal Op. 479 (2017). See *supra* Part II.A.2.

revealed information that was not in the public record.<sup>79</sup>

*d. Consent and Client Involvement in the Writing Process*

We asked all respondents if they supplied a draft of the article to their clients before publication, twelve of thirteen who obtained consent indicated they did; and for respondents who did not obtain consent, none of them showed a copy to the client.<sup>80</sup> The survey reflected the same results for the question asking whether the participants supplied a copy of the draft to the client after the publication.<sup>81</sup> Based on the results, lawyers who obtained consent are more inclined to share a copy of the article with the client as compared to those who did not receive consent.

*e. The Role of Journals in Obtaining Consent*

We also found that out of twenty-seven responses we gathered, only one respondent suggested that a journal required the author to obtain consent from the client for the case study and twenty-three respondents answered “no” to this question.<sup>82</sup> Beyond this representation, however, it is unclear whether authors are required to certify or otherwise prove that client consent was in fact obtained.

*B. Current Scholarship on the Ethical Concerns in Publishing Legal Case Studies*

Although the use of clients’ stories in service of public citizen goals has become more prevalent in legal scholarship in recent years, there has been a paucity of rigorous consideration of the inherent ways the use of those stories is directly at odds with important client representation ethical duties, such as preserving the confidentiality of case-related information and avoiding conflicts. Equally significant, there has been no attempt to develop a protocol or standards for effective and ethical navigation of those tensions.

Although a pair of articles, one by Professor Nina Tarr in 1998,<sup>83</sup> and another by Professor Binny Miller in 2000,<sup>84</sup> first raised the problematic nature of using client stories in scholarship, there have been no serious attempts to answer the important ethical questions raised by those articles. Professor Tarr addresses the broad moral questions

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<sup>79</sup> See *infra* Question 7.

<sup>80</sup> See *infra* Question 9.

<sup>81</sup> See *infra* Question 10.

<sup>82</sup> See *infra* Question 8.

<sup>83</sup> Nina W. Tarr, *Clients’ and Students’ Stories: Avoiding Exploitation and Complying with the Law to Produce Scholarship with Integrity*, 5 CLIN. L. REV. 271 (1998).

<sup>84</sup> Binny Miller, *Telling Stories About Cases and Clients: The Ethics of Narrative*, 14 GEO. J. LEGAL ETHICS 1 (2000).

of using a client's story, pointing out that clinical professors routinely use the experiences of their clients and their students in their scholarship, and asking "whether we are exploiting our positions [as clinical professors] as we use our clients' and students' experiences as the basis for our scholarship."<sup>85</sup>

In addition to highlighting the shortfalls of many possible solutions, Professor Tarr offers the perspectives of other professions—an anthropologist, a psychologist, and an urban planner—on the use of clients' stories and experiences in research and publications. She concludes with important questions that must be resolved if scholars continue using clients' stories in an ethically responsible manner:

If our goal is to respect the dignity, autonomy and privacy of our clients and students, what is the best means of doing so while still being able to create scholarship which has integrity? How do we define and avoid exploitation? If we want to tell a story, how do we ensure that it is not lost in the cover-up of protecting confidentiality and privilege? Relying solely on public record would sterilize our work and eliminate its richness.<sup>86</sup>

Professor Miller also discusses broader moral concerns of ownership of a client's story and client-centered practice. By her own admission, she does not discuss the ethics of using case histories "in the sense of the parameters of the ethical rules governing lawyer conduct," but rather in the sense of client-focused lawyering, and concepts of appropriation and collaboration.<sup>87</sup> Professor Miller ultimately suggests that client consent should not always be a prerequisite for using their stories, but, by her own reckoning, makes only a tentative conclusion with many questions that are still unanswered, including the best practical steps to take to ensure that client stories are not used unethically in the context of the actual ethical rules governing lawyers.<sup>88</sup>

The Tarr and Miller articles highlight the moral pitfalls in using clients' stories, and call on clinicians and others to take the next steps of addressing how to manage those problems. Unfortunately, as the results of our survey indicate, the problems raised by Professors Tarr and Miller have not been addressed in any uniform or rigorous man-

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<sup>85</sup> Tarr, *supra* note 83, at 271.

<sup>86</sup> *Id.* at 309.

<sup>87</sup> Miller, *supra* note 84.

<sup>88</sup> *Id.* at 54. A subsequent Note addressed the competing interests of the public's interest in a more transparent criminal justice system and the duties of confidentiality and loyalty to a client, as well as principles of client dignity and autonomy. See generally Ría Tabacco, *Defensible Ethics: A Proposal to Revise the ABA Model Rules for Criminal Defense Lawyer-Authors*, 83 N.Y.U. L. REV. 568 (2008). Tabacco proposes an adjustment to Rule 1.8(d) that requires lawyers to wait at least five years after representation has terminated to contract with a client for the rights to the client's story. *Id.*



ner across the world of legal scholarship.<sup>89</sup> In fact, as clinical research has continued to become an increasingly robust sub-category of legal scholarship as a whole, there has been even more use of case histories without any discernible widespread advancement in the development of a practical protocol for handling the ethical issues responsibly. In order to fill that gap, we will examine how the medical and mental health counseling professions have advanced protocols for the responsible use of case histories in those arenas, and then propose a set of standards and protocols that can be used to ensure the ethical use of legal case histories.

#### IV. CONFIDENTIALITY PROTECTIONS OF CASE STUDY SUBJECTS IN PUBLICATIONS IN OTHER PROFESSIONS

While legal scholarship has paid scant attention to the confidentiality issues raised by case studies in legal publications, for over a decade, scholars in other professions have attempted to tackle them. We will address this scholarship in two professional contexts—medicine and mental health professions—to provide guidance to the development of rules for preparation of case studies in legal publications.

##### A. *Medicine*

In medical research, case studies are a common practice in the literature.<sup>90</sup> As one medical journal dedicated solely to the publication of case studies put it in their inaugural issue,

A case report provides important and detailed information about an individual, which is often lost in larger studies. Moreover, case reports can serve as an early warning signal for the adverse effects of new medications, or the presentations of new and emerging diseases. . . . Since antiquity, clinicians have learnt from their more experienced peers as well as from their own work with individual patients. Accurate recounting of clinical experience [is] essential to the progress of medicine.<sup>91</sup>

While case studies are prevalent and long-established in medical

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<sup>89</sup> For a notable exception in the social media arena, see Futrell, *supra* note 17, at 12.

<sup>90</sup> COMM. ON PUBL'N ETHICS, JOURNALS' BEST PRACTICES FOR ENSURING CONSENT FOR PUBLISHING MEDICAL CASE REPORTS: GUIDANCE FROM COPE 1 (2016); Annette Flanagan, *Patients' Right to Privacy and Anonymity and Consent for Identifiable Publication*, in *AMA MANUAL OF STYLE: A GUIDE FOR AUTHORS AND EDITORS* § 5.8 (11th Oxford Univ. Press Ed. 2020) (observing that “[c]ase descriptions and case reports . . . make up a substantial portion of some [medical] journal content, especially in some specialties.”).

<sup>91</sup> MICHAEL KIDD & CHARLOTTE HUBBARD, INTRODUCING *Journal of Medical Case Reports* 1 (2007), <https://jmedicalcasereports.biomedcentral.com/track/pdf/10.1186/1752-1947-1-1.pdf> (citation omitted).

scholarship, as in legal research, the ethical issues raised by case studies have only recently been addressed.<sup>92</sup> The formal medical ethics rules do not explicitly address the issue of the rights of patients regarding the publication of case studies. The American Medical Association (“AMA”) Principles of Medical Ethics merely provides pithily, “A physician shall respect the rights of patients, colleagues, and other health professionals, and shall safeguard patient confidences and privacy within the constraints of the law.”<sup>93</sup> The AMA rule does not address, for example, the precise nature of “patient confidences”; its application to former patients; or issues of informed consent.<sup>94</sup> In contrast, the ABA rule addresses in more detail all of these issues.<sup>95</sup>

Those issues and others arising out of patient case studies are tackled in the medical field by peer-reviewed professional journals and associations of medical journals. The AMA has its own Manual of Style for its many journals which includes a section on *Patients’ Rights to Privacy and Anonymity and Consent for Identifiable Publication*.<sup>96</sup> Likewise, the *British Medical Journal* and *British Journal of Medical Case Reports* have adopted their own procedures for handling issues of patient confidences and consent for publication.<sup>97</sup> The International Committee of Medical Journal Editors (“ICMJE”), a working group of medical journal editors from across the globe, publishes periodic *Recommendations for the Conduct, Reporting, Editing, and Publication of Scholarly Work in Medical Journals*, which include a section on protection of research participants, including patients.<sup>98</sup> And the Committee on Publication Ethics (“COPE”), an international forum of editors and publishers dedicated to the promotion of ethics in scientific and medical publications has issued its *Journals’ Best Practices for*

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<sup>92</sup> Michael R. Kidd & Iain Hrynaszkiewicz, *Journal of Medical Case Reports’ Policy on Consent for Publication*, J. MED. CASE REPS., at 1 (2010), <https://jmedicalcasereports.biomedcentral.com/track/pdf/10.1186/1752-1947-4-173.pdf>.

<sup>93</sup> AM. MED. ASS’N, AMA CODE OF MEDICAL ETHICS: AMA PRINCIPLES OF MEDICAL ETHICS 1 (2001), <https://www.ama-assn.org/sites/ama-assn.org/files/corp/media-browser/principles-of-medical-ethics.pdf>.

<sup>94</sup> Compare *id.* with MODEL RULES OF PRO. CONDUCT r. 1.6 (AM. BAR ASS’N 2021).

<sup>95</sup> See *supra*, Part II.A.

<sup>96</sup> Flanagan, *supra* note 90, at § 5.8. The Manual also includes sections on *Patients’ Rights in Social Media* and *Patients’ Rights in Narrative Essays and News Reports in Biomedical Journals*. See Annette Flanagan, *Patients’ Rights in Social Media*, in AMA MANUAL OF STYLE: A GUIDE FOR AUTHORS AND EDITORS § 5.6.6 (11th Oxford Univ. Press, Ed. 2020); Annette Flanagan, *Patients’ Rights in Narrative Essays and News Reports in Biomedical Journals*, in AMA MANUAL OF STYLE: A GUIDE FOR AUTHORS AND EDITORS § 5.8.5 (11th Oxford Univ. Press Ed. 2020).

<sup>97</sup> Kidd & Hrynaszkiewicz, *supra* note 92, at 1; *Patient Consent and Confidentiality*, THEBMJ, <https://www.bmj.com/about-bmj/resources-authors/forms-policies-and-checklists/patient-confidentiality> (last visited Jan. 11, 2022).

<sup>98</sup> INT’L COMM. MED. J. EDS., RECOMMENDATIONS FOR THE CONDUCT, REPORTING, EDITING, AND PUBLICATION OF SCHOLARLY WORK IN MEDICAL JOURNALS 7-8 (2021).

*Ensuring Consent for Publishing Medical Case Reports.*<sup>99</sup> Some of these standards apply not only to peer-reviewed journal articles but also blogs, social media, and online discussion groups.<sup>100</sup>

All the ethical standards adopted by medical journals recognize that in the publication of case studies, “[p]atients have a right of privacy that should not be violated without informed consent.”<sup>101</sup> To that end, these standards seek to assure that case studies withhold or delete identifiable information about the patient. As the AMA Manual of Style provides,

Only those details essential for understanding and interpreting a specific case report or case series should be provided. In most instances, the description can be more general than specific to ensure anonymity, without substantive loss of meaning. Although the degree of specificity needed will depend on the context of what is being reported, specific ages, race/ethnicity, and other sociodemographic details should be presented only if clinically or scientifically relevant and important.<sup>102</sup>

Because of the danger to patient privacy, some standards specifically prohibit the publication of patient photographs even with black bars over the eyes or objects partially obscuring the face.<sup>103</sup> Some journals have suggested that three or more indirect identifiers relating to a patient could, by themselves, present risks to privacy.<sup>104</sup> And one journal has even adopted a policy requiring consent by any living patient for case studies because “[t]he nature of case reports means that [anonymization of patient identity] is almost always impossible to achieve with certainty.”<sup>105</sup>

These journal standards recognize, however, that omission of too many details in case studies detracts from the efficacy of these studies. As the AMA Manual of Style notes,

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<sup>99</sup> COMM. ON PUBL’N ETHICS, *supra* note 90, at 1.

<sup>100</sup> See Flanagan, *supra* note 90, at § 5.6.6.

<sup>101</sup> INT’L COMM. MED. J. EDS., *supra* note 98, at 7; see also Kidd & Hrynaszkiewicz, *supra* note 92, at 1; Flanagan, *supra* note 90, at § 5.8.

<sup>102</sup> Flanagan, *supra* note 90, at § 5.8; see also INT’L COMM. MED. J. EDS., *supra* note 98, at 7 (noting that “[n]onessential identifying details [in case studies]” should be omitted).

<sup>103</sup> INT’L COMM. MED. J. EDS., *supra* note 98, at 7-8; Flanagan, *supra* note 90, at § 5.8.

<sup>104</sup> Kidd & Hrynaszkiewicz, *supra* note 92, at 1. With scientific precision, scholars have pointed to a number of potential indirect patient identifiers, including place of treatment; the rarity of the disease or condition; place of birth; socioeconomic date; and household and family composition. See Iain Hrynaszkiewicz, Melissa L. Norton, Andrew J. Vickers & Douglas G. Altman., *Preparing Raw Clinical Data for Publication: Guidance for Journal Editors, Authors, and Peer Reviewers*, 340 BRITISH MED. J. 3, 3-5 (2010). See generally Paul Schwartz & Daniel Solove, *The PII Problem: Privacy and a New Concept of Personally Identifiable Information*, 86 N.Y.U. L. REV. 1814, 1836; Paul Ohm, *Broken Promises of Privacy*, 57 U.C.L.A. L. REV. 1701 (2010) (analyzing of the “anonymity myth” and risks of re-identifying disaggregated personally identifiable information).

<sup>105</sup> Kidd & Hrynaszkiewicz, *supra* note 92, at 1.

[O]mitting certain details may be problematic. For example, omitting a patient's occupation from a case report might seem reasonable at first, but such information may be needed later during an occupational exposure assessment or an epidemiologic investigation. More important, authors and editors should not alter or falsify details in case descriptions to secure anonymity because doing so may introduce false or inaccurate data into the medical literature. For example, changing the city in which the patient lived may seem innocuous, until another investigator subsequently cites the case report and the erroneous city in an epidemiologic analysis of locations of disease outbreaks. Changing specific demographic data, such as sex, could be considered falsification.<sup>106</sup>

For those case studies in which anonymization is unlikely—when the details of the case description might permit patient identification—the medical journal standards require written informed consent from the patient or legally authorized representative.<sup>107</sup> Medical journals have created consent forms to be signed by patients or their representatives, many in multiple languages.<sup>108</sup> If the patient has died, journals require that consent be obtained from the next of kin.<sup>109</sup> And if a former patient is not traceable, the British Medical Journal will only allow the publication of a case study if the information can be sufficiently anonymized.<sup>110</sup>

Most of the literature on informed consent by patients for publi-

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<sup>106</sup> Flanagan, *supra* note 90, at § 5.8; *see also* INT'L COMM. MED. J. EDS., *supra* note 98, at 8 (“If identifying characteristics are de-identified, authors should provide assurance [to the journal], and editors should so note [in the article] that such changes do not distort scientific meaning.”).

<sup>107</sup> INT'L COMM. MED. J. EDS., *supra* note 98, at 7-8; COMM. ON PUBL'N ETHICS, *supra* note 90, at 1; Flanagan, *supra* note 90, at § 5.8; Kidd & Hrynaszkiewicz, *supra* note 92, at 1; *Patient Consent and Confidentiality*, *supra* note 97.

<sup>108</sup> *See, e.g.*, Flanagan, *supra* note 90, at § 5.8; *Consent for Publication of Identifying Material in JAMA Network Journals*, JAMA NETWORK, <https://jamanetwork.com/DocumentLibrary/InstructionsForAuthors/PatientConsent.pdf> (last visited Jan. 11, 2022) (showing a consent form for American Medical Association journals); *Consent Form*, BRITISH MED. J., <https://s16086.pcdn.co/wp-content/uploads/2019/07/Patient-Consent-Form-English-July-2019.pdf> (last visited Jan. 11, 2022) (showing a consent form for British Medical Journal); *Consent Form*, BIOMED CENTRAL, <https://resource-cms.springernature.com/springer-cms/rest/v1/content/6621850/data/v1#page=1&zoom=auto,-274,848> (last visited Jan. 11, 2022) (showing a consent form for Journal of Medical Case Reports). *See generally* COMM. ON PUBL'N ETHICS, *supra* note 90, at 2 (“Publication consent forms should be required for any case report in which an individual or group of individuals can be identified.”).

<sup>109</sup> COMM. ON PUBL'N ETHICS, *supra* note 90, at 2; Kidd & Hrynaszkiewicz, *supra* note 92, at 2; *Patient Consent and Confidentiality*, *supra* note 97.

<sup>110</sup> *Patient Consent and Confidentiality*, *supra* note 97. In that case, the journal includes the following note at the end of the paper: “Detail has been removed from this case description/these case descriptions to ensure anonymity. The editors and reviewers have seen the detailed information available and are satisfied that the information backs up the case the authors are making.” *Id.* (internal quotation marks omitted).

cation of case studies contains conclusory precatory language requiring such consent but provides little guidance for counseling patients in obtaining consent.<sup>111</sup> The British Medical Journal, however, has published detailed best practices for authors in obtaining consent.<sup>112</sup> This guidance recommends that in obtaining informed consent, authors should: (1) consider the capacity of the patient to consent; (2) provide sufficient information about the content of the material, including providing the patient with a copy of the article, and about the implications of the publication, including the risk of distribution on the internet; and (3) be assured that the patient is making a voluntary decision and, for a treating clinician, that the patient understands that agreeing or not agreeing to publication will not affect their case.<sup>113</sup> In addition, the guidance provides a model for providing “person-centered” support to help with decision-making, observing that “it cannot be assumed that all individuals with the same condition should be treated the same: be guided by the individual.”<sup>114</sup>

Medical journals uniformly include instructions requiring informed consent for case studies to prospective authors.<sup>115</sup> The informed consent forms themselves are archived either with the authors and/or the journals.<sup>116</sup> If authors are unable to obtain patient consent, and the patient’s cannot be de-identified, most journals will not publish the articles.<sup>117</sup> Additionally, some journals require that published articles include an acknowledgment that consent has been received from the patients for the publication of their case studies.<sup>118</sup> The journals of the AMA, for example, require acknowledgments with this suggested language: “We are grateful to the [two] patients who pro-

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<sup>111</sup> See, e.g., INT’L COMM. MED. J. EDS., *supra* note 98 at 8; COMM. ON PUBL’N ETHICS, *supra* note 90, at 2-3; Flanagan, *supra* note 90, at § 5.8.

<sup>112</sup> Simone Ragavooloo & Cat Chatfield, *Consent for Publication: Best Practices for Authors*, BRITISH MED. J., [https://www.bmj.com/sites/default/files/attachments/resources/2021/01/consent\\_for\\_publication\\_best\\_practice\\_for\\_authors.pdf](https://www.bmj.com/sites/default/files/attachments/resources/2021/01/consent_for_publication_best_practice_for_authors.pdf) (last visited Jan. 11, 2022).

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* The Best Practices also provides extensive guidance for obtaining proxy consent for individuals who lack capacity or for children. *Id.*

<sup>115</sup> See INT’L COMM. MED. J. EDS., *supra* note 98, at 8; Flanagan, *supra* note 90, at § 5.8; *Patient Consent and Confidentiality*, *supra* note 97.

<sup>116</sup> See, e.g., INT’L COMM. MED. J. EDS., *supra* note 98, at 7; Flanagan, *supra* note 90, at § 5.8; *Patient Consent and Confidentiality*, *supra* note 97.

<sup>117</sup> See, e.g., Annette Flanagan et al., *Patient and Study Participant Rights to Privacy in Journal Publication*, JAMA NETWORK (June 2, 2020), <https://jamanetwork.com/journals/jama/fullarticle/2766612>; Kidd & Hrynaszkiewicz, *supra* note 92, at 2. Since archiving with a journal breaches patient confidentiality, the ICMJE recommendations notes, “some journals may decide that patient confidentiality is better guarded by having the author archive the consent and instead providing the journal with a written statement that attests that they have received and archived written patient consent.” INT’L COMM. MED. J. EDS., *supra* note 98, at 7.

<sup>118</sup> See, e.g., Flanagan, *supra* note 90, at § 5.8.

vided permission after reviewing the manuscript to publish this [article].”<sup>119</sup>

### B. *Mental Health Professions*

Case studies have long been a significant element of research in the fields of psychology, social work counseling, and psychiatry.<sup>120</sup> As far back as the late nineteenth century, responding to potential critics of his breaches of patient confidentiality in his case studies, Sigmund Freud argued,

in my opinion the physician has taken upon himself duties not only towards the individual patient but towards science as well; and his duties towards science mean ultimately nothing else than his duties towards the many other patients who are suffering or will some day suffer from the same disorder. *Thus it becomes the physician's duty to publish what he believes he knows of the causes and structure of hysteria, and it becomes a disgraceful piece of cowardice on his part to neglect doing so*, as long as he can avoid causing direct personal injury to the single patient concerned.<sup>121</sup>

Following in Freud's footsteps, scholars in the psychotherapy field contend that “training new professionals in the mental health fields and the profession's ongoing development and advancement require a steady stream of clinical cases that accurately reflect current issues in prevention, treatment, and theory development.”<sup>122</sup> Case studies, they assert, provide rich narratives that make didactic training materials “come alive” by describing in detail treatment modalities and interventions.<sup>123</sup> Moreover, they argue, these studies introduce new ideas about effective practice into the field and provide a needed record for later examinations of the history of the effectiveness of particular

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<sup>119</sup> *Id.*

<sup>120</sup> See, e.g., Gary Winship, *The Ethics of Reflective Research in Single Case Study Inquiry*, 43 *PERSPS. IN PSYCHIATRIC CARE* 174, 174 (2007) (observing that “psychotherapy research has remained in the orbit of intensive qualitative approaches[.]” rather than quantitative research); Barbara C. Sieck, *Obtaining Clinical Writing Informed Consent Versus Using Client Disguise and Recommendations for Practice*, 49 *PSYCHOTHERAPY* 3, 3 (2012) (noting that “[c]linical writing about psychotherapy clients has long been an integral part of textbooks, journal articles, and professional presentations”); Janet F. Gilgun, *A Case for Case Studies in Social Work*, 39 *SOC. WORK* 371, 371 (1994). (observing that “[a]lthough [social work] case studies are not useful for estimating prevalence rates or for probabilistic generalization, they are useful to study problems in depth, to understand the stages in processes, or to understand situations in context”).

<sup>121</sup> Sigmund Freud, *Fragment of an Analysis of a Case of Hysteria*, in *FREUD: COMPLETE WORKS 1890-1939* 572, <http://staferla.free.fr/Freud/Freud%20complete%20Works.pdf> (emphasis added).

<sup>122</sup> Maureen Duffy, *Writing About Clients: Developing Case Material and Its Rationale*, 54 *COUNSELING & VALUES* 135, 136 (2010); see also Sieck, *supra* note 120, at 3.

<sup>123</sup> Duffy, *supra* note 122, at 135-36.

treatments.<sup>124</sup> While a single case study may have only limited impact on the field, each study is “crucial to contributing to a critical mass of collective data.”<sup>125</sup> Finally, they suggest, that these studies serve an ethical function for the profession. While the therapeutic relationship is a private one, by writing, therapists keep what they do open to the profession’s scrutiny and assessment of the appropriateness of particular therapeutic models.<sup>126</sup>

Until fairly recently, therapists customarily addressed issues of patient/client confidentiality merely by attempting to disguise his or her identity.<sup>127</sup> But in the last few decades, writers have begun to question this nearly universal practice and started to consider the role of patient consent in the publication process. Two factors have led to this change. First, notions of therapy have evolved from a one-person model (the all-knowing therapist as the expert who guides the patient) to a more relational model in which both the therapist and patient work together through the therapeutic process. With this change in attitude, the paternalistic notion of a therapist making a unilateral decision about the publication of the patient’s case study has been called into question.<sup>128</sup> Second, the existence of the internet has changed the landscape in terms of accessibility to publications of case studies. It is now more likely, therapists fear, that patients, their friends, and colleagues will potentially recognize patients even if attempts are made to mask their identity.<sup>129</sup> In this context, in a survey of 141 therapists who published case studies between 1995 and 2001, 50% of writers in the United States and 40% residing outside of the country ask permission of their patients before publication.<sup>130</sup>

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<sup>124</sup> Judy L. Kantrowitz, *Using Disguised Clinical Case Materials*, 54 COUNSELING & VALUES 117, 132 (2010). See also Winship, *supra* note 120, at 174 (observing that, “[i]t is beneficial to note that even in this time of ‘hard’ quantitative evidence, sometimes the most influential studies of mental health practice in the UK have been derived from single case narratives”).

<sup>125</sup> Winship, *supra* note 120, at 179.

<sup>126</sup> Kantrowitz, *supra* note 124, at 132-33.

<sup>127</sup> Kantrowitz, *supra* note 124, at 117-18; Lewis Aron, *Ethical Considerations in Psychoanalytic Writing Revisited*, 13 PSYCHOANALYTIC PERSPS. 267, 267 (2016) (observing that “[u]ntil fairly recently clinical material used in professional writing was considered to be owned by the psychoanalyst”). The use of disguise followed Freud’s practice of purporting to protect the identity of his patients. Freud, *supra* note 121, at 572. In discussing his classic case study of “Dora,” Freud explained that he took “every precaution” to prevent injury to his patient: picking a patient from a remote provincial town rather than Vienna whose identity was known by only one other physician; waiting four years since the conclusion of treatment; and postponing publication until he learned the patient’s condition changed. *Id.*

<sup>128</sup> Aron, *supra* note 127, at 267; see also Kantrowitz, *supra* note 124, at 118.

<sup>129</sup> Aron, *supra* note 127, at 267.

<sup>130</sup> Kantrowitz, *supra* note 124, at 118. Therapists with a relational theoretical perspective more often asked permission and showed clients what they wrote or individualized their approach on a case-by-case basis, asking permission as their preferred position. *Id.*

Consistent with this recent trend, Section 4.07 of the Ethical Principles of the American Psychological Association (“APA”) provides that psychologists should not

disclose in their writings, lectures, or other public media, confidential, personally identifiable information concerning their clients/patients, students, research participants, organizational clients, or other recipients of their services that they obtained during the course of their work, unless (1) they take reasonable steps to disguise the person or organization, (2) the person or organization has consented in writing, or (3) there is legal authorization for doing so.<sup>131</sup>

Citing this section, the APA Publication Style Manual (“APA Manual”) requires that when writers disclose identifiable information about their patients, they must provide “documented consent” to disclosure of their identities.<sup>132</sup> The Manual also provides that researchers who are APA members, regardless of field, must “certify that they have followed ethical standards as a precondition of publishing their articles in most journals, including APA journals.”<sup>133</sup>

The current ongoing debate in the scholarship in the psychotherapy community concerning the publication of patient case studies concerns the use of patient disguise versus informed consent by the patient.<sup>134</sup> The obvious benefit of patient disguise, the literature asserts, is that “researchers can protect confidentiality by disguising some aspects of the data so that neither the subject nor third parties (e.g., family members, employers) are identifiable.”<sup>135</sup> The APA Manual suggests four strategies to use to create effective disguise: (a) altering specific characteristics of the patient; (b) limiting the description of specific patient characteristics; (c) obfuscating case details by adding extraneous material; and (d) using composite descriptions.<sup>136</sup>

Scholars, however, have identified significant drawbacks to the artifice of patient disguise. First, even with “thick disguise,” a possibility exists that the patient may come across the article on the internet, recognize themselves, their therapists, or identifying characteristics of their case, and feel betrayed.<sup>137</sup> Such a discovery, one scholar suggests,

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<sup>131</sup> AM. PSYCH. ASS’N, ETHICAL PRINCIPLES OF PSYCHOLOGISTS AND CODE OF CONDUCT § 4.07 (2017), <https://www.apa.org/ethics/code/ethics-code-2017.pdf>. See also NAT’L ASS’N OF SOC. WORKERS, CODE OF ETHICS § 1.07(u) (2017).

<sup>132</sup> AM. PSYCH. ASS’N, PUBLICATION MANUAL 22 (7th ed. 2020).

<sup>133</sup> *Id.* at 21.

<sup>134</sup> See generally Aron, *supra* note 127, at 267; Sieck, *supra* note 120, at 3; Glen O. Gabbard, *Disguise or Consent: Problems and Recommendations Concerning the Publication and Presentation of Clinical Material*, 82 INT’L J. PSYCHOANALYSIS 1071 (2000).

<sup>135</sup> AM. PSYCH. ASS’N, *supra* note 132, at 22.

<sup>136</sup> *Id.*

<sup>137</sup> See Kantrowitz, *supra* note 124, at 121; Aron, *supra* note 127, at 267.



could adversely alter the course of therapy.<sup>138</sup> Second, disguising identifying information might lead readers to false conclusions. As the APA cautions, “[s]ubject details should be omitted only if they are not essential to the phenomenon being described.”<sup>139</sup>

But the use of informed consent by patients for their case studies has also been subject to significant controversy. Consistent with the nature of the discipline, psychotherapists have engaged in heated debate regarding the effects of the mere act of making such requests for consent on the therapeutic process. Some writers suggest that these requests actually can be beneficial for the patient’s therapy. One researcher, for example, observes that many of the patients from whom she sought consent expressed pleasure in being asked or included in her writing.<sup>140</sup> She reports,

Many clients felt seen, held emotionally close, and even cherished. After seeing the [publication], these clients were relieved and seemed to genuinely like what they read even though their relationship to the material shifted and increased in complexity. For some, the written draft symbolized being included in my life’s work, concretized our connection, and served as a remedy against separation anxiety.<sup>141</sup>

And a psychoanalyst writes about the reactions of a patient upon learning of his writing about her,

To my surprise, she responded with enthusiasm. She told me that it felt easy for her to give her consent because she felt reassured by my writing, presenting, and publishing. She said that, in the face of the personal risks she experienced in her analysis, she felt that much safer knowing that our work was linked to a professional community and to my own serious commitment to contributing to my field. For her, the writing added to a sane context for her terrifying analytic journey.<sup>142</sup>

Other therapists, however, raise deep concerns about the effect of

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<sup>138</sup> Kantrowitz, *supra* note 124, at 121.

<sup>139</sup> AM. PSYCH. ASS’N, *supra* note 132, at 22. Like the AMA, the APA recognizes that a balance is necessary between disguise (for the benefit of the client) and accuracy (for the benefit of the other researchers). *But see* Kantrowitz, *supra* note 124, at 122 (observing that [t]his objection to the use of disguise seems based on a misunderstanding of the nature and purpose of psychoanalytic case examples. The data they provide are not, and cannot be, comparable to the data of basic science, or often even social science, because they are most often taken from a single case. Analysts can only illustrate the points they want to make, they cannot prove them; as is commonly noted, what analysts report is colored by their subjectivity. No measure of reliability can apply.).

<sup>140</sup> Nancy A. Bridges, *Clinical Writing About Clients: Seeking Consent and Negotiating the Impact on Clients and Their Treatments*, 54 COUNSELING AND VALUES 103, 108 (2010).

<sup>141</sup> *Id.*

<sup>142</sup> Stuart A. Pizer, *A Gift in Return: The Clinical Use of Writing About a Patient*, 10 PSYCHOANALYTIC DIALOGUES 247, 258 (2000).

requests for such consent on the therapeutic process. They suggest, for instance, that some patients may feel violated merely by being asked to consent to the publication.<sup>143</sup> Patients consider therapy as a time devoted solely to themselves and may feel exploited or resentful if the therapist asks for consent to write about their cases.<sup>144</sup> Some scholars even have apprehensions against asking consent from former patients who are having a fragile recovery. They speculate that such individuals may feel overwhelmed by being asked to accommodate their therapists' professional agenda.<sup>145</sup>

Moreover, a number of scholars question whether, given the power imbalance between the therapist and the patient, informed consent is even possible. Because of this asymmetry, the patient may feel compelled to agree to the request to look "good" and "healthy."<sup>146</sup> "[M]any patients may feel that to stay within their [therapist's] good graces, they must acquiesce to the [therapist's] request. They may fear, with some basis in reality, that the [therapist] will be hurt or angry if they decline."<sup>147</sup>

On the other side of the power balance, requests for consent may—albeit unconsciously—shift the outlook of therapists toward the relationship with their patients.

For example, if a client sanctions a request to be the subject of clinical writing, the psychologist could feel indebted to the client, which might result in . . . less challenging insights. If a client declines the request, the psychotherapist may feel—consciously or unconsciously—angry or resentful. In either case, the therapist may be tempted to use his or her personal feelings, rather than professional judgment, when interacting with the client and creating the client's treatment plan.<sup>148</sup>

Overall, scholars in this field recognize that the publication of a patient's case study necessarily results in a conflict of interest between "the patient's right to privacy, the profession's requirement to publish

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<sup>143</sup> Len Sperry & Ronald Pies, *Writing About Clients: Ethical Considerations and Options*, 54 COUNSELING & VALUES 88, 91 (2010); Sieck, *supra* note 120, at 7; Bridges, *supra* note 140, at 111 (reporting of an instance in which a therapy client, after asked to give consent, felt a betrayal of trust and left treatment "hurt and enraged").

<sup>144</sup> Sieck, *supra* note 120, at 7. One psychoanalyst tells the story of a patient who had given consent to the publication of her case study. Even though she acknowledged that, because her identity was disguised, no one would recognize her, after the publication, she was "shocked and appalled that her personal material was laid out for all the world to see even if they did not know it was hers." Aron, *supra* note 127, at 271.

<sup>145</sup> Sperry & Pies, *supra* note 143, at 91.

<sup>146</sup> See, e.g., Sieck, *supra* note 120, at 6; Gabbard, *supra* note 134, at 1077.

<sup>147</sup> Gabbard, *supra* note 134, at 1077.

<sup>148</sup> Sieck, *supra* note 120, at 6. See also Bridges, *supra* note 140, at 106 (noting that if the therapist is developing an article before consent is given, "a therapist's sense of vulnerability [may be exacerbated] and increase the risk of untoward risks.").

advances and new knowledge in the field, and the analyst's need for recognition."<sup>149</sup> For that reason, the literature recommends that writers consider each publication decision on a case-by-case basis.<sup>150</sup> One factor to consider, scholars suggest, is the ability to craft a "thick disguise" for patients or develop vignettes so the identity of their particular patients cannot be ascertained, while, at the same time, maintaining the validity of the reports.<sup>151</sup> If clinicians seek to obtain their patient's consent for the publication, scholars suggest that they consider a number of factors: the patient's ego strength; the effect of the request on the patient's behavior; and the effect of the request on the therapist's behavior.<sup>152</sup> One researcher in the field recommends that clinicians encourage their patient to spend a week or more considering the request for consent to reduce the pressure the patient may feel.<sup>153</sup>

*C. Different Approaches to Confidentiality Protections of Case Study Subjects in Publications in Law, Medicine, and Counseling*

The description in the prior sections of the approaches to confidentiality protections for patients in medicine and counseling publications highlights significant differences between those professions and the legal profession. Those distinctions arise primarily from the role that case studies play in those professions. As previously described, in medicine and counseling, case studies of patients and clients are a common method of qualitative empirical research.<sup>154</sup> Just as quantitative empirical researchers gather numerical data to explain general phenomena that cannot be directly observed, qualitative researchers in medicine and counseling collect and analyze nonstatistical data using methods such as case studies and ethnographic field work to draw inferences about the causes of conditions or events.<sup>155</sup> In both disciplines, such studies have long been considered essential for empirical research into the improvement of practice and are part and parcel of professional publications.<sup>156</sup> As scientists, they use the scientific

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<sup>149</sup> Gabbard, *supra* note 134, at 1083.

<sup>150</sup> See, e.g., Sieck, *supra* note 120, at 7-9; Gabbard, *supra* note 134, at 1083; Jeffrey E. Barnett, *Clinical Writing About Clients: Is Informed Consent Sufficient*, 49 PSYCHOTHERAPY 12, 14 (2012); Aron, *supra* note 127, at 289.

<sup>151</sup> Gabbard, *supra* note 134, at 1083; Sieck, *supra* note 120, at 8.

<sup>152</sup> See, e.g., Sieck, *supra* note 120, at 6-8.

<sup>153</sup> See, e.g., *id.* at 9.

<sup>154</sup> See *supra* text accompanying notes 90-91 and 120-22.

<sup>155</sup> See Richard K. Neumann Jr. & Stefan H. Krieger, *Empirical Inquiry Twenty-Five Years After The Lawyering Process*, 10 CLIN. L. REV. 349, 353 (2003).

<sup>156</sup> See *supra* text accompanying notes 90 and 120-22.

method of inquiry.

In contrast, empirical research in the legal profession—both quantitative and qualitative—has not been considered an essential methodology for achieving the non-representational responsibilities of lawyers for improving the legal system, the quality of lawyering, and improving legal education until very recently.<sup>157</sup> Legal scholars traditionally do not approach a subject using the modes of scientific inquiry but rather employ the persuasion mode in their writing: arguing for a position based on a “self-interested and pre-determined meaning.”<sup>158</sup> In legal scholarship, until quite recently, discussions about cases have been primarily descriptions and analyses of published legal or administrative decisions, not detailed case studies examining the authors’ own practice that took place—in the law office with the client, conference room with adversaries, or courtroom with the judge, jury, and witnesses—prior to those decisions. In that context, confidentiality rules for publication of case studies about legal practice, unlike confidentiality standards in medicine and counseling, have not been fully developed.

As described previously, the ethical guidelines for both medicine and counseling case study publication, for example, are well developed and explicitly address the confidentiality issues for such writing.<sup>159</sup> They expressly require either informed consent for published case studies or the deletion of identifying information.<sup>160</sup> And an extensive scholarly literature in these disciplines addresses issues raised by these guidelines: the nature of the required consent; the process of obtaining such consent; the effect of the making such requests on the professional relationship; and possible conflicts of interests resulting

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<sup>157</sup> See *supra* Part I.A; see, e.g., Theodore Eisenberg, *Why Do Empirical Legal Scholarship?*, 41 SAN DIEGO L. REV. 1741, 1741-42 (2004).

<sup>158</sup> Neumann Jr. & Krieger, *supra* note 155, at 355 (quoting Robert J. Condlin, *Learning from Colleagues: A Case Study in the Relationship Between “Academic” and “Ecological” Clinical Legal Education*, 3 CLIN. L. REV. 337, 354 (1997)); see Stefan H. Krieger, *The Stories Clinicians Tell*, 24 INT’L J. CLINICAL LEGAL EDUC. 246, 272 (2017) (observing that “[u]nlike researchers in other fields such as medical education, scholars in legal education have substituted empirical examination of their work with arguments and theories based on the authors’ own experience in the classroom”). As one commentator has noted, in medicine, there is “a near-universal *consensus about the central value* toward which the medical profession is oriented”: on the substantive definition of health and its importance compared with other values.” Dietrich Rueschemeyer, *Doctors and Lawyers: A Comment of the Theory of Professions*, 1 CAN. REV. SOCIO. & ANTHROPOLOGY 17, 19 (1964). In law, on the other hand, justice ranks high as a central value, but in the substantive definition of justice “there are considerable ambiguities and wide discrepancies.” *Id.* Legal scholars have traditionally focused their publications on arguments about these conceptions of justice in particular contexts.

<sup>159</sup> See *supra* text accompanying notes 97-110 and 131.

<sup>160</sup> See *supra* text accompanying notes 112-119 and 132.

from the consent process.<sup>161</sup>

In contrast to the medical and counseling guidelines, the Model Rules provide no explicit guidance as to client confidentiality for the publication of case studies.<sup>162</sup> While the general confidentiality rules appear to apply to such publications, they do not expressly address disclosure of confidential information in out-of-court writings about the client's case.<sup>163</sup> And, unlike in those other disciplines, as discussed previously, there is a paucity of legal scholarship on the process of obtaining consent by clients for publications in regard to their cases.<sup>164</sup>

Moreover, a comparison of the treatment of confidentiality rules in the publication standards of scholarly journals in the different professions discloses the contrasting approach of practitioners in these fields to those rules. The primary journals in both the fields of medicine and counseling, adhering to the standards of empirical research, require authors to certify their compliance with those rules.<sup>165</sup> Scouring through 150 of the top-cited legal journals on Hein Online, we found only two journals—both published by Cambridge University Press—that require obtaining client consent as a prerequisite for publication of case studies. According to the journals' publication agreement, authors must represent that “the [Article] and any Supplementary Material contain nothing that breaches a duty of confidentiality or discloses any private or personal information of any person without that person's written consent.”<sup>166</sup> Unfortunately, even the *Clinical Law Review*, which regularly publishes cases studies authored by clinical teachers, has no formal editorial policy on confidentiality for publication of those studies. And, in the extensive rules in the *Bluebook: A Uniform System of Citation*, the issue of divulging confidential information in law review articles and notes is completely ig-

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<sup>161</sup> See *supra* text accompanying notes 113-114 and 140-153.

<sup>162</sup> See *supra* Part II.A.

<sup>163</sup> See *supra* Part II.A. The one provision of the rules that addresses the issue of a lawyers' disclosure of information relating to a publication is a conflicts of interest rule. See MODEL RULES OF PRO. CONDUCT r. 1.8(d) (AM. BAR ASS'N 2021). The rule provides that: “[P]rior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation.” *Id.* That rule is silent on the issue of confidentiality of that information. See *id.*

<sup>164</sup> See *supra* Part II.C.

<sup>165</sup> See *supra* text accompanying notes 115-117 and 132-133.

<sup>166</sup> See *Exclusive License to Publish (“LTP”)*, CAMBRIDGE UNIV. PRESS, <https://www.cambridge.org/core/services/aop-file-manager/file/5ff49f453b20b44968c61895/08-AJI-standard-form-one-author.pdf> (last visited Jan. 11, 2022) (publishing in *American Journal of International Law*); *Exclusive License to Publish (“LTP”)*, CAMBRIDGE UNIV. PRESS, <https://www.cambridge.org/core/services/aop-file-manager/file/5e441cde632e1cc00a768466/08-LSI-Standard-Form-One-Author.pdf> (last visited Jan. 11, 2022) (publishing in *Law & Social Inquiry*).

nored.<sup>167</sup> We have also found no bar journals with an editorial policy on the publication of case studies.

Finally, the different professions have adopted contrasting approaches to the issue of patient/client disguise as an alternative to informed consent by the subject. Both the medical and counseling scholarship extensively address the issue of the sufficiency of such disguise and the impact of disguise on the validity of the case study.<sup>168</sup> Again, the legal scholarship regarding client case studies ignores those issues. And those legal case studies that explicitly acknowledge the use of client disguise fail to address the issue of the possible effect of the disguise on the validity of the point the author seeks to make.

## V. AN ETHICAL APPROACH FOR THE PUBLICATION OF LEGAL CASE STUDIES

### A. *A Proposed Protocol for an Ethical Approach for the Publication of Legal Case Studies*

Given the current increase in the use of case studies in legal scholarship and the inadequate attention to the ethics issues raised by such publications, we propose a protocol for addressing these issues. The protocol we suggest is not designed as a boilerplate form or checklist. Issues such as client capacity, the purpose of the case study, the risks and benefits to a client, and many other factors, will vary extensively. Rather, the protocol described here provides important considerations in determining when, how, and whether to use a case study, and concrete actions that can be taken to use a case study in an ethical manner.<sup>169</sup>

#### 1. *Determining Whether There is Value in Using a Case Study*

The use of a case study in an article does not come without cost. As noted earlier in this Article, the inevitable disclosure of confidential information when using a case study could have negative consequences for the client's legal matter, and almost certainly requires conversations with a client that could interfere with the lawyer-relationship in myriad ways.<sup>170</sup> Because the severity of the risks of interfering with a current client relationship are especially serious, and because the likelihood of that interference is higher with current clients, the protocol does not condone seeking the use of case histories

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<sup>167</sup> See generally THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (Columbia L. Rev. Ass'n et al eds., 21st ed. 2020) (showing that, throughout the entire Bluebook, there is no reference to confidentiality in law review articles).

<sup>168</sup> See *supra* text accompanying notes 97-110 and 131-133.

<sup>169</sup> Appendix B contains a full copy of the protocol.

<sup>170</sup> See *supra* Part II.

for current clients except in extraordinary circumstances. Such circumstances might include a situation where the case, while still technically active, is only in a post-litigation monitoring phase, or a case in which the client, from the inception of the case, has independently made it clear she is eager to have the lawyer use the case history to achieve broader goals outside the litigation.

Even for former clients, prior to engaging in any analysis of what information can or should be used, and how to obtain consent from a client, an author who wishes to use her client's case in an article should first ask herself what, if any, value the case study would have. More specifically, the author should reflect on whether there is a public citizen goal advanced by the use of the case study. In many law reviews that use case studies, the authors have clear and explicit objectives that are consistent with public citizen goals.<sup>171</sup> If there is no public citizen goal advanced through the use of a case study, however, then the potential costs are almost certainly not worth the risks; the telling of a client's story cannot simply be for the lawyer's own self-promotion or to share a good story.<sup>172</sup> The author must also engage in a clear-eyed assessment of how her own interests might be affected by the use of the case study. Will it enable her to write an article more likely to help her achieve a more favorable faculty status? More acclaim among colleagues? Or even simply keeping her job? Assessing these interests is significant both as a check on a possible presumption of our own altruistic motivations, and as a factor in ensuring full transparency when and if informed consent of the client is sought.

Once a viable public citizen goal is established, a necessary subsequent consideration is whether the proposed case study would in fact be useful to achieving that goal. An effective case study can advance a broader goal in at least three ways: by enhancing the reader's engage-

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<sup>171</sup> See, e.g., Negar Katirai, *Retraumatized in Court*, 62 ARIZ. L. REV. 81, 82-84 (2020); Alina Ball & Manoj Viswanathan, *From Business Tax Theory to Practice*, 24 CLIN. L. REV. 27, 34-36 (2017); Silverstein, *supra* note 48, at 555.

<sup>172</sup> Client testimonials or stories that are being explicitly used for advertising are beyond the scope of this paper, as they require a different set of considerations. See MODEL RULES OF PRO. CONDUCT r. 7.2, cmt. 1 (AM. BAR ASS'N 2021) (permitting use of name of clients regularly represented, with consent of client). Most jurisdictions have a high bar for the use of even a client's name for advertising purposes. See N.Y.S.B.A. ETHICS OP. 1088 (2016) (requiring prior written consent for use of client's name in advertising unless the name of client would not be considered confidential under New York law); S.C. RULES OF PRO. CONDUCT r. 1.6, cmt. 7 (2021) ("Disclosure of information related to the representation of a client for the purpose of marketing or advertising the lawyer's services is not impliedly authorized because the disclosure is being made to promote the lawyer or law firm rather than to carry out the representation of a client. . . . [P]aragraph (a) requires that a lawyer obtain informed consent from a current or former client if an advertisement reveals information relating to the representation. This restriction applies regardless of whether the information is contained in court filings or has become generally known.").

ment in the public citizen goal of the article; by providing clear modeling of effective lawyering, teaching, or systemic change for other lawyers, legal academics, or law students; and by presenting persuasive evidence in support of the author's claims or proposals.<sup>173</sup> In Abbe Smith's article, *The Difference in Criminal Defense and the Difference It Makes*, for example, the details of a client's background, sentencing, and experience in prison provide a compelling ongoing narrative to ground Smith's claims about the value of zeal in an adversarial system.<sup>174</sup> Likewise, Benjamin Hoffman and Marissa Vahlsing's article, *Collaborative Lawyering in Transnational Human Rights Advocacy*, intended in part as a guide for effective transnational collaboration in lawyering, uses a case involving negotiating with a multinational oil company on behalf of Amazon communities, and provides a model of the challenges and techniques in successful collaborations.<sup>175</sup> Case studies can also provide persuasive evidence in support of a proposition. In fact, the real-world quality of a case study often provides much more viscerally compelling evidence than a dry case citation.<sup>176</sup>

*Recommended Protocol: Assessing Appropriateness of Using a Case Study*

- Determine whether the case study arises from a current client or a former client.<sup>177</sup> A case study from a current client should only be considered for use in extraordinary circumstances.
- Determine whether the case study is being used to advance a public citizen goal of improving the legal system, improving the quality of lawyering, or improving legal education. If not, then the case study should not be used.
- Determine what self-interests of the author are being advanced by the use of the case study.
- If the case study is being used to advance a public citizen goal, consider whether the case study will actually assist in achiev-

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<sup>173</sup> See *supra* Part I.

<sup>174</sup> Smith, *supra* note 49.

<sup>175</sup> Hoffman & Vahlsing, *supra* note 31, at 255.

<sup>176</sup> Sabrineh Ardalan's article on the lack of due process rights for immigrants with prior unexecuted removal orders, for example, substantiates her claim that the immigration system fails to safeguard fundamental equal protection and due process rights with the heart-wrenching stories of two of her clients. See generally Sabrineh Ardalan, *Asymmetries in Immigration Protection*, 85 BROOK. L. REV. 319 (2020).

<sup>177</sup> We recognize that where an author herself did not represent the client, but rather is using a case study provided by another lawyer, the author and lawyer will have to collaborate closely to execute various portions of the protocol, especially with regard to any interactions with the client.



ing that goal by any or all of the following: reader engagement; effective modeling; or evidentiary support for a proposition. If the case study will not assist in any of those ways, it should not be used.

## 2. *Determining the Content of the Case Study*

Not every fact or detail of a case must be provided for a case study to serve its purpose. Authors should make an initial determination about which facts and what level of detail are material to the effective use of the case study to advance one or more identified public citizen goals. Similar to the evidentiary standard for “materiality,” the facts used should be of consequence to the point the author is trying to make. Other facts can be altered or disguised. As described above, disguising information in a case study can have several important benefits.<sup>178</sup> First, if there is a sufficient level of disguise, it can obviate the need for consent. A case study so well disguised that neither the client nor any member of the client’s community could recognize it (a high standard) does not require the client’s consent.<sup>179</sup> Second, disguising some information, even where it does not completely protect discovery of a client’s identity, at least provides a heightened level of confidentiality protection compared to full disclosure. Preserving confidentiality to the extent possible should almost always be a high priority,<sup>180</sup> and the more information that is disguised the less likely that detrimental or embarrassing information will be revealed and that the client will be identifiable. Finally, a client may be more comfortable providing consent to the lawyer’s use of confidential information if her identity is sufficiently disguised. A client who can recognize herself in a case study, for example, but is confident that no other individual could, may be more likely to consent to the use of the information.

The use of disguise in a case study does not necessarily come without cost. As noted earlier, too much disguise may undermine the potential benefits of using the case study—reader engagement; effective modeling; or evidentiary support. We reject the idea that disguise will necessarily render a case study of little use, as well as the idea that changing facts is foolhardy because the actual case will always be recognizable.<sup>181</sup> We agree, however, that a proper analysis of disguise use

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<sup>178</sup> See *supra* Part II.A.

<sup>179</sup> See *supra* Part II.A.; cf. Kantrowitz, *supra* note 124, at 117-18.

<sup>180</sup> One exception is where the client herself wants her case widely publicized.

<sup>181</sup> See *Patient Consent and Confidentiality*, *supra* note 97. In addition, clients of clinicians might be even more readily identifiable because clinics usually have limited caseloads and fewer clients than a public defender or a large firm or legal services office.

must balance the identifiability of a client through the use of certain facts with the importance of those facts to the effectiveness of the case study.<sup>182</sup>

The balancing of the benefits and drawbacks of disguise must also account for the fact that there are different stakes for current and former clients. Unlike a case study based on a former client representation, a current client case study may jeopardize an active matter, or interfere with the client-lawyer relationship in a manner that will negatively affect the representation.

*Recommended Protocol: Determining Content of a Case Study*

- List the facts in the case study that might reasonably identify the client or the client's case either to the client, or to individuals who know the client or are familiar with the client's case. These facts include, but are not limited to, the following:
  - Client name
  - Names of other parties, witnesses, family members, or community members
  - Geographic identifiers (street address, city, county, zip code)
  - Dates of birth of client or other parties, witnesses, family members, or community members
  - Dates of case-related incidents directly related to client or other parties, witnesses, family members, or community members, such as dates of any incidents described
  - Contact information of client or other parties, witnesses, family members, or community members, including phone numbers, email addresses, and social media
  - Photographic or other images of client or other parties, witnesses, family members, or community members
  - For organizational clients, the nature of the organization's activities
  - Any other unique identifying characteristic of client or other parties, witnesses, lawyers, family members, or community members, that would render the case study identifiable to the client or the client's community
- Determine which facts and what level of detail are material to the effective use of the case study to advance one or more identified

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<sup>182</sup> For example, Andrew Budzinski's article on reforming service of process rules to ensure greater access to justice for indigent survivors of domestic violence uses a number of details about a client's background and socioeconomic status to illustrate how poor people are presented with practical barriers to seeking orders of protection; without those details, the case study would have lost any power to engage the reader or provide evidence in support of the author's claims. See generally Andrew C. Budzinski, *Reforming Service of Process: An Access-to-Justice Framework*, 90 U. COLO. L. REV. 167 (2019).

public citizen goals.

- Remove or alter details that are not necessary for the effective use of the case study.

### 3. *Obtaining Informed Consent*

Obtaining informed consent from a client is rarely easy or straightforward. In a worst-case scenario, even asking for informed consent can have a detrimental effect on the lawyer-client relationship.<sup>183</sup> For current clients especially, this risk must be seriously considered. For example, asking a current client who is an immigrant and a survivor of domestic violence for consent to use her story could erode trust if it is perceived (perhaps correctly) as a lack of understanding of the client's deep privacy concerns and real fears about retribution from an abuser or deportation by the government. For former clients, the potential consequences if there is an erosion of trust due to a request to use their former stories are generally less severe as the client no longer depends on the lawyer for counseling, advocacy, communication, and other representational duties to the same extent. For either current or former clients, the potential effect on the lawyer-client relationship should be a consideration.

Ensuring that consent is "informed" is also a nuanced and complex task that, under the Model Rules definition, requires the clear communication and explanation of three elements of the request: the proposed course of action; the material risks to the proposed action; and the reasonably available alternatives to the proposed action.<sup>184</sup> For the use of a case study, a lawyer must therefore first clearly explain the proposed content and use of the case study, including the goals the lawyer hopes to achieve through the use of the case study. Some material risks of using the client's story will be similar across most types of case studies, such as the fact that the story could be used, copied or further distributed by anyone who sees it.<sup>185</sup> Other material risks will vary based on the status of the client (former vs. current), as well as a number of case-specific considerations. For the client who is a survivor of domestic violence with immigration issues, the potential risk of harm to the client from the abuser, or the adverse consequences to the client's case, may be extreme, depending on the level of case-specific information disclosed. The author should con-

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<sup>183</sup> See *supra* Part II; cf. Sperry & Pies, *supra* note 143, at 91 (analogizing to the risks of asking for informed consent with regard to therapy).

<sup>184</sup> MODEL RULES OF PRO. CONDUCT r. 1.0(e) (AM. BAR ASS'N 2021).

<sup>185</sup> See, e.g., CLINICAL ANTHOLOGY: READINGS FOR LIVE CLIENT CLINICS (Alex J. Hurder et al. eds., LexisNexis 2011) (widely used anthology with excerpts of several articles with case histories).

sider and discuss both the probability of harm and the severity of that harm. Finally, the reasonably available alternatives must include a clear communication that the case study will not be used if the client chooses not to provide consent, as well as an explanation of how disguise could be used to protect some of the confidential information.

A lawyer using a case study must also consider whether a client even has the capacity to provide informed consent. Medical professionals have developed guidelines for ensuring compliance with informed consent requirements when the subject has diminished capacity, and typically divide the protocols into situations where the subject does not currently have the capacity to consent but will develop that capacity, and situations where the subject will likely never develop that capacity.<sup>186</sup> For the former category—a case study of a child, or of an adult with a capacity-inhibiting medical condition when a recovery is expected, for example—guidelines for the use of medical histories require the author to wait until the subject has capacity before seeking informed consent.<sup>187</sup> For the latter category—a case study of a person with severe, non-remitting Alzheimer’s, or of a deceased person, for example—the author is required to get the consent of a legally authorized person, such as a court-appointed guardian, or if no such person is available, to ensure that publication of the case study is in the “best interests” of the subject.<sup>188</sup>

We recommend similar protocols for the use of case studies in legal publications. When a client’s lack of capacity is temporary, the author should wait until the client develops capacity before seeking informed consent. Waiting for capacity to develop, or to re-emerge, is consistent both with the lawyer’s duty to inform the client of any decision when informed consent is required, and to the extent possible to treat a client with diminished capacity like any other client.<sup>189</sup> The delay may be onerous, and may interfere with an author’s plan for publication of an article, but waiting for capacity to develop respects the developing autonomy of the client, and comports with guidance in the ethical rules.<sup>190</sup> When the capacity to provide informed consent will never develop, the lawyer should consult with individuals such as family members, legal guardians, or court-appointed caretakers, to en-

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<sup>186</sup> In the British Medical Journal’s “Consent for Publication: Best Practice for Authors,” for example, there are two separate flowcharts for obtaining consent from adults and from children, and each chart also has different sets of procedures depending on whether the subject has capacity, will develop capacity, or neither. See Ragavooloo & Chatfield, *supra* note 112.

<sup>187</sup> *Id.* at fig. 2.

<sup>188</sup> *Id.*

<sup>189</sup> MODEL RULES OF PRO. CONDUCT r. 1.4(a), 1.14(a) (AM. BAR ASS’N 2021).

<sup>190</sup> *Id.*; Tarr, *supra* note 83, at 271.

sure that the decision to publish a case study protects the client's interests and is consistent with any previously-stated representational goals or considerations of the client.<sup>191</sup>

The most daunting challenge when obtaining consent from a client when capacity is in question is actually assessing that capacity accurately. Most lawyers have neither professional experience nor professional training in assessing capacity. The Model Rules provide some guidance, recommending that lawyers

. . . consider and balance such factors as: the client's ability to articulate reasoning leading to a decision, variability of state of mind and ability to appreciate consequences of a decision; the substantive fairness of a decision; and the consistency of a decision with the known long-term commitments and values of the client.<sup>192</sup>

When it is not clear how to balance these factors, an assessment or evaluation by a mental health or medical professional may be required before seeking informed consent from the client.<sup>193</sup>

Finally, because there may be inherent pressure on a client to consent as a way to show gratitude to her lawyer, and because the disclosure of confidential information is likely to be a decision that requires a fair amount of consideration, lawyers should provide the client with sufficient opportunity to ask questions, as well as ample time and space to reflect before making a decision. And because the writing of the case study will almost certainly be an ongoing process, lawyers should re-visit the process of obtaining informed consent whenever there are material changes to the amount of information the author wishes to disclose, and again when the case study is finalized.

*Recommended Protocol: Obtaining Informed Consent*

- Determine whether it is appropriate to ask for informed consent for the use of the case history. Consider the following factors:
  - The importance of using the case history to achieve public citizen goals
  - Whether the client is a current or former client
  - The potential impact of the request for informed consent on the lawyer-client relationship
  - Whether the use of the case study would undermine the stated goals of the client
  - Whether the stated goals of the client include making an impact beyond the client's own matter
  - The capacity of the client to make an independent judgment

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<sup>191</sup> MODEL RULES OF PRO. CONDUCT r. 1.14, cmt. 5 (AM. BAR ASS'N 2021).

<sup>192</sup> *Id.* r. 1.14, cmt. 6.

<sup>193</sup> *Id.*

- regarding the use of the case study
- When it is appropriate to ask for informed consent, the request should consist of the following:
    - A clear and detailed description of what aspects of the case study the lawyer would like to use
    - A clear and detailed description of potential risks of publishing the client's case, including any possibility that the client's case, if ongoing, might be jeopardized; the possibility that the client might gain unwanted attention; the possibility that anyone reading the story could use, copy, or further distribute the case study; the possibility that the amount of information provided in the case history could lead to the discovery of other information about the client; and the possibility that others might use the information for their own purposes
    - A clear and detailed description of the possible benefits, including positive publicity for the client's case, and broader societal benefits
    - A clear and detailed description of "reasonably available alternatives," including waiting until the case is finished, if the case is ongoing; using a hypothetical that fully disguises the client's identity; removing some details; and simply not using the case at all
    - Providing the client with a sufficient and reasonable timeframe in which to consider the request in order to ensure the client has sufficient space and time after the request to minimize the chance she will feel undue pressure to provide consent
    - Informing the client that she should strongly consider consulting with other trusted individuals, including other lawyers if she wishes, before deciding whether to provide consent, and providing the client sufficient time to do so
    - For organizational clients, the lawyer's initial step will be to determine who is the appropriate individual to provide informed consent on behalf of the organization
  - If the client provides informed consent, it should be in writing<sup>194</sup>
  - If the case study is altered to provide different or additional facts after the client provides informed consent, a new written informed consent should be obtained, following the protocol above
  - After the case study is written and published, it should be provided to the client.

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<sup>194</sup> A template for an informed consent form is contained in Appendix C.

*B. Regulation of Ethical Issues in the Publication of Legal Case Studies*

This protocol for an ethical approach for the publication of legal case studies should provide necessary guidance for legal scholars and attorneys for protecting the confidentiality of their current and former clients in the publication of studies about their cases. The issue arises, however, whether anything more than self-regulation is required for assuring such confidentiality. As previously described, in the fields of medicine and counseling, professional societies and publications play an important role in ensuring compliance with confidentiality standards for studies of patient and client cases.<sup>195</sup> So, should the legal profession follow suit?

Except in especially egregious cases, the regulation of the confidentiality requirements of ethical codes has been left primarily to the personal responsibility of attorneys in their professional judgment.<sup>196</sup> The ABA Model Rules of Professional Conduct, for example, contain a general prohibition in regard to revealing information relating to the representation of a client without prior consent, but do not provide detailed protocols for compliance with those rules and the enumerated exceptions.<sup>197</sup> For the most part, attorneys, in their professional judgment, interpret those rules for themselves in the context of particular cases.

While this same self-regulating approach could be adopted regarding the publication of legal case studies, for several reasons it is inadequate. First, a published case study may have a greater impact on the lawyer/client relationship than a violation of confidentiality requirements in the nonpublication situation. While clients might feel an invasion of privacy and a breach of trust in both cases, in the context of a publication, they likely also will feel that they have been used by their lawyers for their attorneys' own personal advantage. They might assume that, unbeknownst to them, in their representation, their lawyers were not focused exclusively on their interests but instead had a scholarly agenda.<sup>198</sup> Second, even though scholars have flagged these issues for decades,<sup>199</sup> our survey suggests that a significant number of

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<sup>195</sup> See *supra* Part IV.A–B.

<sup>196</sup> See Fred C. Zacharias, *Specificity in Professional Responsibility Codes: Theory, Practice, and the Paradigm of Prosecutorial Ethics*, 69 NOTRE DAME L. REV. 223, 236–37 (1993) (“[B]ecause code drafters may be unwilling to select a single type of behavior as the ‘correct behavior,’ they often opt for rules that promote introspection by lawyers—thought about what conduct is ‘professional’ given the lawyer’s ‘role.’ The desire for, or expectation of, discipline in these categories of rules is limited to extreme cases.”).

<sup>197</sup> MODEL RULES OF PRO. CONDUCT r. 1.6 (AM. BAR ASS’N 2021).

<sup>198</sup> See *supra* Part II.B.

<sup>199</sup> Miller, *supra* note 84; Tarr, *supra* note 83, at 271.

scholars still have not sufficiently considered protections of confidentiality when publishing legal case studies.<sup>200</sup> And even though the survey suggests some scholars have recognized the issue, it appears that their approaches to protection of client confidentiality have not been consistent.<sup>201</sup> Finally, the self-regulatory approach may be insufficient for the profession as a whole because of the increase in publication of client case studies in clinical and experiential legal education, and professional journals and blogs.<sup>202</sup> With the proliferation of these studies, problems of breaches of client confidences in publications will only increase. The general language of ethics codes and individual self-regulation will not be sufficient to ensure serious, consistent protection of client confidences.

Given the inadequacy of individual self-regulation to address this issue, there are three possible options for regulating the publication of case studies: (1) the IRB process; (2) state ethics codes; and (3) journal standards.

### 1. *The IRB Process*

Under Department of Health and Human Services (“HHS”) regulations, universities and research institutions that receive federal funding for research are required to establish Institutional Research Boards (“IRB”) to assure protections in research involving human subjects.<sup>203</sup> Before performing such research, researchers are required to submit an application to the IRB describing the purposes of the research and the methodology they plan to use in performing it.<sup>204</sup> At first glance, then, it would seem that IRBs would be an ideal oversight body to ensure the protections of client confidences. Legal researchers would be required to set forth their process for protecting client identities and/or obtaining informed consent in their description of methodology in their IRB application.

Under HHS regulations, however, “research” is defined as “a systematic investigation, including research development, testing, and evaluation, designed to develop or contribute to generalizable knowledge.”<sup>205</sup> Interpreting this definition, medical research institutions have determined that publication of individual case studies do not constitute “research.”<sup>206</sup> As the University of Texas MD Anderson

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<sup>200</sup> See *infra* Appendix A.

<sup>201</sup> See *infra* Appendix A; see also *supra* Part III.A.1–2.

<sup>202</sup> See *infra* Appendix A; see also *supra* Part III.

<sup>203</sup> 45 CFR § 46.103(d) (2021).

<sup>204</sup> *Id.*

<sup>205</sup> 45 C.F.R. § 46.102(l) (2021).

<sup>206</sup> See, e.g., *Does My Project Need IRB Review?*, EMORY UNIV., <https://www.irb.emory.edu/guidance/getting-started/review.html> (expand the Case Studies/Series



Center explains,

Regulations define research as a systematic investigation, including research development, testing and evaluation, designed to develop or contribute to generalizable knowledge. Generally, a report of a small number of patients does not involve a systematic investigation as it does not include defining a hypothesis that is then investigated prospectively and systematically, to develop or contribute to generalizable knowledge. Therefore, the review of medical records for publication of a single case report or a case series involving data from two or three patients is not considered by the MD Anderson IRB to be research involving human subjects, and does not require IRB review and approval.<sup>207</sup>

Following this approach, it appears that the typical law publication case study will not fall under the purview of most university's IRB policies. The case studies addressed in this article are not the result of systematic investigation of a hypothesis but instead are retrospective analyses of one or several cases or situations. The primary purpose of IRB review is "to assure, both in advance and by periodic review, that appropriate steps are taken to protect the rights and welfare of humans participating as subjects in the research."<sup>208</sup> For most legal case studies, attorneys do not have a research agenda when their clients retain them, so advance approval or periodic review is irrelevant. They only engage in the development of a research plan during or after the representation. Accordingly, IRB oversight for protection of client confidences in legal case studies appears to be an inappropriate option.

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tab) (last visited June 23, 2022) (IRB standards for Emory University providing that: "A case study, in contrast [to research], tends to highlight one or a few particular cases for purposes of demonstration rather than for purposes of drawing generalized conclusions"); *Case Report Publication Guidance: IRB Review and HIPAA Compliance*, JOHNS HOPKINS MED. (May 2021), [https://www.hopkinsmedicine.org/institutional\\_review\\_board/guidelines\\_policies/guidelines/case\\_report.html](https://www.hopkinsmedicine.org/institutional_review_board/guidelines_policies/guidelines/case_report.html) (stating a Johns Hopkins policy that "[a] case report for IRB purposes is a retrospective analysis of one, two, or three clinical cases. If more than three cases are involved in the analytical activity, the activity will constitute 'research'"); UNIV. PA. INSTITUTIONAL REV. BD., IS IRB REVIEW REQUIRED? 3 (2009), <https://irb.upenn.edu/sites/default/files/Is%20IRB%20Review%20Required.pdf> ("A single retrospective case report is a medical/educational activity and does not meet the Federal Policy for the Protection of Human Subjects definition of 'research' which is 'a systematic investigation, including research development, testing and evaluation, designed to develop or contribute to generalizable knowledge'").

<sup>207</sup> *Single Case Reports and Case Series*, UNIV. MED. CTR. INSTITUTIONAL REV. BD., <https://www.umcsn.com/getmedia/40686901-0e6e-4ee3-988b-82d5987e07bb/CaseReportSeriesGuidance.pdf> (last visited June 23, 2022).

<sup>208</sup> See *Institutional Review Boards (IRBs) and Protection of Human Subjects in Clinical Trials*, U.S. FOOD & DRUGS ADMIN., <https://www.fda.gov/about-fda/center-drug-evaluation-and-research-cder/institutional-review-boards-irbs-and-protection-human-subjects-clinical-trials> (last visited Nov. 28, 2021).

## 2. *Ethics Codes*

As previously described, rule 1.6 of the ABA Model Rules of Professional Conduct and similar state ethics codes bar attorneys from revealing information relating to the representation of clients without their consent. A second possible option for ensuring protection of client confidentiality in case study publication is amendment of these codes to provide specific guidance to this general rule. A revised rule for publication of case studies, for example, could address issues of adequate client disguise, the nature of informed consent, and the protocol for obtaining informed consent in publishing client case studies.

Such specificity, however, might hit a roadblock in the amendment process. For the most part, ethics codes have focused on general guidance for attorneys rather than specific directions for attorney conduct. As Fred Zacharias observes in regard to ABA Model Rule 1.6(b)—the exceptions to the general confidentiality rule—“[I]n guiding lawyers rather than directing (or enabling future regulators to direct) particular acts, the codes acknowledge that there may be more than one appropriate response to the situations in question.”<sup>209</sup> By focusing primarily on an attorney’s professional role, in most cases, the code drafters do not address a single fact pattern or set of fact patterns, but rather hope to address perhaps unforeseen dilemmas lawyers may face.<sup>210</sup> And to the extent that the drafters do address such situations, they attempt to provide a response that makes the lawyer act for ethical reasons rather than because of the coercive force of potential discipline forcing lawyers to think in ethical terms in hope of promoting an introspective process that carries over to situations the drafters do not foresee.<sup>211</sup> Given this outlook about the purpose of ethics rules, most code drafting committees probably would be reluctant to amend the confidentiality rules to provide specific direction in regard to publication of case studies.<sup>212</sup>

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<sup>209</sup> Zacharias, *supra* note 196, at 258.

<sup>210</sup> *Id.* (citations omitted). There are of course some rules that are explicitly designed to deal with specific situations, such as Rule 1.15 provisions on keeping attorney and client funds separate, Rule 1.8 provisions that address distinctive conflict situations such as having sexual relations with a client, and Rule 7.2 provisions about what precisely is permitted in an advertisement. MODEL RULES OF PRO. CONDUCT r. 1.15, 1.8, 7.2 (AM. BAR ASS’N 2021).

<sup>211</sup> Zacharias, *supra* note 196, at 258-59.

<sup>212</sup> There are certainly some rules that provide a great deal of specificity, though these tend to relate primarily to specific, business-related guidance rather than more foundational ethical principles such as confidentiality. *See, e.g.*, MODEL RULES OF PRO. CONDUCT r. 1.15(b) (AM. BAR ASS’N 2021) (allowing deposit of lawyer’s own funds into client trust account solely for purpose of paying bank service charges); MODEL RULES OF PRO. CONDUCT r. 7.2(c) (creating specific criteria for when a lawyer can refer to herself as a “certified” specialist).

Moreover, while the ABA Model Rules have provided a model for state ethics codes, each state has a rulemaking process for adoption of amendments to its rules.<sup>213</sup> Accordingly, even if the ABA Standing Committee on Ethics and Professional Responsibility proposed amendments to the Model Rules for publication of case studies and the ABA House of Delegates approved them, each state would be responsible for considering whether to adopt amendments to their rules to reflect the ABA amendments. Such a process would be arduous and time-consuming. Amendments to ethics codes, then, are not a realistic option for expeditiously addressing the problem.

### 3. *Journal Standards*

A third and final option for addressing the issue of protecting client confidences is the adoption by journals of standards for publication of case studies that provide a protocol for protecting confidential client information. Similar to the guidelines used by journals in the fields of medicine and counseling,<sup>214</sup> these standards would provide specific guidance to both scholars and their editors for review of a manuscript before it is accepted for publication. Since most journals already have detailed protocols for articles accepted for publication,<sup>215</sup> they would not consider additional procedures for publication of case studies as out of the ordinary.

In regard to peer-review journals, such as the *Clinical Law Review*, the *International Journal of Clinical Legal Education*, or the *Journal of Legal Education*, adoption of such standards probably will be welcome.<sup>216</sup> The editorial boards of these journals include serious legal scholars, several of whom are leaders in clinical education, who certainly are aware of the ethical issues raised by the publication of case studies and would likely expeditiously adopt protocols similar to those proposed in this article. Sensitive to these issues, editors at such journals would professionally collaborate with authors in assuring compliance with these standards.

In contrast, editorial boards at student-edited journals most likely will either be unaware of the ethical issues raised by case studies or, if they have some familiarity with professional responsibility issues, will not have a sufficient understanding of the issues such as client disguise

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<sup>213</sup> The American Bar Association posts a state-by-state comparison and jurisdictional rules comparison charts on its website. AM. BAR ASS'N, RULES CHARTS, [https://www.americanbar.org/groups/professional\\_responsibility/policy/rule\\_charts](https://www.americanbar.org/groups/professional_responsibility/policy/rule_charts) (last visited Sept. 9, 2022).

<sup>214</sup> See *supra* Part IV.A–B.

<sup>215</sup> See, e.g., *A Journal of Lawyering and Legal Education*, *supra* note 24; *About this Journal*, *supra* note 25.

<sup>216</sup> In fact, the Editor-in-Chief of the *International Journal of Clinical Legal Education* encouraged the publication of this article.

and the technical issues involved with obtaining informed consent for publication. Since a large proportion of legal scholarship is published in student-run law reviews, this third option has significant limitations. These problems can be addressed with proactive guidance from student journal faculty advisors. Collaborating with clinical faculty and professional responsibility faculty, these advisors can educate student editors about the issues involved in reviewing articles containing case studies before publication.<sup>217</sup>

### CONCLUSION

Lawyers know how to tell a good story, and are expected, encouraged, and even ethically required to use that skill on behalf of their clients. More and more, lawyers and legal academics are now using clients' stories to advance goals that go far beyond achieving a client's objectives: educating the public about the functioning and limitations of the legal system; increasing the quality of lawyering; and improving our system of legal education. Unfortunately, the increase in the use of case histories to achieve these admirable goals has not been paired with an increase in the self-reflection and deep analysis required to ensure case histories are used in a responsible and ethical manner. This stands in stark contrast to other professions that regularly use case histories to achieve broader goals and have much more developed protocols for protecting individual clients while using their stories.

This paper and the proposed protocol are meant to apply to the use of case studies the same level of reflection and analysis that the medical and mental health professions have brought to the question of how to use case histories responsibly. Our proposal covers what we deem to be the key elements of a protocol that is both ethical and effective: determining if the use of the case history advances a public citizen goal; limiting the information disclosed to what is necessary to advance that goal; obtaining informed consent in a thorough and responsible manner; and enforcing compliance with the protocol by authors through the insistence by law reviews and other publishers that authors commit to following it. We recognize that this paper and our proposed protocol are of course merely a starting point. We hope that the discussion contained here is viewed as the beginning of a rigorous

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<sup>217</sup> Even with detailed standards at peer-review law journals and faculty guidance at student journals, a problem still exists as to lack of oversight of attorney blogs. We would hope that, even without a formal ethical rule, the substantial changes in requirements at legal journals in regard to publication of case studies would lead to a cultural change in the legal community which would encourage writers on attorney blogs to take seriously the ethical issues raised by descriptions of their cases.

self-analysis by the legal profession on the ethical use of case histories, and that our suggested protocol is seen as a template, ripe for adapting, modifying and improving.

Fall 2022]

*Ethical Guardrails and Case Histories*

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## APPENDIX A

## EMAIL TO POTENTIAL PARTICIPANTS

Dear [Potential Participant]:

Theo Liebmann and I are writing an article on the ethical issues raised when lawyers write articles containing descriptions of cases they have handled or are handling. Both of us have included case studies in our own writing and, quite honestly, have not always been vigilant about these issues. So, given the sparse scholarship on these issues, we thought we would tackle them. One component of our research is to survey the practice of other clinicians who have included case studies of their own cases in their scholarship.

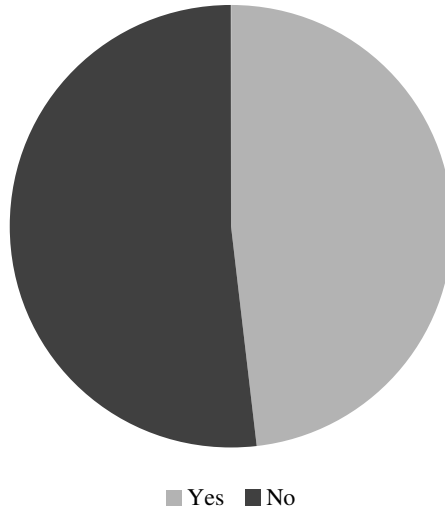
We have found that you published the article, [Article by Potential Participant], which contains a reference to a case you handled. It would be helpful to our research if you could respond to the following very short anonymous SurveyMonkey questions about this article. (The survey contains ten brief questions and should take no more than three minutes to complete.) In our own description of this survey, we assure you that your participation in this study will not be disclosed.

Thanks in advance for your help.

Stef

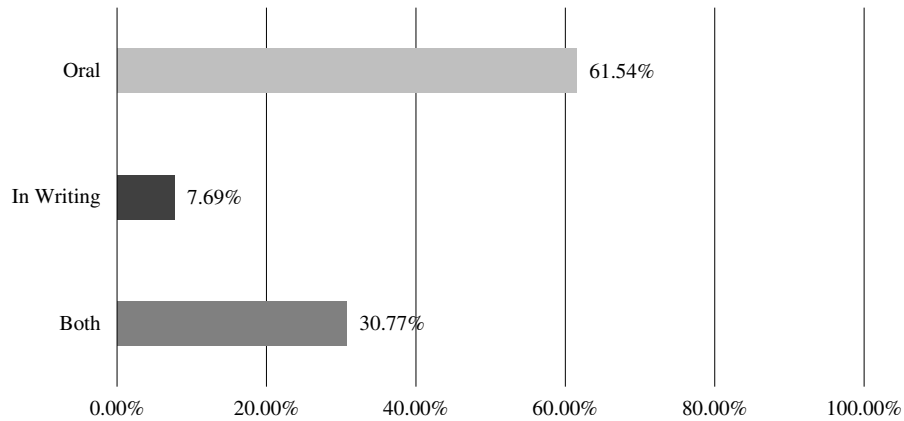
**Stefan H. Krieger** | *Richard J. Cardali Distinguished Professor of Trial Advocacy and Director, Center for Applied Legal Reasoning* | Maurice A. Deane School of Law at Hofstra University | 121 Hofstra University | Hempstead, NY 11549 | 516-463-6078 | lawshk@hofstra.edu

Question 1: Did you seek consent from the client for the case study in your article?



ANSWER CHOICES	RESPONSE	
Yes	48.15%	13
No	51.85%	14
<b>TOTAL</b>		27

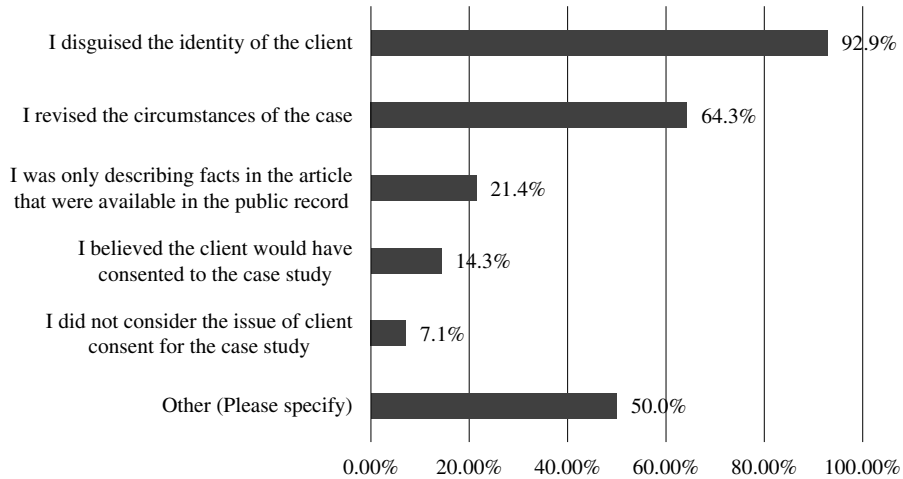
Q2: If your answer to Question 1 is “Yes,” how did you receive the consent?<sup>218</sup>



<sup>218</sup> This is a follow up question of Question 1; the results recorded the answers of 13 respondents who selected “Yes” to Question 1.

ANSWER CHOICES	RESPONSES	
Orally	30.77%	4
In Writing	7.69%	1
Both	61.54%	8
<b>TOTAL</b>		<b>13</b>

Q3: If your answer to Question 1 is “No,” why did you not seek consent? (Answer all responses which are applicable)<sup>219</sup>



ANSWER CHOICES	RESPONSE	
I disguised the identity of the client	92.86%	13
I revised the circumstances of the case	64.29%	9
I was only describing facts in the article that were available in the public record	21.43%	3
I believed the client would have consented to the case study	14.29%	2
I did not consider the issue of client consent for the case study	7.14%	1
Other (please specify) <sup>220</sup>	50%	7
<b>TOTAL</b>		<b>14</b>

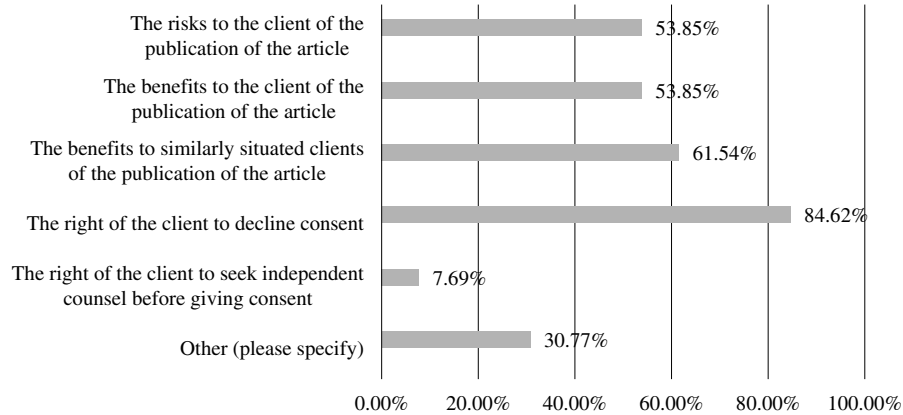
<sup>219</sup> This is a follow up question of Question 1; the results recorded the answers of 14 respondents who selected “No” to Question 1.

<sup>220</sup> The answers of the 7 respondents who selected “Other (please specify)” are listed as follows:

- The focus of the case study was on the student’s response to the client, even though I did address the client’s circumstances as well. I did try to contact the student to ask for their permission but could not get in touch. I disguised the student’s identity and revised the circumstances involved. Moreover, I raised these consent issues



Q4: If your answer to Question 1 is “Yes,” what information did you provide the client before obtaining consent?  
(Answer all responses which are applicable)<sup>221</sup>



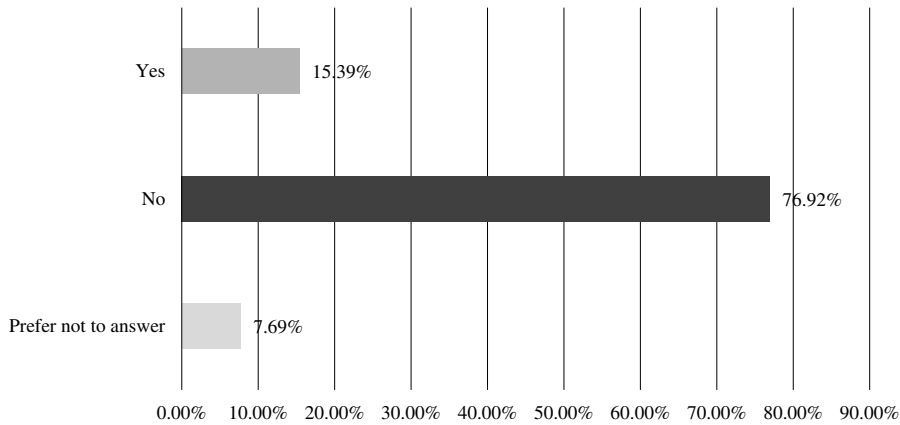
with mentors in the field and recall that they advised me that as long as I did not reveal identifying information, it was OK.

- Note that my article was not really a case study but did reference students' reactions to working with clients, without specifically focusing on particular clients or the facts of their cases.
- The brief mention of the case did not provide enough information to identify the client, the defendant, the time period, or even the jurisdiction. There was a brief mention of a situation, not a case study. Accordingly, many of the questions below are inapplicable. For example, I neither disguised information nor revealed it.
- The case was described in general, vague terms that was typical of many cases and therefore the client could not possibly be identified or traced to a particular person or family.
- I had already left the firm I was working for when I encountered her case. Also, the case was so old that the case file would have been destroyed per the guidelines of the firm, thus making the client unreachable (assuming that she still had the same contact information).
- I used only the most barebones and common situational facts – a client asking whether to have independent contractors or employees in her small business.
- I was unable to make contact with the client.

<sup>221</sup> This is a follow up question of Question 1; the results recorded the answers of 13 respondents who selected “Yes” to Question 1.

ANSWER CHOICES	RESPONSES	
The risks to the client of the publication of the article	53.85%	7
The benefits to the client of the publication of the article	53.85%	7
The benefits to similarly situated clients of the publication of the article	61.54%	8
The right of the client to decline consent	84.62%	11
The right of the client to seek independent counsel before giving consent	7.69%	1
Other (please specify) <sup>222</sup>	30.77%	4
<b>TOTAL</b>		<b>13</b>

Q5: If your answer to Question 1 is “Yes,” did the client ask any questions before giving consent?<sup>223</sup>



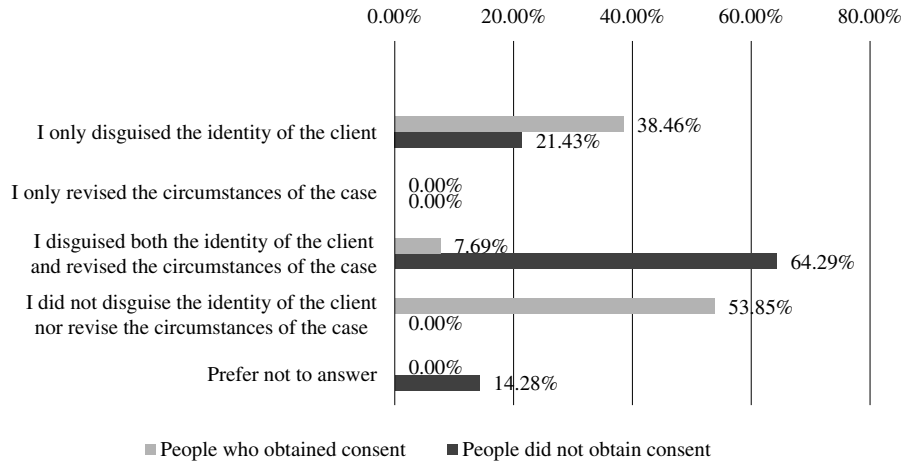
<sup>222</sup> The answers of the 4 respondents who selected “Other (please specify)” are listed as follows:

- The client’s response would not impact my representation in any way, and if the client declined to consent it would not even harm me as I could easily get another client (who had a similar case) to consent. Therefore, the client should not feel any pressure to consent.
- Sorry I didn’t keep better notes on conversations – it’s possible other issues were discussed and questions asked. Also, there were 2 cases/clients – client identity was disguised for one but disclosed for the other.
- I did not discuss risks or benefit, as I did not think there were either risks or benefits.
- The client had already published her own account of her case, which I referenced.

<sup>223</sup> This is a follow up question of Question 1; the results recorded the answers of 13 respondents who selected “Yes” to Question 1.

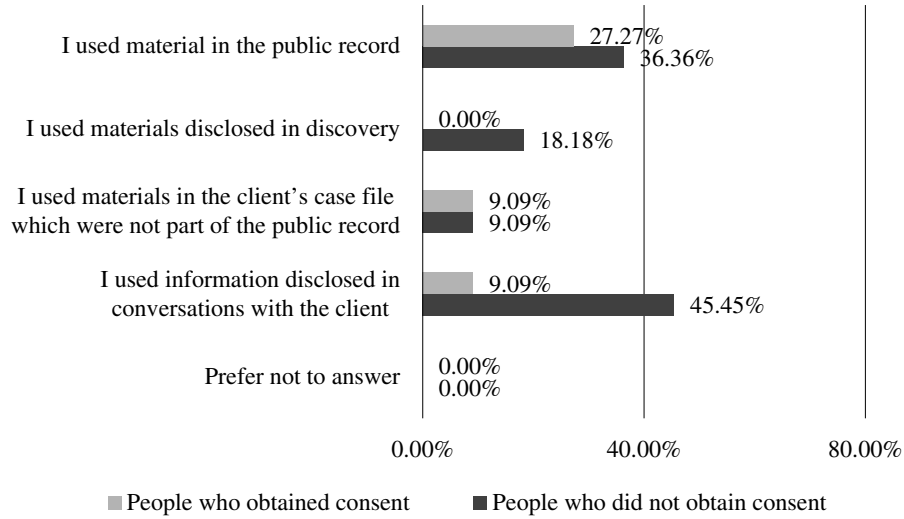
ANSWER CHOICES	RESPONSES	
	Yes	15.38%
No	76.92%	10
Prefer not to answer	7.70%	1
<b>TOTAL</b>		<b>13</b>

Q6: In your description of the case, which of these methods did you use?



ANSWER CHOICES	RESPONSE				TOTAL	
	PEOPLE WHO OBTAINED CONSENT		PEOPLE WHO DID NOT OBTAIN CONSENT			
I only disguised the identity of the client	38.46%	5	21.43%	3	29.63%	8
I only revised the circumstances of the case	0.00%	0	0.00%	0	0%	0
I disguised both the identity of the client and revised the circumstances of the case	7.69%	1	64.29%	9	37.04%	10
I did not disguise the identity of the client nor revise the circumstances of the case.	53.85%	7	0.00%	0	25.93%	7
Prefer not to answer	0.00%	0	14.28%	2	7.47%	2

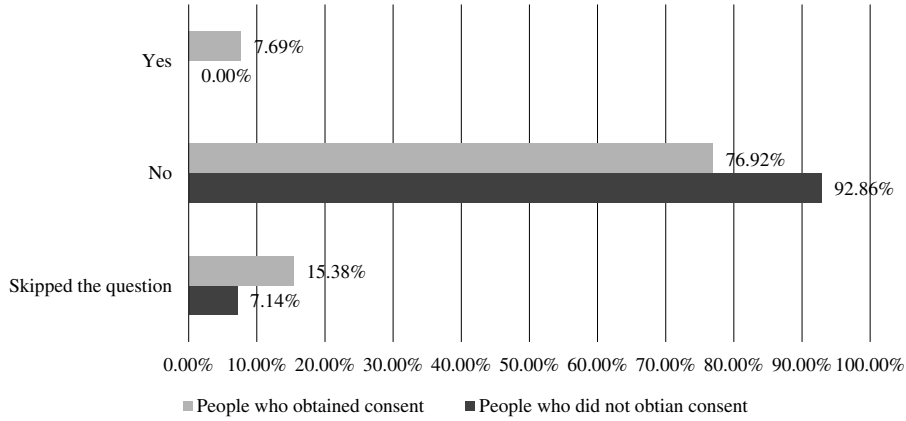
**Q7: In writing your case study, which of these materials did you use?  
(Answer all responses which are applicable)<sup>224</sup>**



ANSWER CHOICES	RESPONSE (SAMPLE SIZE: 11)					
	PEOPLE WHO OBTAINED CONSENT		PEOPLE WHO DID NOT OBTAIN CONSENT		TOTAL	
I used material in the public record	27.27%	3	36.36%	4	63.64%	7
I used materials disclosed in discovery	0.00%	0	18.18%	2	18.18%	2
I used materials in the client's case file which were not part of the public record	9.09%	1	9.09%	1	18.18%	2
I used information disclosed in conversations with the client	9.09%	1	45.45%	5	54.55%	6
Prefer not to answer	0.00%	0	0.00%	0	0.00%	0

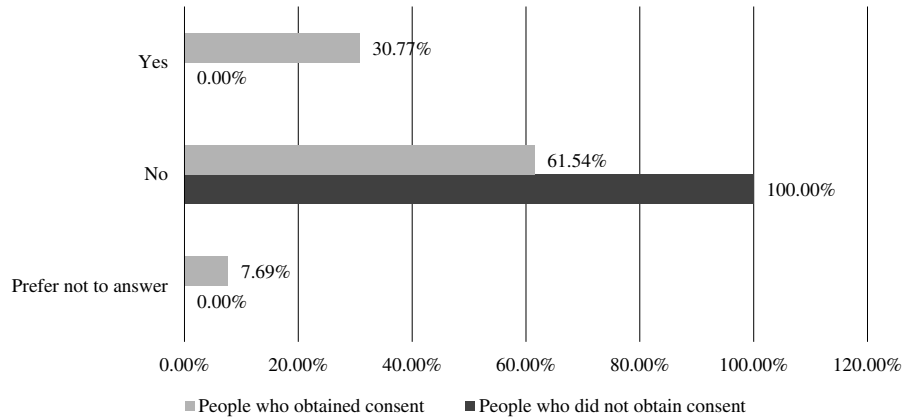
<sup>224</sup> This question was designed to allow respondents to select multiple answers, but there was a technical issue for the first 16 surveys that were sent out, in which respondents were only allowed to select one answer. The issue was later fixed, and 11 responses were received for the updated survey, the data above reflect the sample size of 11 respondents.

Q8: Did the journal which published your article require obtaining consent from the client for the case study?



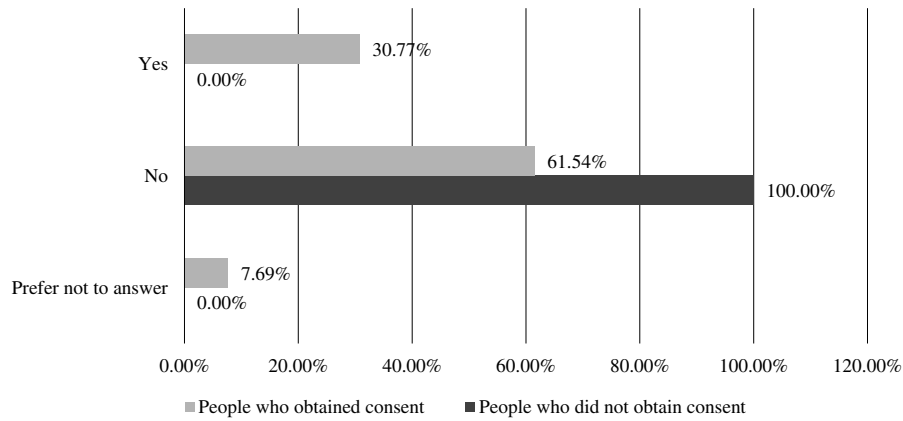
ANSWER CHOICES	RESPONSE					
	PEOPLE WHO OBTAINED CONSENT		PEOPLE WHO DID NOT OBTAIN CONSENT		TOTAL	
Yes	7.69%	1	0.00%	0	3.70%	1
No	76.92%	10	92.86%	13	85.19%	23
Prefer not to answer	15.38%	2	7.14%	1	1.11%	3

Q9: Did you show a draft of the article to your client before its publication?



ANSWER CHOICES	RESPONSE					
	PEOPLE WHO OBTAINED CONSENT		PEOPLE WHO DID NOT OBTAIN CONSENT		TOTAL	
Yes	30.77%	4	0.00%	0	14.81%	4
No	61.54%	8	100.00%	14	81.48%	22
Prefer not to answer	7.69%	1	0.00%	0	3.71%	1

Q10: Did you show a copy of the article to the client after its publication?



ANSWER CHOICES	RESPONSE					
	PEOPLE WHO OBTAINED CONSENT		PEOPLE WHO DID NOT OBTAIN CONSENT		TOTAL	
Yes	30.77%	4	0.00%	0	14.81%	4
No	61.54%	8	100.00%	14	81.48%	22
Prefer not to answer	7.69%	1	0.00%	0	3.70%	1

## APPENDIX B

## PROTOCOLS FOR THE PUBLICATION OF LEGAL CASE STUDIES

Assessing Appropriateness of Using a Case Study

- Determine whether the case study arises from a current client or a former client. A case study from a current client should only be considered for use in extraordinary circumstances.
- Determine whether the case study is being used to advance a public citizen goal of improving the legal system, improving the quality of lawyering, or improving legal education. If not, then the case study should not be used.
- Determine what self-interests of the author are being advanced by the use of the case study.
- If the case study is being used to advance a public citizen goal, consider whether the case study will actually assist in achieving that goal by any or all of the following: reader engagement; effective modeling; or evidentiary support for a proposition. If the case study will not assist in any of those ways, it should not be used.

Determining Content of a Case Study

- List the facts in the case study that might reasonably identify the client or the client's case either to the client, or to individuals who know the client or are familiar with the client's case. These facts include, but are not limited to, the following:
  - Client name
  - Names of other parties, witnesses, family members, or community members
  - Geographic identifiers (street address, city, county, zip code)
  - Dates of birth of client or other parties, witnesses, family members, or community members
  - Dates of case-related incidents directly related to client or other parties, witnesses, family members, or community members, such as dates of any incidents described
  - Contact information of client or other parties, witnesses, family members, or community members, including phone numbers, email addresses, and social media
  - Photographic or other images of client or other parties, witnesses, family members, or community members
  - For organizational clients, the nature of the organization's activities
  - Any other unique identifying characteristic of client or other parties, witnesses, lawyers, family members, or community members, that would render the case study identifiable to the

client or the client's community

- Determine which facts and what level of detail are material to the effective use of the case study to advance one or more identified public citizen goals.
- Remove or alter details that are not necessary for the effective use of the case study.

#### Obtaining Informed Consent

- Determine whether it is appropriate to ask for informed consent for the use of the case history. Consider the following factors:
  - The importance of using the case history to achieve public citizen goals
  - Whether the client is a current or former client
  - The potential impact of the request for informed consent on the lawyer-client relationship
  - Whether the use of the case study would undermine the stated goals of the client
  - Whether the stated goals of the client include making an impact beyond the client's own matter
  - The capacity of the client to make an independent judgment regarding the use of the case study
- When it is appropriate to ask for informed consent, the request should consist of the following:
  - A clear and detailed description of what aspects of the case study the lawyer would like to use
  - A clear and detailed description of potential risks of publishing the client's case, including any possibility that the client's case, if ongoing, might be jeopardized; the possibility that the client might gain unwanted attention; the possibility that the amount of information provided in the case history could lead to the discovery of other information about the client; and the possibility that that others might use the information for their own purposes
  - A clear and detailed description of the possible benefits, including positive publicity for the client's case, and broader societal benefits
  - A clear and detailed description of "reasonably available alternatives," including waiting until the case is finished, if the case is ongoing; using a hypothetical that fully disguises the client's identity; removing some details; and simply not using the case at all
  - Providing the client with at least a one-week timeframe in which to consider the request in order to ensure the client has



sufficient space and time after the request to minimize the chance she will feel undue pressure to provide consent

- Informing the client that she should strongly consider consulting with other trusted individuals, including other lawyers if she wishes, before deciding whether to provide consent
- For organizational clients, the lawyer's initial step will be to determine who is the appropriate individual to provide informed consent on behalf of the organization
- If the client provides informed consent, it should be in writing.
- If the case study is altered to provide different or additional facts after the client provides informed consent, a new written informed consent should be obtained, following the protocol above.
- After the case study is written and published, it should be provided to the client.

## APPENDIX C

## INFORMED CONSENT FOR [RESEARCH TOPIC]

My attorney, [name of attorney], informs me that [he/she/they] are studying the [topic of research]. As part of this study, [name of attorney] wants to describe work [he/she/they] performed in my [describe case].

Specifically, [name of attorney] wants to refer to work in my case in [describe the planned publication, e.g., law review article, book chapter, digital article, podcast]. In this article [he/she/they] will describe these aspects of my case: [provide details of the case which will be addressed].

In referring to my case, [name of attorney] [will/will not] disguise my identify.

This publication may benefit [identify possible readers of the publication, e.g., scholars, lawyers, and the general public] by [describe benefits].

The risk posed by this Project is [identify possible risks, e.g., that the client's name and information may be divulged to the public]. Since the specific details of the case are so important to understanding the events in the case, [name of attorney] can identify no reasonable alternative to describing your case in [describe publication].

[Name of attorney] also informs me that neither [he/she/they] nor any former legal intern will divulge any information that I told them not to disclose or that they reasonably believed I did not want disclosed.

I understand that I am under no obligation to consent to this publication.

[For present clients: [Name of attorney] has informed me that the decision whether to consent to this publication will not affect [his/her/their] representation of me.]

Before publication of [describe publication], [name of attorney] will submit a copy to me for approval. After publication of [describe publication], [name of attorney] will provide me with a copy of the publication.

Based on this information, I agree to the description of my case in [name of attorney's] proposed publication.

Date: \_\_\_\_\_

