

1994

Testing the Radical Experiment: A Study of Lawyer Response to Clients Who Intend to Harm Others

Leslie Levin

University of Connecticut School of Law

Follow this and additional works at: https://opencommons.uconn.edu/law_papers



Part of the [Legal Ethics and Professional Responsibility Commons](#), and the [Legal Profession Commons](#)

Recommended Citation

Levin, Leslie, "Testing the Radical Experiment: A Study of Lawyer Response to Clients Who Intend to Harm Others" (1994). *Faculty Articles and Papers*. 229.

https://opencommons.uconn.edu/law_papers/229

HEINONLINE

Citation: 47 Rutgers L. Rev. 81 1994-1995



Content downloaded/printed from
HeinOnline (<http://heinonline.org>)
Tue Aug 16 13:01:23 2016

- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <http://heinonline.org/HOL/License>
- The search text of this PDF is generated from uncorrected OCR text.
- To obtain permission to use this article beyond the scope of your HeinOnline license, please use:

[https://www.copyright.com/ccc/basicSearch.do?
&operation=go&searchType=0
&lastSearch=simple&all=on&titleOrStdNo=0036-0465](https://www.copyright.com/ccc/basicSearch.do?&operation=go&searchType=0&lastSearch=simple&all=on&titleOrStdNo=0036-0465)

TESTING THE RADICAL EXPERIMENT: A STUDY OF LAWYER RESPONSE TO CLIENTS WHO INTEND TO HARM OTHERS

*Leslie C. Levin**

There are many, or at least *several* occasions when a client gives indications that he/she *might* commit[] a violent/criminal act against another person. These situations are the toughest, most perplexing dilem[m]as that I face. In other words, I am not reasonably convinced that the client will definitely commit[] the act; I am reasonably convinced that he *might* commit the act. . . .[H]ow can anyone ever be sure? My worst fears have never been realized, but I live in dread that they may be.¹

The question of what, if anything, a lawyer should do when confronted with a client who intends to commit a criminal or fraudulent act that will seriously harm another is theoretically

* Associate Clinical Professor of Law and Director of the Lawyering Process Program, University of Connecticut School of Law. Columbia University School of Law, J.D. 1979. I would like to thank Dale Jones of the New Jersey Public Defenders' Office for assistance in distributing the survey instrument described in this Article. My thanks also go to Louise Roth for statistical assistance, Steven Kaplan for comments on an earlier draft and Peggy McKee and the staff of the New York University Lawyering Program for their administrative support in connection with the survey.

1. I.D. No. 193, Question A.C. (Additional Comments section). This quote is from a comment made by a New Jersey lawyer responding to a thirty-nine question mail survey. This survey is part of a study of how New Jersey lawyers respond to the problem of clients who plan to cause serious harm to others ("New Jersey study"). The survey is described in detail *infra* parts IV. A. & B. Tables containing specific frequencies and tabulations derived from the survey responses are cited in this article as "Table ____." Individual lawyers responding to the survey were assigned coded identification numbers, and their quotes are cited in this article as "I.D. No. __, Question ____." Only those tables and survey responses quoted in this article are on file with the *Rutgers Law Review*. All tables and survey responses are on file with the author.

challenging and as a practical matter, agonizingly difficult. Problems begin almost immediately, with questions about what to tell the client about the confidentiality of communications when the client's conversations turn to future criminal plans or fraudulent pursuits. The problems multiply as the lawyer tries to assess the likelihood that the wrongful act² will in fact occur and the seriousness of any harm that it might cause.

Once these questions are answered, the lawyer must then face the more difficult question of what to do. Efforts to convince the client to abandon the plans may alienate the client and—even worse—fail. A decision to alert the intended victim may subject the client to prosecution, prejudice the client in other proceedings and destroy the attorney-client relationship. While weighing the moral-philosophical implications of disclosure and non-disclosure, the attorney must also wrestle with competing self-interested considerations. These considerations include potential civil liability to third parties or clients,³ loss of business and reputation, and even personal danger,⁴ depending upon the lawyer's response to the client's plans.

Lawyers have not been left alone to struggle with their clients and their consciences. Codes of professional responsibility and to a lesser extent, other laws, have addressed this prob-

2. The terms "wrongful act" and "wrongdoing" are used in this article to mean a criminal, illegal or fraudulent act. It is, of course, possible that a lawyer will learn that a client intends to take some entirely lawful action that will cause substantial harm to a third party. No rule or professional responsibility code suggests that attorneys must prevent such an action and this article focuses on wrongful acts only.

3. Clients may have a claim for wrongful disclosure of client confidences. See, e.g., Alan B. Vickery, Note, *Breach of Confidence: An Emerging Tort*, 82 COLUM. L. REV. 1426, 1461, 1464-65 (1982). In addition, attorneys may have to contend with disciplinary proceedings. One attorney stated that she has been forced to respond to disciplinary charges that her client brought against her because she disclosed client information to prevent harm to another. Telephone Interview with Attorney A (June 24, 1993).

4. Attorney A, described in *supra* note 3, revealed a client's plans to physically harm a witness, and is concerned about her personal safety. She noted that even though her former client is now incarcerated, "he'll get out" and because she lives alone she said, "I'm nervous about it." Telephone Interview with Attorney A, *supra* note 3.

lem, but they reflect competing views of how lawyers should respond to client plans to commit wrongful acts. The "solutions" run the gamut from giving lawyers wide discretion to decide whether to disclose their clients' plans to giving them no apparent discretion whatsoever, other than quiet disobedience of the rules.⁵

The justifications for the varying approaches to the problem are based in large part upon assumptions about how lawyers and clients will behave when communications between lawyer and client are treated as confidential. While much has been written about the theoretical justifications underlying confidentiality and disclosure in this context,⁶ little has been done to test the underlying assumptions about how practitioners in fact behave when confronted with clients who intend to commit wrongful acts that will seriously harm others.⁷ Less is known about whether lawyers follow the rules that address this problem or whether they make their own rules.⁸

5. Compare MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101 (C) (1980) (lawyer may reveal intention of a client to commit a crime) with N.J. RULES OF PROFESSIONAL CONDUCT Rule 1.6(b) (1985) (lawyer must disclose when necessary to prevent criminal or fraudulent acts likely to result in substantial harm to others) and CAL. BUS. & PROF. CODE § 6068(e) (Deering 1993) (lawyer must maintain inviolate the confidences and secrets of the client).

6. See, e.g., David J. Fried, *Too High a Price for Truth: The Exception to the Attorney-Client Privilege for Contemplated Crimes and Frauds*, 64 N.C. L. REV. 443, 490-98 (1986); Harry I. Subin, *The Lawyer as Superego: Disclosure of Client Confidences to Prevent Harm*, 70 IOWA L. REV. 1091, 1159-75 (1985); Fred C. Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 351, 358-76 (1989); Note, *Developments in the Law - Privileged Communications*, 98 HARV. L. REV. 1450, 1501-24 (1985) [hereinafter *Developments*].

7. Only two studies provide some information about lawyer conduct in this context. KENNETH MANN, *DEFENDING WHITE-COLLAR CRIME* 111-23 (1985); Zacharias, *supra* note 6, at 389. Neither focused primarily on this subject.

8. Professor Susan Koniak has demonstrated how the bar's conception of the hierarchy of rules that bind it is different than the state's vision and that bar rules may at times be followed even when they conflict with rules created by courts or other non-bar entities. This is particularly true when client confidentiality is at stake. Susan P. Koniak, *The Law Between the Bar and the State*, 70 N.C. L. REV. 1389, 1411-47 (1992).

To explore these questions, New Jersey lawyers were surveyed to determine how they respond to clients who plan to commit wrongful acts that are likely to substantially harm others. New Jersey's Rules of Professional Conduct have been called an "openly radical experiment,"⁹ in part because New Jersey was the first state to adopt a rule of professional conduct *requiring* lawyers to disclose client information to prevent a client from committing a criminal, fraudulent or illegal act that would seriously harm another.¹⁰ New Jersey Rule of Professional Conduct (RPC) 1.6(b) was a radical departure from previous bar rules, which had only *permitted* lawyers to reveal client information to prevent future crimes.¹¹

Other states have followed New Jersey's lead and now require that lawyers disclose information to prevent clients from committing certain wrongful acts that will seriously harm others.¹² On the tenth anniversary of New Jersey's rule, it is time to revisit the experiment to consider the workability of mandatory disclosure rules in practice and to reflect upon what the experiment teaches about the assumptions underlying the rules governing lawyers when their clients plan to harm others.

This Article considers not only mandatory disclosure rules, but the other rules that govern attorney conduct when lawyers are confronted with clients who intend to commit serious wrongdoing. It begins with the rules governing lawyer confi-

9. 2 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT*, § AP4:104 at 1263-65 (2d ed. Supp. 1993) [hereinafter *THE LAW OF LAWYERING*]. The "radical experiment" included not only the requirement that lawyers disclose client information to prevent future crimes and fraud, but a requirement that lawyers disclose material facts where the tribunal may be misled by not knowing them, even if the lawyer and client did not mislead the court. *See infra* notes 49, 52 and accompanying text.

10. N.J. RULES OF PROFESSIONAL CONDUCT Rule 1.6(b) (1985) [hereinafter *RPC 1.6(b)*].

11. *See infra* notes 31-37, 44-45 and accompanying text.

12. Nine other states have adopted mandatory disclosure requirements to prevent clients from committing certain future wrongful acts. Most of them do not go as far as *RPC 1.6(b)* and are limited to disclosure to prevent death or substantial bodily harm. *See infra* note 55.

dentiality and disclosure in this context and their theoretical justifications. It then considers the empirical support for those rules, including the results of the New Jersey study. The New Jersey study is only a preliminary effort to explore this area,¹³ but the results of the study cast doubt on some of the justifications underlying mandatory disclosure rules. The results also suggest that more consideration must be given to what lawyers tell clients about mandatory disclosure rules and to whether broad disclosure rules are worth their price.

I. THE RULES GOVERNING ATTORNEYS WHEN THEIR CLIENTS INTEND TO HARM OTHERS

The laws and rules governing attorneys when they learn that their clients are planning to commit wrongful acts consist of a patchwork of evidentiary privilege, common law duties, miscellaneous statutes and professional responsibility rules. To understand lawyer response to such client plans, it is useful to briefly identify those laws and rules, beginning with the attorney-client privilege which informs so much bar tradition.

A. *The Attorney-Client Privilege*

The attorney-client privilege is too well known to warrant extended discussion. It protects against the use of legal process to compel disclosure of communications made in confidence by a client to a lawyer relating to the subject of the representation.¹⁴ To enjoy the status of a privileged communication, the communication must be made for the purpose of obtaining legal advice.¹⁵

The justifications for the attorney-client privilege can be roughly classified as rights-based and utilitarian.¹⁶ The

13. The New Jersey study is the largest of its kind, but it is not based on a completely random sample, see *infra* notes 108-12, 126 and accompanying text, and should be viewed as a preliminary effort to explore this area.

14. 8 JOHN H. WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2290 (McNaughton rev. 1961). See also *Developments*, *supra* note 6, at 1456 & n.10.

15. 8 WIGMORE, *supra* note 14, § 2292 at 554. See also Subin, *supra* note 6, at 1113.

16. The justifications have also been described as "utilitarian" and

rights-based justifications relate directly to the client's privacy and personal autonomy.¹⁷ The utilitarian justifications are based largely on assumptions about the benefits to the client and to society of full and free communication between lawyer and client. Those benefits include improved legal representation because the trust relationship between the attorney and client encourages the client to feel free to convey all relevant facts to an attorney.¹⁸ In addition, clients will seek legal advice about questionable conduct and lawyers will encourage their clients to act within the law and discourage them from acting in violation of the law.¹⁹

The attorney-client privilege does not protect the communications of a client who consults an attorney for advice that will serve the client in the commission of a crime or fraud.²⁰ The crime-fraud exception to the privilege applies both to communications with an attorney concerning future crimes or fraud, and communications concerning wrongful acts that are already

"non-utilitarian," *Developments*, *supra* note 6, at 1501-09; as "instrumental" and "rights-based," Subin, *supra* note 6, at 1159-72; and as "deontological" and "utilitarian," Lee A. Pizzimenti, *The Lawyer's Duty to Warn Clients about Limits on Confidentiality*, 39 CATH. U. L. REV. 441, 444 (1990).

17. The rights-based justifications focus on the client's rights and on the notion that the client is entitled to know the law and to obtain assistance from a lawyer in dealing with a complicated legal system. *See, e.g.*, Subin, *supra* note 6, at 1160. Confidentiality also insures that the lawyer will not make disclosures that may harm the client, effectively disclosing a client's self-incriminating statements. For a discussion of the relationship between the attorney-client privilege and the constitutionally-protected right to avoid self-incrimination, see *id.* at 1120-34.

18. Attorneys are thought to need these communications to provide their clients with effective representation and to produce a more just result in the representation, which is a positive societal goal. Zacharias, *supra* note 6, at 358.

19. For critiques of the rights-based and utilitarian defenses of confidentiality, see Subin, *supra* note 6, at 1160-72; Zacharias, *supra* note 6, at 359-76.

20. *See Developments*, *supra* note 6, at 1457 & n.18. Wigmore states that "it has been agreed from the beginning" that the privilege does not protect the client in concerting with the lawyer a crime or other evil enterprise. 8 WIGMORE, *supra* note 14, § 2298 at 572. *See Fried*, *supra* note 6, at 446-89, for general background regarding the crime-fraud exception to the attorney-client privilege.

in progress.²¹ The client's intent usually determines whether the exception applies, that is, whether the client knowingly sought the attorney's aid in committing or concealing a crime or fraud.²² The crime-fraud exception applies even if the attorney has no knowledge of the wrongful activity.²³

The exception is justified on the ground that protecting communications about planned crime or fraud does not achieve the objectives of the attorney-client privilege.²⁴ Since there is little societal interest in fostering client communications with a lawyer which were made with the intent to further a crime or fraud, the balance tips toward disclosure.

The crime-fraud exception addresses only the issue of testimonial compulsion—usually after wrongdoing has occurred—and not the question of what an attorney should do when faced with knowledge that a client is about to commit a wrongful act. That question is answered to a limited extent by case law, statutes and state professional responsibility codes.

B. Laws Requiring Disclosure to Prevent Harm to Others

Traditionally, lawyers, like the general public, have no legal obligation to take steps to prevent a future crime or fraud.²⁵

21. *Developments*, *supra* note 6, at 1509-10. In contrast, communications about wrongful acts that have been completed are protected by the attorney-client privilege. *Id.* at 1510 n.50. See also 8 WIGMORE, *supra* note 14, § 2298, at 573; THE LAW OF LAWYERING, *supra* note 9, §1.6:104 at 138.

22. Subin, *supra* note 6, at 1115. In fact, the exception seems to apply regardless of the client's purpose when consulting the attorney, if the client subsequently commits a crime or fraud aided by the attorney's advice. See Fried, *supra* note 6, at 459 & n.70. See also *Developments*, *supra* note 6, at 1512-13.

23. Subin, *supra* note 6, at 1114.

24. *Developments*, *supra* note 6, at 1510. In addition, the client has no "right" to engage in wrongful activity and no right to use a lawyer's services to facilitate that activity. Subin, *supra* note 6, at 1162.

25. The law generally does not require lay persons to make disclosures in order to prevent a future crime that will result in physical harm to others. Indeed, in most states they need not take steps to prevent a crime as it happens, even if it would require relatively little for them to do so. Daniel B. Yeager, *A Radical Community of Aid: A Rejoinder to Opponents of Affirmative Duties to Help Strangers*, 71 WASH. U. L.Q. 1, 5-8 (1993).

Courts have generally declined to impose obligations on lawyers to prevent wrongful client acts in which the lawyers are not involved.²⁶ Where the lawyers knowingly lend assistance to client wrongdoing, they will be subject to common law liability on an agency theory for failure to disclose client information to prevent a client from committing wrongful acts.²⁷

Although Congress has considered imposing statutory duties on lawyers to disclose information that may include client confidences in order to prevent future harm to others, it has been reluctant to do so.²⁸ State legislatures have been only slightly more willing to impose a duty to disclose. For example, while lawyers in some states have an obligation to disclose past or ongoing child abuse, few states obligate lawyers to

26. There are some individuals who have special duties to prevent imminent physical harm because they have special relationships with the persons who may cause harm to others. The most well-known example is mental health professionals, who in some states have a duty to act to prevent their patients from causing serious physical harm to others. *E.g.*, *Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 334 (Cal. 1976). Parents of minor children, masters of their servants and persons "in charge" of another with dangerous propensities also have special relationships giving rise to a duty to control the conduct of another to prevent harm to third parties. See E.L. Kellett, Annotation, *Private Person's Duty and Liability for Failure to Protect Another Against Criminal Attack by Third Person*, 10 A.L.R.3d 619, 623 (1966 & Supp. 1993). These duties to take steps to prevent serious bodily harm to a third party have not been extended to lawyers. *E.g.*, *Seibel v. City & County of Honolulu*, 602 P.2d 532 (Haw. 1979); *Hawkins v. King County Dep't of Rehabilitative Servs.*, 602 P.2d 361 (Wash. 1979).

It is possible that in the future, courts may hold lawyers liable for failure to prevent future harm based upon bar code obligations to disclose. One court has found a duty to disclose fraud based on disclosure requirements contained in a state bar code. See *Philadelphia Reserve Supply Co. v. Nowalk & Assoc., Inc.*, 1992 U.S. Dist. LEXIS 12745 (E.D. Pa. Aug. 25, 1992). But see *Schatz v. Rosenberg*, 943 F.2d 485, 492 (4th Cir. 1991) (holding alleged violation of ethical rule did not create duty to disclose), *cert. denied*, 112 S. Ct. 1475 (1992).

27. See Geoffrey C. Hazard, Jr., *Lawyers and Client Fraud: They Still Don't Get It*, 6 GEO. J. LEGAL ETHICS 701, 706-07 (1993). As Professor Hazard notes, client fraud may also entail accessorial civil liability for a lawyer who is merely negligent. *Id.* at 707.

28. Senator Arlen Specter proposed the Lawyer's Duty of Disclosure Act of 1983, S. 485, 98th Cong., 1st Sess. (1983). The Act never made it out of the Senate Judiciary Committee.

reveal a belief about future abuse.²⁹ Regulatory agencies such as the Securities and Exchange Commission and the Office of Thrift Supervision have pursued lawyers for failure to disclose client information to prevent serious financial injury, but they have not done so where the lawyers were not allegedly assisting the wrongful activity.³⁰ Lawyers confronted with clients who are contemplating future wrongdoing must often look to their consciences and to the applicable state codes of professional responsibility to decide what to do.

C. Professional Responsibility Codes

1. The ABA Codes

Prior to 1983, the ABA bar codes required lawyers to maintain client confidences, but permitted them to disclose the intention of a client to commit a crime.³¹ Lawyers were not permitted to reveal a client's intention to commit a non-criminal fraud, although they were required to reveal a fraud or

29. See generally Robert P. Mosteller, *Child Abuse Reporting Laws and Attorney-Client Confidences: The Reality and the Specter of Lawyer as Informant*, 42 DUKE L.J. 203, 217-21, 244-55 (1992).

30. See generally Geoffrey C. Hazard, Jr., *Lawyer Liability in Third Party Situations: The Meaning of the Kaye Scholer Case*, 26 AKRON L. REV. 395, 400-06 (1993); Richard M. Phillips, *Client Fraud and the Securities Lawyer's Duty of Confidentiality*, 49 WASH. & LEE L. REV. 823, 827 (1992).

31. Canon 37 announced the "duty of a lawyer to preserve his client's confidences," but explicitly permitted an attorney to disclose the announced intention of a client to commit a crime. See CANONS OF PROFESSIONAL ETHICS Canon 37 (1928).

The ABA Model Code of Professional Responsibility, which was adopted in some form by virtually every state, permitted lawyers to reveal "the intention of a client to commit a crime and the information necessary to prevent the crime," regardless of the seriousness of the crime. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C) (1970) [hereinafter CPR]. Although the official footnotes to the Code of Professional Responsibility suggested that a lawyer was *required* to make disclosure to prevent crimes under certain circumstances, Professor Hazard has suggested, probably correctly, that in practice it was generally understood that only "serious" crimes qualified for disclosure and that there was no mandatory disclosure requirement even in serious cases. See THE LAW OF LAWYERING, *supra* note 9, §1.6:302 at 165.

perjury that had already occurred in the course of the representation.³²

In the late 1970's, the ABA's Kutak Commission, which was charged with drafting new proposed Model Rules of Professional Conduct, prepared a Discussion Draft *requiring* disclosure of client information to prevent substantial bodily harm to another. This proposal provoked such controversy³³ that the Kutak Commission ultimately recommended in its Proposed Final Draft that attorneys be *permitted* to disclose client confidences when necessary to prevent a client from committing a criminal or fraudulent act that was likely to result in substantial bodily harm or injury to the financial interest or property of another.³⁴

32. See CANONS OF PROFESSIONAL ETHICS Canons 29, 41 (1937). Subsequent ABA ethics opinions significantly eroded the force of the disclosure requirements set out in Canons 29 and Canon 41 based on the perceived importance of maintaining client confidences. See Koniak, *supra* note 8, at 1431-34.

When the ABA adopted the Model Code of Professional Responsibility it included in DR 7-102(B)(1) the requirement that lawyers disclose information to avoid a fraud or perjury on a person or tribunal that occurred in the course of the representation. In 1974, the ABA amended Rule 7-102(B) to add that disclosure must be made unless the information was protected as a "privileged communication." This exception virtually eliminated the disclosure obligation. Many states, including New Jersey, did not adopt this amendment. *E.g.*, N.J. CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(B)(1) (1983).

33. The controversy began in earnest in August 1979 when Professor Monroe Freedman, an outspoken proponent of strict confidentiality, disclosed to the press the Kutak Commission's Discussion Draft, which required lawyers to disclose client confidences in order to prevent death or serious bodily harm and permitted disclosure to prevent or rectify a "deliberately wrongful act." See Ted Schneyer, *Professionalism as Bar Politics: The Making of the Model Rules of Professional Conduct*, 14 LAW & SOC. INQUIRY 677, 702 (1989). In response, the American Trial Lawyers' Association began to draft an alternative code. The Kutak Commission ultimately dropped the proposal concerning mandatory disclosure. *Id.* at 710-12.

34. The Proposed Final Draft Rule 1.6(b) stated in part that a lawyer may reveal information to the extent the lawyer reasonably believes necessary:

(2) to prevent the client from committing a criminal or fraudulent act that the lawyer believes is likely to result in death or substantial injury to the financial interest or property of another;

The ABA House of Delegates declined to adopt the Kutak Commission's proposal.³⁵ Instead, in early 1983, the ABA adopted an amendment to Rule 1.6 which narrowed the discretion previously left to lawyers by permitting an attorney to reveal client information only to the extent necessary to prevent a client from committing criminal acts likely to result in imminent death or substantial bodily harm.³⁶ Lawyers were not permitted to reveal the intention of a client to commit criminal or fraudulent acts likely to result in substantial financial injury or property damage.³⁷

The ABA Model Rules of Professional Conduct have been adopted in some form in the majority of the states.³⁸ Although it made some significant modifications, New Jersey was the first state to consider and adopt some form of the Model Rules.

(3) to rectify the consequences of a client's criminal or fraudulent act in the commission of which the lawyer's services had been used.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (Proposed Final Draft 1981).

35. During the February 1983 mid-year meeting, following a heated debate, the American College of Trial Lawyers offered an amendment to Model Rule 1.6 which by a 207-109 vote eliminated those provisions of Rule 1.6(b) which permitted lawyers to disclose the intention of a client to commit "fraudulent" acts or to disclose client information in order to prevent substantial injury to the financial interest or property of another. See ELAINE REICH, ABA CENTER FOR PROFESSIONAL RESPONSIBILITY, THE LEGISLATIVE HISTORY OF THE MODEL RULES OF PROFESSIONAL CONDUCT: THEIR DEVELOPMENT IN THE HOUSE OF DELEGATES 48 (1987).

36. Model Rule 1.6(b) provides that a lawyer may reveal information to the extent the lawyer reasonably believes necessary

(1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm.

MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6(b)(1) (1983).

37. The only disclosure that could be made concerning client fraud appeared in Model Rule 3.3, entitled "Candor Toward the Tribunal," which provided that a lawyer shall not knowingly fail to "disclose a material fact to a tribunal when disclosure is necessary to avoid assisting" a client's criminal or fraudulent act. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(a)(2)(1983).

38. At least 35 states have adopted some form of the Model Rules. THE LAW OF LAWYERING, *supra* note 9, § AP4:101 at 1255. Model Rule 1.6 is the section most often revised by the states. *Id.* § AP4:102 at 1257-59.

2. *New Jersey's Rules of Professional Conduct: The Radical Experiment*

In July 1982, in the midst of the controversy surrounding the Kutak Commission's proposals, the New Jersey Supreme Court appointed a committee to recommend whether the ABA's proposed Model Rules should be adopted in New Jersey.³⁹ The following year, the Debevoise Committee⁴⁰ proposed that Model Rule 1.6 be revised to *require* an attorney to disclose client information if necessary to prevent the client from committing a criminal or fraudulent act likely to result in death or substantial bodily injury.⁴¹ It also recommended that a lawyer be *permitted* to reveal information to prevent criminal or fraudulent acts likely to result in substantial injury to the financial interest or property of another.⁴²

This proposed rule went even farther than the highly controversial Kutak Commission's Proposed Final Draft, which had been rejected a few months earlier by the ABA House of Delegates. Perhaps because of this controversy, the Committee felt compelled to note in its report that the Kutak proposal was "by no means [a] radical departure[] from New Jersey's present Disciplinary Rules."⁴³

In fact, the Debevoise Committee's own proposal concerning disclosure of future client wrongdoing was something of a "radical departure" from the existing rules. Although New Jersey's then-existing professional responsibility rules permitted lawyers to reveal the intention of a client to commit a crime,⁴⁴

39. See *Report of the New Jersey Supreme Court Committee on the Model Rules of Professional Conduct*, 112 N.J. L.J. 93 (Supp. 1983).

40. The 20-person committee, chaired by United States District Court Judge Dickinson R. Debevoise, was comprised largely of the mainstream New Jersey legal establishment. The Committee included four judges, three law professors, one law school dean, a vice president of the New Jersey State Bar Association, the president of Legal Services Corporation, and two prominent non-lawyers. *Report*, *supra* note 39, Supp. at 1 (1983).

41. See *Report*, *supra* note 39, Supp. at 10 (1983).

42. The Committee's recommendation mirrored the balance of the Kutak Commission's Proposed Final Draft Rule 1.6, including that disclosure be permitted to rectify the consequences of a client's wrongful acts in the furtherance of which the lawyer's services had been used. *Id.*

43. *Id.* at 9.

44. N.J. CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C) (1983).

never before had there been any *requirement* that an attorney disclose a client's intention to commit a crime, no matter how heinous. Moreover, New Jersey's existing rules did not permit lawyers to reveal a client's future plans to commit non-criminal fraud.⁴⁵

The Committee sought to bolster its recommendation by relying upon New Jersey Supreme Court pronouncements that when balancing the conflicting principles of full disclosure versus confidentiality, "public policy demands that full disclosure is the more fundamental principle."⁴⁶ The Committee also reasoned that "any step less than acceptance by the bar of proposed Rule 1.6 will diminish the public's esteem for the legal profession."⁴⁷ Due possibly in part to concern about the public's particularly low opinion of lawyers at that time, the New Jersey State Bar Association endorsed the Committee's mandatory disclosure proposal.⁴⁸

45. At that time, New Jersey's Code of Professional Responsibility required disclosure of client fraud only when the lawyer learns the "client has, in the course of the representation, perpetrated a fraud upon a person or tribunal." N.J. CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(B)(2) (1983).

46. *Report*, *supra* note 39, Supp. at 10 (1983). The Committee cited *In re Kozlov*, 398 A.2d 882 (N.J. 1979) and *In re Richardson*, 157 A.2d 695 (N.J. 1960). It is not surprising that the balance was struck in favor of disclosure in those cases, since they involved communications that fell within the well recognized crime-fraud exception to the attorney-client privilege. There were not, however, any prior opinions which required lawyers to disclose the intention of their clients to commit a crime.

47. *Report*, *supra* note 39, Supp. at 10 (1983). The Committee had good reason to be concerned about the public's esteem given the bad press that lawyers were receiving at that time. In 1983, the OPM case was in the news, the ABA's Model Rules were receiving mixed reviews and a Gallup Poll revealed that the public rated funeral directors as having higher ethical standards than lawyers. *E.g.*, Stephen P. Doyle et al., *Trustee's Criticism of Lawyers in O.P.M. Imbroglio*, LEGAL TIMES, May 2, 1983, at 20; Stephen Gillers, *Lawyers' Silence: Wrong . . .*, N.Y. TIMES, Feb. 14, 1983, at A17; *Honesty and Ethical Standards--Overview*, GALLUP OPINION INDEX 4 (1983).

48. See New Jersey State Bar Association Special Committee on Model Rules of Professional Conduct, Report on the Proposed Model Rules of Professional Conduct 2, 4 (Dec. 9, 1983) (copy on file with the *Rutgers Law Review*).

When the New Jersey Supreme Court adopted its new Rules of Professional Conduct in 1984, it took the Debevoise Committee's recommendations two steps farther. RPC 1.6(b) required that an attorney disclose information necessary to prevent a client from committing a criminal, fraudulent or illegal act that is likely to result in death or substantial bodily harm to another or *in substantial injury to the financial interest or property* of another.⁴⁹ The Court provided no specific explanation of its reasons for adopting mandatory disclosure requirements or for its decision to expand the disclosure requirements to the prevention of non-bodily harm.⁵⁰

In a statement accompanying the release of the new rules, Chief Justice Robert N. Wilentz explained, "[w]e believe that

Another explanation for the bar's acquiescence to this change in the rules is that the legal culture of the organized bar in New Jersey was different than the legal cultures represented in the ABA House of Delegates. This difference is suggested in an editorial a few months earlier in which the *New Jersey Law Journal* expressed clear disapproval of the ABA's rejection of the Kutak proposal. The newspaper noted: "The wringing of legal hands at the House of Delegates seems shocking. We in New Jersey are doing our duty to our clients and courts and at the same time serving a standard of conduct higher than that rejected by the A.B.A." *Attorney's Duty to Report Client Fraud*, 111 N.J. L.J. 329, 332 (1983). See also Bruce Rosen, *Lawyer-Client Rules Toughened*, THE BERGEN RECORD, July 20, 1984, at A1, A16 (noting that while trial lawyers fought for the adoption of the ABA Model Rules in other states, "there was no such move in New Jersey").

49. The rule provides:

(b) A lawyer shall reveal such information to the proper authorities, as soon as, and to the extent the lawyer reasonably believes necessary, to prevent the client

(1) from committing a criminal, illegal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm or substantial injury to the financial interest or property of another.

RPC 1.6(b)(1). Another unexpected and controversial addition to the New Jersey Rules of Professional Conduct was RPC 3.3(a)(5), which stated that a lawyer shall not knowingly "fail to disclose to the tribunal a material fact with knowledge that the tribunal may tend to be misled by such failure."

50. See Administrative Office of the Courts: State of New Jersey, Press Release on the Rules of Professional Conduct (July 19, 1984) (copy on file with the *Rutgers Law Review*); Comment to RPC 1.6, 114 N.J. L.J. 53 (Supp. at 3) (1984).

these new Rules of Professional Conduct represent sound principles that protect the public and the integrity of the legal profession and maintain New Jersey's position as a leader in setting and upholding high professional standards."⁵¹ The New Jersey bar voiced no opposition to RPC 1.6(b), even though it contained the most far-reaching disclosure requirements of any attorney code of conduct in the country.⁵² The new rules were hailed by some as a welcome reordering of priorities⁵³ and criticized by others as "an extremely unfortunate development."⁵⁴ Thus, a radical experiment commenced.⁵⁵

51. Press Release, *supra* note 50.

52. See Robert G. Seidenstein, *Lawyers Required to Report Illicit Plots of Clients*, STAR LEDGER, July 20, 1984, at 17; Judy Rotholz, *Court: Lawyers Must Snitch on Clients*, THE TRENTONIAN, July 20, 1984, at 1. The bar may have been silent about Rule 1.6 because it was so concerned about RPC 3.3(a)(5). See *supra* note 49. The latter rule was the subject of a letter from the Trustees of the State Bar Association to the New Jersey Supreme Court, stating that that rule had generated "near universal concern" and asking that the Court withhold its implementation. Letter from Raymond R. Trombadore, First Vice President, New Jersey State Bar Association, to the Supreme Court of New Jersey 2 (Aug. 9, 1984) (copy on file with the *Rutgers Law Review*).

53. One member of the Debevoise Committee described the reordering of priorities:

The New Jersey Rules place the public interest before the interests of both clients and lawyers, and the interests of clients ahead of those of lawyers. . . . Although traditional adversary ethics (reflected in former rules) provide a legal and, perhaps, a moral justification to ignore the public interest when pursuing the interests of a client, the New Jersey Rules clearly do not. [footnotes omitted]

Michael P. Ambrosio, *The "New" New Jersey Rules of Professional Conduct: Reordered Priorities for Public Accountability*, 11 SETON HALL LEGIS. J. 121, 130 (1987).

54. See Bruce S. Rosen, *New Jersey Adopts Code Tougher than ABA's*, NAT'L L.J., Aug. 6, 1984, at 3 (remarks of John C. Elam, past president of American College of Trial Attorneys).

55. Subsequently, Arizona, Connecticut, Florida, Illinois, Nevada, North Dakota, Texas, Virginia and Wisconsin adopted mandatory disclosure requirements to prevent serious bodily harm. Florida and Virginia require disclosure when lawyers learn that a client plans to commit *any* crime. FLA. RULES OF PROFESSIONAL CONDUCT Rule 4-1.6 (1992); VA. CODE OF PROFESSIONAL RESPONSIBILITY DR #4-101(D) (1994). Wisconsin's rule is similar to New Jersey's RPC 1.6. See WIS. RULES OF PROFESSIONAL CON-

II. THE JUSTIFICATIONS FOR CONFIDENTIALITY AND DISCLOSURE RULES WHEN CLIENTS PLAN TO CAUSE HARM

Before considering the responses of New Jersey lawyers to clients who plan to harm others, it is useful to identify briefly some of the theoretical justifications for confidentiality and disclosure under both mandatory and permissive schemes.⁵⁶ Those justifications are infused with intuitive assumptions about the ways in which attorneys and clients behave when lawyers are confronted with clients who are likely to seriously harm others.

A. The Rationale For "Strict" Confidentiality

Proponents of strict confidentiality⁵⁷ view the lawyer as the client's defender against the world and rely heavily on the same justifications supporting the attorney-client privilege.⁵⁸

DUCT FOR ATTORNEYS SCR 20:1.6 (1988).

56. There is no dearth of law review articles analyzing the theoretical justifications for attorney confidentiality when clients plan to commit future wrongdoing. See *supra* note 6. See also Kenneth J. Drexler, Note, *Honest Attorneys, Crooked Clients and Innocent Third Parties: A Case for More Disclosure*, 6 GEO. J. LEGAL ETHICS 393, 405-13 (1992); Timothy J. Miller, Note, *The Attorney's Duty to Reveal a Client's Intended Future Criminal Conduct*, 1984 DUKE L.J. 582, 592-600 (1984). The purpose of this section is to move the discussion beyond critiques of strict confidentiality and to take a look at the rationales for disclosure.

57. When commentators analyze the justifications for confidentiality, they often assume a "strict confidentiality" model. *E.g.*, Subin, *supra* note 6, at 1159-72; Zacharias, *supra* note 6, at 359-70. In fact, only one state seems to require lawyers to maintain strict confidentiality even when a client intends to cause serious bodily harm to another. CAL. BUS. & PROF. CODE § 6068(e) (Deering 1993). See also San Diego County Bar Association Legal Ethics and Unlawful Practices Committee Opinion 1990-1, 6 Laws. Man. on Prof. Conduct (ABA/BNA) 394 (1990) (lawyers are prohibited from disclosing a client's intention to kill an informant). Forty-two states permit or require lawyers to disclose client information to prevent future financial and property crimes. Drexler, *supra* note 56, at 405 n.61. At this point, the debate within the bar is not about "strict" confidentiality, but is largely a debate over the proper scope of the exceptions. See THE LAW OF LAWYERING, *supra* note 9, §1.6:102 at 130.

58. See *supra* notes 16-19 and accompanying text. See also MONROE H. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* 5 (1975). See generally Marvin E. Frankel, *The Search for Truth Continued: More Dis-*

They contend that confidentiality exceptions will interfere with the development of client trust and will discourage clients from using or freely communicating with their counsel.⁵⁹ In essence, if clients know that a communication about future wrongdoing may be disclosed, then other important communications may not occur.

In addition to this broad based concern, the "more focused" argument for strict confidentiality is that a confidentiality requirement will in fact help prevent serious harm to the public.⁶⁰ The reasoning is as follows: (1) client confidentiality encourages clients to tell their lawyers that they are contemplating wrongful acts; (2) lawyers who learn of these plans will try to dissuade their clients; and (3) lawyers who try to dissuade their clients from wrongdoing will succeed.⁶¹ Confidentiality proponents argue that if the client is deterred from communicating with counsel about those future plans by fear of attorney disclosure, then the attorney will not have the opportunity to prevent the wrongful act.

Another justification for strict confidentiality is that it promotes client autonomy. It is widely agreed that clients are entitled to know about exceptions to client confidentiality rules in order to make informed decisions about whether to disclose information to their counsel.⁶² Confidentiality proponents argue that as a practical matter, lawyers do not tell clients about the exceptions to confidentiality rules.⁶³ Strict confidentiality

closure, Less Privilege, 54 U. COLO. L. REV. 51, 62 (1982).

59. See *id.* See generally DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 189-90 (1988). For example, even clients who have no plans to commit wrongful acts may be deterred from communicating fully with their lawyers because they cannot make the fine distinctions that lawyers must make between future, past and ongoing wrongdoing.

60. See *THE LAW OF LAWYERING*, *supra* note 9, § AP4:104 at 1263.

61. See, Subin, *supra* note 6, at 1166; Zacharias, *supra* note 6, at 369-70; MODEL RULES Rule 1.6 cmt.

62. See, e.g., Drexler, *supra* note 56, at 408; W. William Hodes, *The Code of Professional Responsibility, The Kutak Rules and the Trial Lawyer's Code: Surprisingly, Three Peas in a Pod*, 35 U. MIAMI L. REV. 739, 786 (1981); Pizzimenti, *supra* note 16, at 481-83; Roy M. Sobelson, *Lawyers, Clients and Assurances of Confidentiality: Lawyers Talking Without Speaking, Clients Hearing Without Listening*, 1 GEO. J. LEGAL ETHICS 703, 711 (1988); Subin, *supra* note 6, at 1166.

63. This argument is supported by existing empirical research. See

thus promotes client autonomy because it causes lawyer's actions to conform to client expectations that lawyers will maintain confidentiality.⁶⁴

B. The Rationale For Mandatory Disclosure

Proponents of disclosure devote much of their effort to demonstrating why the justifications for strict confidentiality do not bear up under scrutiny.⁶⁵ Perhaps their strongest argument is that there is no evidence that clients are discouraged from talking with their lawyers as a result of exceptions to confidentiality rules, and that pure self interest would cause clients to talk.⁶⁶ They also question whether and to what extent lawyers dissuade their clients from committing wrongful acts.⁶⁷

infra text accompanying note 95.

64. Zacharias, *supra* note 6, at 367-68.

65. *E.g.*, Subin, *supra* note 6, at 1159-72; *See generally*, Zacharias, *supra* note 6, at 361-76.

66. As Professor Simon has noted:

People would have ample incentives to disclose adverse information to counsel even without confidentiality safeguards because they are honest and law abiding, because they cannot make reliable judgments about when it is in their interests to withhold, or because in many business contexts they risk liability by failing to seek good legal advice.

William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1142 (1988). *See also* Bruce M. Landesman, *Confidentiality and the Lawyer-Client Relationship in THE GOOD LAWYER* 208 (David Luban ed. 1983); *Developments*, *supra* note 6, at 1474, 1476; Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589, 614 (1985); Subin, *supra* note 6, at 1163-65.

67. *See* Subin, *supra* note 6, at 1166-68 ("[e]ven assuming that lawyers regularly advise their clients to adhere to the law, it does not necessarily follow that lawyers are effective as law enforcers"). *See also* authorities cited in Zacharias, *supra* note 6, at 369 n.83. *But see* Fried, *supra* note 6, at 492 n.275.

A third argument against strict confidentiality is that lawyers do not need complete client candor and that it should not be encouraged at the cost of silencing lawyers so that they cannot prevent harm to third parties. In fact, there is some evidence that lawyers believe that they do not need to know everything that their clients might tell them in order to provide adequate representation. *See* Zacharias, *supra* note 6, at 367. While lawyers probably do not need to know everything their clients

While these points deserve serious consideration, they do not explain why there should be *mandatory* disclosure rules, particularly when most states do not require the public to act to prevent harm to others.⁶⁸ Considering that ten states currently require disclosure of client information to prevent some types of prospective client harm to a third party,⁶⁹ it is appropriate to ask what are the justifications for requiring lawyers to disclose client confidences in order to prevent a client from seriously harming another?

One major reason for disclosure of client information in this context is to prevent harm to third parties.⁷⁰ It seems one of the justifications for a disclosure *requirement* is that the privilege conferred on lawyers to practice law, and the lawyer's role as an officer of the court, give rise to an obligation to protect the public from a client who intends to cause serious harm.⁷¹ Society's interests are judged to outweigh the client's interests when the client is contemplating future wrongdoing.⁷² The broader philosophical justification for mandatory disclosure is that a moral society requires this result.⁷³

Disclosure proponents also offer other, related arguments to support their position. They contend that lawyers should be required to disclose simply because they can more conveniently do so than others.⁷⁴ In addition, if lawyers are required to dis-

might tell them, the real question is whether lawyers need to know the information that is being withheld, which is a very difficult question to answer without also asking clients.

68. See *supra* note 25 and accompanying text.

69. See *supra* note 55.

70. Landesman, *supra* note 66, at 207-08.

71. Subin, *supra* note 6, at 1175. See generally Frankel, *supra* note 58, at 52.

72. A pervasive theme of the New Jersey Rules of Professional Conduct is that accountability to the public interest at times outweighs the duty of loyalty to the client. Ambrosio, *supra* note 53, at 130. See also Jennifer Hall, *States Modifying ABA's Ethics Rules*, LEGAL TIMES, Aug. 12, 1985 at 1 (indicating revision of Virginia code also addressed this balance).

73. Subin, *supra* note 6, at 1105-06, 1169, 1172. See also LUBAN, *supra* note 59, at 205.

74. Professor Subin has argued that a lawyer's duty to disclose felonies is the "precise equivalent" of the doctor's duty to report gunshot wounds, communicable diseases or dangerous patients. Subin, *supra* note

close client confidences to prevent harm to others, then they will be better able to dissuade clients from planned wrongdoing by threatening to disclose if the clients' plans are not abandoned.⁷⁵ Even if lawyers cannot dissuade their clients, they are more likely to disclose to prevent harm than lawyers would be under a permissive disclosure scheme.⁷⁶

Finally, those favoring disclosure argue that unless there is mandatory disclosure of client plans to cause future harm, clients will believe that lawyers will do anything for them. As a result of this belief, clients will be encouraged to bring more wrongful schemes to their lawyers, and society's view of lawyers and legal institutions will suffer.⁷⁷ Societal disapproval of the rules governing lawyers may also adversely affect the ability of lawyers to continue to regulate themselves.⁷⁸

6, at 1173 & n.378. These analogies are not precise. Injuries or illnesses present no ambiguity about whether they have occurred. The duty to report dangerous patients is also an imperfect analogy, because it is based on a "control" theory. See Marc L. Sands, Note, *The Attorney's Affirmative Duty to Warn Foreseeable Victims of A Client's Intended Violent Assault*, 21 TORT & INS. L.J. 355, 356, 363 (1986). Lawyers cannot commit their clients to institutions, nor do they have the same level of control that parents have over children or masters have over their servants.

75. Subin, *supra* note 6, at 1166, 1173-74.

76. Subin, *id.* at 1174. One response to these arguments is that if lawyers fear that they must disclose client confidences, lawyers will be more reluctant to obtain complete information from their clients. In order to reconcile a lawyer's duty of loyalty and desire to maintain confidences with an obligation to disclose, attorneys might be less aggressive in eliciting information. Cf. *Developments, supra* note 6, at 1476-77. As Professor David Luban has noted, "[t]here is a personal dimension to confidentiality: clients trust their lawyers, and lawyers want to deserve that trust." LUBAN, *supra* note 59, at 186. If lawyers seek to avoid learning certain information, they will have few opportunities to dissuade.

77. *Report, supra* note 39, Supp. at 10. See generally Zacharias, *supra* note 6, at 375.

Concern about public opinion seems to have affected the decisions in some states to support mandatory disclosure rules. See, e.g., *supra* note 47 and accompanying text. In fact, it is not clear that a disclosure requirement to prevent future harm would significantly affect the public's perception of lawyers. See *infra* note 103 and accompanying text.

78. Lawyers have a substantial interest in maintaining their role in the regulation of the bar, which is increasingly under siege. To the extent that the public disapproves of the rules used to govern the bar, the

C. *The Rationale for a Permissive Disclosure Scheme*

Permissive disclosure rules afford lawyers latitude to deal with very difficult and often highly fact specific problems.⁷⁹ Proponents of this approach hope that clients will confide in their lawyers and that lawyers who learn of a client's intention to commit a crime or fraud will listen without concern about a disclosure *requirement* and dissuade a client from committing the act.⁸⁰ Supporters of permissive rules also believe that when lawyers are faced with clients who will not abandon plans to cause harm, lawyers will "do the right thing."⁸¹

Permissive disclosure rules are also justified on the ground that they promote lawyer morality. It has been argued that lawyers' attitudes about their role suffer when confidentiality is required because it can distort the view of their own obligations "as moral and autonomous individuals."⁸² In essence, a strict confidentiality requirement permits lawyers to fall back on the code requirement and their role as "lawyers" and to ignore the morality of their conduct. In contrast, a permissive scheme forces them to confront these difficult issues.

* * *

rules may ultimately be revised by courts, legislatures and regulatory agencies. See Drexler, *supra* note 56, at 400-02; Koniak, *supra* note 8, at 1477-78. But see David B. Wilkins, *Who Should Regulate Lawyers?*, 105 HARV. L. REV. 799, 810-11 (1992) (suggesting it is not unrealistic to assume that the Model Rules and the CPR will be used by enforcement officials to determine behavior for which lawyers can be sanctioned, even if they do not approve of rules).

79. J. Michael Callan & Harris David, *Professional Responsibility and the Duty of Confidentiality: Disclosure of Client Misconduct in an Adversary System*, 29 RUTGERS L. REV. 332, 356 (1976); Zacharias, *supra* note 6, at 405. Some have criticized permissive disclosure schemes because they substitute the lawyer's views for society's judgment. See Subin, *supra* note 6, at 1174. But see Simon, *supra* note 66, at 1145 (noting the benefits of affording lawyers more discretion when representing clients).

80. Callan & David, *supra* note 79, at 356.

81. Professor William Hodes has expressed the view that as a practical matter when serious bodily injury is at stake, the permissive disclosure rule will be read as "shall" and a strict confidentiality rule would be ignored. Hodes, *supra* note 62, at 755-58.

82. Landesman, *supra* note 66, at 208-09; Subin, *supra* note 6, at 1091; Zacharias, *supra* note 6, at 372-73.

Many of the utilitarian justifications for the rules governing lawyers with clients who are contemplating wrongdoing can be explored empirically. Before looking at the New Jersey study, it is useful to review what is known to date about how attorneys view and use the attorney-client confidentiality rules, and what attorneys actually do when confronted with clients who intend to commit wrongful acts.

III. PRIOR EMPIRICAL RESEARCH

Lawyers and their relationships with their clients have been the subject of several studies.⁸³ Unfortunately, relatively little empirical research has focused on the assumptions underlying the attorney-client confidentiality rules.⁸⁴ Even less effort has been made to study empirically lawyer response to clients who intend to commit wrongful acts that will substantially harm another.⁸⁵ The absence of such research has been much not-

83. *E.g.*, JEROME E. CARLIN, *LAWYERS' ETHICS: A SURVEY OF THE NEW YORK CITY BAR* (1966); JOEL F. HANDLER, *THE LAWYER AND HIS COMMUNITY: THE PRACTICING BAR IN A MIDDLE-SIZED CITY* (1967); JOHN P. HEINZ & EDWARD O. LAUMANN, *CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR* (1982); DOUGLAS E. ROSENTHAL, *LAWYER AND CLIENT: WHO'S IN CHARGE?* (1974); Edward Laumann et al., *Washington Lawyers and Others: The Structure of Washington Representation*, 37 STAN. L. REV. 465 (1985).

84. There are two notable exceptions. See Notes & Comments, *Functional Overlap Between the Lawyer and Other Professionals: Its Implications for the Privileged Communications Doctrine*, 71 YALE L.J. 1226 (1962) [hereinafter YALE NOTE]; Zacharias, *supra* note 6, at 379-96. See generally Note, *Corporate Legal Ethics--An Empirical Study: The Model Rules, The Code of Professional Responsibility, and Counsel's Continuing Struggle Between Theory and Practice*, 8 J. CORP. L. 601, 622 (1983).

85. Indeed, not much is even known about whether this problem presents itself with any frequency in practice. One of the few studies suggesting that it might is Kenneth Mann's study of white collar criminal defense lawyers. He found that "requests for legal counsel in order to cover up future criminal acts are not frequent [but] neither are they a rare phenomenon." MANN, *supra* note 7, at 111. See generally Zacharias, *supra* note 6, at 389.

ed,⁸⁶ but little has been done to remedy the problem.⁸⁷ Some of the existing empirical research is summarized below.

A. *What Clients Don't Know About the Confidentiality Rules*

Laypersons seem to know that their communications with lawyers are confidential, but they do not understand the exceptions to the general rule. According to a study conducted by the *Yale Law Journal* in 1962 ("Yale study"), over 50% of the laypersons surveyed⁸⁸ correctly believed that lawyers did not have a legal obligation to disclose confidential information if asked to do so by a lawyer in court.⁸⁹ At the same time, over 30% of the laypersons believed that lawyer-client communications were more protected than they in fact were.⁹⁰

In a study conducted more than twenty-five years later in Tompkins County, New York ("Tompkins County study"), these basic findings were confirmed.⁹¹ The Tompkins County study revealed that most clients claimed to know of attorney-client

86. Drexler, *supra* note 56, at 411; Fried, *supra* note 6, at 490; Lonnie Kocotes, *Client Confidentiality and the Crooked Client: Why Silence is Not Golden*, 6 GEO. J. LEGAL ETHICS 283 (1992); Subin, *supra* note 6, at 1165, n.353, 1168. See generally *Developments*, *supra* note 6, at 1474; THE LAW OF LAWYERING, *supra* note 9, § 1.6:101 at 128.

87. See *supra* note 7. On the one hand, the relative lack of empirical research is surprising because so many commentators have noted the dearth of empirical research and because many of the assumptions underlying confidentiality could be tested on an empirical basis. On the other hand, the absence of such research is not that surprising, because empirical research is expensive and time consuming; it is far easier to analyze someone else's study than to generate one's own.

88. The Yale study analyzed, *inter alia*, the responses of 108 laypersons who lived in the Eastern United States. Those answering the questionnaire tended to be "non-lower class socially and economically." YALE NOTE, *supra* note 84, at 1227 n.6.

89. *Id.* at 1262. Almost two-thirds of the laypersons surveyed believed that lawyers would not repeat client confidences.

90. Laypersons were asked whether they thought that a lawyer "would refuse to talk even if ordered to do so by a judge." *Id.*

91. Cornell University is located in Tompkins County, New York. The Tompkins County study analyzed 105 responses from lay people, including 73 persons who had consulted lawyers in the past ("clients"). It also analyzed 63 responses from lawyers. Zacharias, *supra* note 6, at 379.

confidentiality.⁹² Over 42% of all the clients surveyed believed that the confidentiality requirements are absolute.⁹³

The Tompkins County study also revealed that "lawyers overwhelmingly do not tell clients of confidentiality rules."⁹⁴ Even when the Tompkins County lawyers told their clients about confidentiality, most told their clients "only generally that all communications are confidential," and only one quarter told their clients that any exceptions to the rule of attorney-client confidentiality exist.⁹⁵

Although these studies involved relatively small samples and were comprised of a better-educated population than the norm, they strongly suggest that many lay people do not understand the limits of attorney-client confidentiality. Perhaps one reason why lay people do not understand is because lawyers intentionally exaggerate the scope of confidentiality, believing that most of their clients misunderstand its scope.⁹⁶

B. What Clients and the Public Think About Confidentiality

Some empirical evidence indicates clients would be less willing to disclose information to their lawyers if they believed

92. The vast majority of clients who were not told of confidentiality directly by their lawyers claimed to know of the rule. *Id.* at 383 (79.1%).

93. *Id.* In fact, New York lawyers were permitted to disclose client confidences to prevent any crime. N.Y. LAWYERS CODE OF PROFESSIONAL RESPONSIBILITY DR# 4-101(C) (1992 & Supp. 1994).

94. The study showed that 22.6% of the lawyers surveyed "almost never" informed clients of the confidentiality of their communications to the lawyer. Another 59.7% of the lawyers surveyed informed their clients of confidentiality in less than half of their cases. Zacharias, *supra* note 6, at 382. When clients were asked a similar question, 53.5% of them confirmed that none of their attorneys had mentioned confidentiality. *Id.* at 383 n.155.

A 1982 study of corporate law practice also suggests that lawyers do not tell clients of confidentiality rules. In that survey of 85 corporate lawyers, almost 70% of them reported that they raised the issue of confidentiality when interviewing corporate employees, but less than one-third of that group seemed to raise the issue under all circumstances. *Corporate Legal Ethics*, *supra* note 84, at 604 & n.5-6, 622-23.

95. Zacharias, *supra* note 6, at 386 (27.8%).

96. Almost two-thirds (64.8%) of the lawyers surveyed thought that more than three-quarters of their clients believed that confidentiality is absolute. *Id.* at 386-87.

their lawyers might disclose information. In the Yale Study, more than 50% of the lay people believed they would be less likely to make free and complete disclosure to a lawyer if there were a legal obligation to disclose client information to another lawyer in court.⁹⁷ Over 15% of the Tompkins County lay people indicated that they would withhold information from an attorney if the attorney promised confidentiality except for specific types of information which the lawyer described in advance.⁹⁸ The Tompkins County respondents also indicated that a permissive disclosure rule or other disclosure by lawyers would cause them to trust and use lawyers less.⁹⁹ These questions, however, were hypothetical and do not necessarily reflect what clients would do if confronted with the actual need for lawyers' services.¹⁰⁰

Not surprisingly, lay people view the confidentiality rules differently when the rules may be protecting someone else's secrets. In the Yale study, only 45% of the lay people clearly supported the attorney-client privilege.¹⁰¹ In the Tompkins

97. YALE NOTE, *supra* note 84, at 1262 (50.9%).

98. Zacharias, *supra* note 6, at 386 (15.1%). Professor Zacharias notes that this percentage is not that different from the 11.3% of the clients who reported that they withheld information from their lawyers under current confidentiality rules, and states that this similarity suggests that "the general sense of trust in attorneys as professionals, rather than strict confidentiality rules, is what fosters client candor." *Id.* This conclusion seems premature. It may be that the 11.3% who withheld information from their lawyers knew that New York permitted lawyers to reveal client confidences under certain circumstances and that those clients withheld information precisely for that reason.

99. When lay people were asked about a proposed code amendment that would allow disclosure by a lawyer "who reasonably deems it necessary in the public interest," approximately one third said they would consult lawyers less frequently and they would trust lawyers less. Zacharias, *supra* note 6, at 388 n.191, 395.

100. There is no serious dispute that if clients know that there are exceptions to confidentiality, it will inhibit some client communications in some circumstances. Zacharias, *supra* note 6, at 358. As Professor Zacharias has noted, the question is not really "whether confidentiality as a whole comports with its general underlying theory," but "on how well confidentiality serves its justifications and whether limited exceptions would undermine the rules' effects." Zacharias, *supra* note 6, at 381.

101. YALE NOTE, *supra* note 84, at 1262. Lay people were asked whether they thought that lawyers should have a legal obligation to disclose

County study, most laypersons believed that lawyers should be permitted to disclose client information in a variety of contexts not currently permitted by state codes in order to prevent injury to others.¹⁰² At the same time, most of the Tompkins County laypersons did not believe that public perception of lawyers would be improved by a broad permissive disclosure rule that would allow disclosures in the public interest.¹⁰³

C. Lawyer Willingness and Ability to Prevent Harm

Relatively little research has focused specifically on the theory that strict confidentiality enables lawyers to dissuade clients from wrongdoing, or on the alternative theory that mandatory disclosure better equips lawyers to prevent harm. A study of white-collar criminal defense attorneys suggests that some lawyers attempt to neutralize the impact of information about prospective wrongdoing rather than to dissuade their clients from committing wrongful acts.¹⁰⁴ Other evidence suggests that at some points in their careers, most lawyers dissuade clients from taking improper action, but it is not known what techniques they use to dissuade, how consistently they

confidential information if asked to do so by a lawyer in court. *Id.*

102. Zacharias, *supra* note 6, at 394-95. At the same time, anywhere from 10-25% indicated that if lawyers could disclose client information in those cases, it would affect their willingness to use lawyers. *Id.*

103. The respondents were asked about the effect of a hypothetical code amendment that would allow disclosure by a lawyer who "reasonably deems it necessary in the public interest." Zacharias, *supra* note 6, at 388. More than 55% of the respondents believed that such a change would either have no effect on the public perception of lawyers or that it would cause the public perception of lawyers to decline. *Id.* at n.191. As Professor Zacharias noted, this question is problematic because it asked respondents to gauge the view of the public and not to report their own views, but the results probably are somewhat indicative of the respondents' views. *Id.* at n.195. It does not necessarily reflect what the public would think of a more focused disclosure rule.

104. MANN, *supra* note 7, at 106-17.

try to dissuade or how often they succeed.¹⁰⁵ How much of a role confidentiality plays in those efforts is also not known.¹⁰⁶

Finally, no study has examined what lawyers do when they fail to dissuade their clients and must decide what step, if any, to take next. In fact, little is known about how lawyers view the disclosure rules or whether they obey the rules in practice. The purpose of the New Jersey study was to begin to explore some of these questions.

IV. THE NEW JERSEY STUDY

A thirty-nine question mail survey was used to explore how New Jersey attorneys respond when they believe a client may be about to commit a wrongful act that is likely to result in substantial harm to others. The survey also attempted to determine whether New Jersey attorneys comply with their obligation to disclose under the Rules of Professional Conduct and if not, why not.

A. *The Survey*

The surveys were mailed in September 1993 to approximately 1950 lawyers throughout New Jersey who were identified as practicing members of the state bar. A cover letter that accompanied the survey explained the purpose of the survey and requested anonymous responses.¹⁰⁷

The experiences of lawyers who practiced criminal law and family law were of particular interest because of the nature of

105. In the Tompkins County study, more than three-quarters of the respondents indicated that confidentiality had at some point in their careers enabled them to dissuade a client from taking improper action. Zacharias, *supra* note 6, at 381; *see also* Fried, *supra* note 6, at 492 n.275.

106. In the Tompkins County study, more than 40% of the lawyers indicated that the existence of confidentiality had "occasionally" enabled the lawyer to obtain information and then dissuade a client from taking improper action. Zacharias, *supra* note 6, at 381 & n.146. The answer to this compound question does not reveal how often the existence of confidentiality had enabled lawyers to obtain information.

107. Anonymous responses were used to try to prevent self-selection of respondents who might not be proud of their approach to the problem and to try to insure that the answers were not self-censored.

the problems their clients confront. Consequently, approximately one-third of the surveys were mailed to lawyers who were believed to devote a portion of their practice to criminal defense work¹⁰⁸ and about one-fifth were mailed to lawyers who identified themselves as devoting part of their practice to family law.¹⁰⁹ Most of the remaining surveys were mailed to lawyers engaged in other practice areas¹¹⁰ who did not work for any governmental entity.¹¹¹ Surveys were also provided to New Jersey public defenders who requested a copy.¹¹²

108. The names of 569 lawyers were obtained from the membership list of the 1992-93 Handbook of the Association of Criminal Defense Lawyers-New Jersey [hereinafter ACDL Handbook]. The names of an additional 120 lawyers who indicated that they devoted at least 25% of their practice to criminal defense work were obtained from the Westlaw New Jersey West's Legal Directory. Search of Westlaw, WLD database (July 14, 1993).

109. Westlaw was used to obtain the names and addresses of 377 New Jersey lawyers who indicated that they devoted 20% or more of their time to practicing matrimonial, domestic or family law. Search of Westlaw, WLD database (approx. July 22, 1993).

110. A search of Westlaw initially identified 20,994 lawyers who did not list themselves as practicing any specific percentage of criminal, matrimonial, family or domestic law. Search of Westlaw, WLD database (July 22, 1993). Lawyers from this list were selected by a random sampling in the pattern 1-5, 100-05, 200-05, etc. The names and addresses of 877 lawyers were selected by this method.

Thus, the sampling technique used in this survey combined a systematic random sample of New Jersey lawyers with a stratified sample of lawyers who devoted a substantial portion of their practice to criminal law or family law, in order to obtain an adequate number of such lawyers to discern trends and make statistical inferences. See EARL R. BABBIE, *THE PRACTICE OF SOCIAL RESEARCH* 184-90 (6th ed. 1989).

111. Government lawyers were excluded from the sample because they have somewhat different ethical obligations than other lawyers and because it was believed that they would not have much experience with this problem.

112. Approximately 80 surveys were mailed directly to New Jersey public defenders whose addresses were obtained either from the ACDL Handbook or the Westlaw, WLD database. In an effort to help the author reach the remaining 220 New Jersey public defenders, Dale Jones, Esq., Assistant Public Defender of the State of New Jersey, circulated a memorandum to all New Jersey public defenders advising them of the availability of the survey, encouraging participation in the survey and indicating how a copy of the survey could be obtained.

To obtain a complete picture of attorney conduct when lawyers encounter clients who are about to commit future wrongdoing, clients should also be surveyed. Clients of the attorney-respondents could not be surveyed, however, because the attorneys answered the surveys anonymously.¹¹³ No attempt was made to identify and survey randomly selected clients who had discussed future wrongdoing with their lawyers. Efforts to survey certain client groups should be considered in the future.¹¹⁴

1. *The Survey Design*

A passive-observation design was used for the eleven page survey.¹¹⁵ The first section requested some limited demographic information.¹¹⁶ The second section asked very generally about attorney-client confidentiality. The third and fourth sections inquired in detail about actual attorney experience with clients who were going to commit wrongful acts that were likely to result in substantial bodily harm, financial injury or property damage to another.¹¹⁷ The last section of the survey

113. Even if the identities of the attorneys were known, they have a duty to maintain the confidences of their clients and could not reveal the information. *See generally In re Advisory Opinion No. 544 of the N.J. Sup. Ct. Advisory Comm. on Professional Ethics*, 511 A.2d 609 (N.J. 1986) (holding that legal services organizations may not disclose client identity to private or governmental entities without consent or legal justification).

114. Clients were not surveyed because of the difficulty and expense of locating a sufficiently large sample using random sampling techniques. The New Jersey study reveals information about the practice areas of lawyers who encounter the problem and the types of wrongful acts that they encounter which may permit more focused sampling in the future. *See infra* text accompanying notes 131, 138, 142.

115. The survey questions are found in the Appendix. For a discussion of passive observation, see NOREEN L. CHANNELS, *SOCIAL SCIENCE METHODS IN THE LEGAL PROCESS* 74-75 (1985).

116. There was a real risk that many lawyers would refuse to answer a longer survey. Due to space constraints, certain information such as gender and race was not requested.

117. The term "bodily harm" is used in this Article to encompass the idea of death as well as substantial bodily harm. "Financial injury or property damage" is used to convey the idea of "substantial injury to the financial interest or property of another" set forth in RPC 1.6.

asked about attorney views and practices, including views about mandatory disclosure rules. To obtain unbiased and unapologetic responses from the attorneys, the survey never mentioned RPC 1.6 and did not explain the attorney's duty to disclose under that rule. The majority of the survey questions were multiple choice, although the survey also asked a number of open-ended questions to allow attorneys to elaborate on their experiences. Space was left at the end of the survey for additional comments.

2. *The Survey Respondents*

The survey yielded a response rate of almost 40%,¹¹⁸ which is considered a good rate for a survey of professionals. In certain respects, the survey respondents resembled the general population of active New Jersey lawyers.¹¹⁹ Almost three-quarters of the respondents were admitted to the bar within the last twenty years, which is similar to the 73.3% admitted in the general population since 1976.¹²⁰ Approximately one-half of the survey respondents were also admitted to practice in another state, as compared to 59.6% of the lawyers in the general New Jersey population.¹²¹

In other respects, the respondents differed from the general population of New Jersey lawyers. The survey respondents were somewhat more experienced attorneys than the general population of New Jersey lawyers.¹²² A far greater percentage

118. After removing names from the sample because they were not attorneys admitted to practice in New Jersey or for other valid reasons, the total sample size was 1926 lawyers. Valid responses to the mail survey totalled 762, producing a response rate to the mail survey of 39.6%. An additional 14 surveys were completed in response to the internal memorandum to public defenders inviting them to complete the survey. Thus, the total number of responses in the study was 776.

119. Table 1.

120. The total number of lawyers admitted to practice was 50,314 as of March 1993, but it appears that less than 47,000 were actively engaged in practice. ADMINISTRATIVE OFFICE OF THE COURTS AND OFFICE OF ATTORNEY ETHICS, CHARACTERISTICS OF THE BAR OF THE STATE OF NEW JERSEY 1992 at 3 (1993) [hereinafter CHARACTERISTICS OF THE BAR].

121. Table 2. CHARACTERISTICS OF THE BAR, *supra* note 120, at 5. New York was the most frequent other state of admission for both groups. Table 3.

122. Although three-quarters of the lawyers in both groups were admit-

of the respondents worked in private practice than did the general population.¹²³ Not surprisingly, almost one-third of the survey respondents devoted a substantial amount of their time to criminal defense work and almost one-quarter of the respondents devoted a substantial amount of their time to family law practice.¹²⁴ These percentages are probably higher than the percentage of such practitioners in the general population of New Jersey lawyers because they were over-sampled.¹²⁵

Thus, while the sample is representative in its geographic distribution throughout the state, it cannot be characterized as truly random¹²⁶ or as completely representative of the general population of New Jersey lawyers. Nevertheless, the results provide some indication of the ways in which some New Jersey attorneys respond to the problem of a client who intends to cause serious harm to another.

B. Survey Results

1. The Problem is Real

The survey revealed that the problem of a client who may cause serious harm to another is not just a hypothetical problem;¹²⁷ it is a real one. Sixty-seven lawyers reported that

ted within the last 20 years, *see supra* text accompanying note 121, approximately one-third of the survey respondents had been admitted to the bar since September 1983. *See* Table 1 (37.7%). In contrast, 61% of all New Jersey lawyers were admitted to practice since 1980. CHARACTERISTICS OF THE BAR, *supra* note 120, at 3.

123. *See* Table 4 (89.9%). Only 52.8% of all New Jersey lawyers worked in private practice in 1992. CHARACTERISTICS OF THE BAR, *supra* note 120, at 7.

124. Table 5. For the purposes of this article, "substantial" means 20% or more of the attorney's time was devoted to the particular practice area.

125. Many of the respondents also devoted a substantial amount of time to personal injury and real estate practices. In contrast, relatively few respondents practiced tax or environmental law. Table 5.

126. *See supra* note 110. For a discussion of "systematic" or "quasi-random" samples, *see* CHANNELS, *supra* note 115, at 94-97. Only the 877 names derived from the Westlaw general practice list were selected through systematic random sample.

127. More than one respondent suggested that the problem of a client

since January 1985, they had encountered at least one occasion on which they reasonably believed that a client was going to commit a specific wrongful act that was likely to result in death or substantial bodily harm to an identifiable third party.¹²⁸ Almost half of those lawyers had encountered the problem on more than one occasion.¹²⁹ About 20% of the lawyers who had encountered the problem identified the anticipated act as homicide.¹³⁰ Another 58% identified the act as assault or battery, including acts of domestic violence.¹³¹ Other anticipated wrongful acts included arson, kidnapping, driving while intoxicated and terrorism.¹³²

Approximately 190 attorneys reported that since January 1985 they had encountered occasions on which they believed that a client was going to commit a wrongful act that was likely to result in substantial injury to the financial interests or property of another.¹³³ Most of the lawyers who had confronted this problem had encountered it on more than one occasion.¹³⁴ The most commonly reported anticipated act was

who discusses with counsel future criminal or fraudulent acts was an academic exercise rather than a real problem. I.D. No. 619, Question 34. See I.D. Nos. 007, 300, at Question A.C..

128. Table 6. RPC 1.6(b) does not limit the attorney's disclosure obligations to situations in which an identifiable third party will be harmed, but pre-testing of the survey suggested that the survey questions should be so limited to avoid ambiguous responses. Some lawyers routinely represent clients who they reasonably believe intend to commit serious crimes, but whose victim is not identifiable. I.D. No. 174, Question 8; I.D. No. 332, Question 8. As one lawyer noted, "90% of my criminal practice deals with possession-sales [of controlled drug substances]. My answer "none" to questions [about clients whom the lawyer believes will substantially harm others] result from the word "identifiable" [third party]. I have no idea of the identity of the next purchaser." I.D. No. 599, Question A.C. Of course, in those cases RPC 1.6(b) still requires disclosure, but lawyers who represent repeat offenders indicated that they draw a distinction between the general belief that criminal activity will continue and situations when identifiable third parties were likely to be harmed.

129. Table 6 (47.8%).

130. Table 7 (19.4%).

131. *Id.*

132. *Id.*

133. Table 8.

134. *Id.* (78%).

financial fraud.¹³⁵ Some of the other anticipated wrongful acts were vandalism, theft, environmental pollution and perjury.¹³⁶

One important caveat must be noted. These responses do not necessarily reflect the frequency with which the general New Jersey lawyer population encounters clients who intend to commit serious wrongful acts because the survey respondents probably included more criminal defense attorneys and family law attorneys than would be found in the general lawyer population.¹³⁷ These practitioners reported encountering the problem of clients who were contemplating future wrongdoing significantly more often than other lawyers.¹³⁸ Moreover, prior experience with the problem may cause respondent self-selection.¹³⁹ At most, the survey responses reflect that this problem occurs with some frequency in certain types of practices, and occurs at least occasionally in a wide variety of practices.¹⁴⁰

135. Table 9. The term "financial fraud" in this article includes all types of fraud resulting in the loss of money or other assets including, but not limited to, bankruptcy, insurance, real estate, tax or securities fraud and secreting marital assets.

136. Table 9. Perjury is governed by a separate sub-section of RPC 1.6(b) which requires disclosure to prevent a client from committing a fraud upon a tribunal. *See* RPC 1.6(b)(2). Nevertheless, since perjury also involves a future crime that may result in substantial injury to the financial interests or property of another under RPC 1.6(b)(1), it is included here.

137. *See supra* text accompanying notes 124-25.

138. Lawyers who devoted at least 40% of their time to practicing criminal law or at least 20% of their time to practicing family law encountered clients whom they believed were going to cause substantial bodily harm, financial injury or property damage significantly more often than lawyers who practiced in other areas. Table 47.

139. For example, lawyers who had previously encountered the problem may have been more likely to complete the survey because they were interested in the subject, skewing upward the reported frequency of the problem. At the same time, it is possible that attorneys who were not comfortable with the manner in which they had previously handled the problem may have decided not to answer the survey.

140. There were lawyers who reported encountering this problem who spent at least 90% of their time practicing in the following areas: Bankruptcy (I.D. Nos. 214, 318, at Question 2); Commercial litigation (I.D. Nos. 260, 696, at Question 2); Corporate (I.D. No. 104, Question 2); Envi-

The survey also revealed that lawyers who work in certain law office settings were more likely to learn of clients' plans to commit wrongful acts than other lawyers.¹⁴¹ For example, legal services attorneys were significantly more likely to encounter clients who they believed intended to physically harm others than attorneys in law firms or other practice settings.¹⁴² Attorneys practicing in small firms encountered the problem of clients who were contemplating wrongful acts that would cause injury to financial interests or property more often than lawyers in other practice settings.¹⁴³

The lawyers who reported that they had encountered clients who they "reasonably believed" were going to commit wrongful acts seemed fairly convinced about their clients' plans.¹⁴⁴ Few of these lawyers thought that their clients did not commit the anticipated acts because they were mistaken about their clients' original intentions.¹⁴⁵

ronmental (I.D. No. 722, Question 2); and Trust & Estates (I.D. No. 163, Question 2).

141. Lawyers were asked to indicate whether they worked as solo practitioners, in small law firms (2-20 lawyers), in medium or large firms (more than 20 lawyers), in a corporation, or in a legal services office. See Appendix *infra* Survey Question 1.

142. Table 13. The significance of this finding should not be overstated. Criminal defense attorneys, as a group, were more likely to encounter the problem of future client wrongdoing than most other lawyers. See *supra* text accompanying note 138. Nevertheless, this finding is somewhat surprising given the view expressed by more than one public defender that their clients do not trust them. See, e.g., I.D. No. 730, Question A.C. As one public defender noted, "defendants often have distrust in a public defender." I.D. No. 494, Question 7. That lawyer also wrote, "a defendant often believes that a public defender is an agent of the state who will not preserve confidences. In trial preparation, I spend much time building a trust relationship. Usually, a defendant believes that their public defender is the last person to speak to about a criminal plan." I.D. No. 494, Question A.C. See also I.D. No. 730, Question A.C..

143. Table 14.

144. Although much concern has been voiced about whether a lawyer can "know" that a client is going to commit a wrongful act, see, e.g., MODEL RULES 1.6 cmt. (1983), it was mainly the attorneys who had never encountered the problem who indicated concern about how they would "know" that the client would commit the act. E.g., I.D. No. 193, Question A.C.; I.D. No. 150, Questions 8, 34, A.C.

145. Lawyers who believed that their clients were going to commit

The lawyers may have felt fairly confident about their beliefs because their clients directly told them about their plans. Almost 60% of the lawyers who believed that their clients were going to cause death or bodily injury formed those beliefs as a result of direct oral communications from clients.¹⁴⁶ Likewise, more than 80% of the lawyers who believed their clients were going to cause substantial financial injury or property damage reached that conclusion based on client statements or questions.¹⁴⁷ Thus, any suggestion that lawyers do not learn of client plans directly from their clients—and that client confidentiality is not compromised by disclosure requirements¹⁴⁸—is probably incorrect.

Finally, a number of attorneys indicated that they had had clients who spoke about future wrongful acts that would cause substantial harm to others, but that the lawyers did not “reasonably believe” that the client would commit the acts.¹⁴⁹ For example, some lawyers noted that their clients were simply “letting off steam” or sending up “trial balloons.”¹⁵⁰ Others noted that clients raised questions as to the advisability of taking certain action, rather than expressing a clear intent to do so.¹⁵¹ Some of the lawyers felt that they needed to respond

wrongful acts, but whose clients did not ultimately commit the acts, were asked why they thought the acts did not occur. Only 4 out of 52 lawyers indicated that the reason was because their clients were not serious or they were wrong about their clients’ intentions to commit acts likely to result in death or bodily injury. *See* Table 10. Only 3 out of 96 lawyers said they were wrong about their clients’ intentions to cause financial injury or property damage. *See* Tables 10A & 10B.

146. Table 11 (59.7%).

147. Table 12 (80.7%).

148. *See generally* Zacharias, *supra* note 6, at 399 (questioning whether information used to dissuade client misconduct was type covered by confidentiality rules).

149. I.D. Nos. 019, 146, 184, 193, 290, 313, 368, 661, 740, at Question A.C.; I.D. Nos. 254, 365, 535, at Question 34. As one lawyer observed: “In family law practice you have a great deal of emotion—You must take some ‘talk’ with a grain of salt. You sometime [sic] get ‘I would like to break his neck. . . .’ You have to discount this type of statement as venting of ones [sic] frustrations.” I.D. No. 580, Question A.C.

150. I.D. Nos. 19, 290, at Question A-C.

151. I.D. No. 229, Question 29. As one attorney wrote, “please note that though only a handful of clients have told me that they fully in-

strongly to these client statements in order to prevent the client from developing serious plans to commit wrongful acts.¹⁵²

These responses suggest that the problem of clients who communicate to their lawyers that they are contemplating future wrongful acts may be more pervasive than indicated above.¹⁵³ In considering whether mandatory disclosure rules "work," it is important to remember that those rules may indeed have some effect on clients who are communicating their thoughts about future wrongdoing to their lawyers, even though clients are not communicating these ideas with such conviction that they are causing lawyers to conclude that their clients are reasonably likely to commit wrongful acts.

2. Lawyers Try to Dissuade Their Clients From Wrongdoing—and Think They Do

An important premise underlying attorney confidentiality is that lawyers who learn of client plans to commit wrongful acts will attempt to dissuade their clients from committing those acts and that they usually succeed in those efforts.¹⁵⁴ The survey responses revealed that New Jersey lawyers who reasonably believed that their clients intended to commit wrongful acts did try to dissuade their clients from committing the acts. Most of the lawyers who reported having clients who were going to commit wrongful acts indicated that their clients did not commit the acts after talking with their lawyers. The lawyers believe they were largely responsible for preventing the harm.¹⁵⁵

tended to do something illegal, scores have asked me 'what if' types of questions." I.D. No. 506, Question A.C..

152. *E.g.*, I.D. No. 70, Question A.C.; I.D. No. 110, Questions 29, 34.

153. Another indication that the problem arises more often than reflected in the text is that some attorneys reported that they tell prospective clients about their obligations to disclose at their first meeting, after an individual indicates an intention to cause harm to others, and then decline to represent that person. *E.g.*, I.D. Nos. 391, 445, 543, at Question A.C. These lawyers did not indicate that they had had clients who they reasonably believed were going to commit wrongful acts likely to harm others, but they may have answered differently if they had not immediately terminated their contact with the prospective client. I.D. Nos. 391, 445, 543, at Question B, A.C..

154. See *supra* note 61 and accompanying text.

155. Tables 10 & 10A. It is not possible to determine from the lawyers'

a. *Attorneys Try to Dissuade Their Clients From Harming Others*

The vast majority of lawyers who believed that their clients were going to commit wrongful acts that were likely to cause substantial bodily harm reported that they discussed this belief with their clients.¹⁵⁶ In those discussions, the lawyers appealed mainly to their clients' self-interest. Virtually all of those lawyers discussed the legal consequences of the act.¹⁵⁷ Approximately three-quarters of the lawyers discussed the likelihood of apprehension.¹⁵⁸ Less than half of the lawyers discussed the morality of the act.¹⁵⁹ Almost 20% of the lawyers explicitly threatened to disclose the anticipated act to someone else¹⁶⁰ and about 5% threatened to withdraw from the representation.¹⁶¹

Similarly, almost all of the attorneys who believed that their clients were going to commit wrongful acts likely to result in substantial injury to the financial interest or property of another discussed their belief with their clients.¹⁶² More than

responses whether clients in fact abandoned plans to commit wrongful acts as a direct result of talking with their lawyers. Ideally, clients should also be asked this question.

156. Table 16 (92.4%). Lawyers were asked about the "most recent occasion on which you believed that [a] client was going to commit a criminal, illegal or fraudulent act that was likely to result in death or substantial bodily harm to another." See Appendix *infra* heading to Survey Question Nos. 10-20. The lawyers who did not talk with their clients did not do so because they did not believe the client, there was inadequate proof, or the defendant was already in custody. Table 16B.

157. Table 16A (96.7%). The lawyers were able to identify more than one subject they discussed and so the percentages in the text total more than 100%.

158. *Id.*

159. *Id.* (49.1%).

160. Tables 16A & 16E (19.7%). "Lawyers who threatened to disclose" are defined in this Article as those lawyers who explicitly told their clients that they would disclose information to prevent the act.

161. Table 16C (4.9%).

162. Tables 17 & 17A (97.8%). Of the four lawyers who did not discuss their belief with their clients, one reported that someone else discussed it with the client, one could not get in touch with the client, one said "that was their business" (gambling) and one attorney did not want to know more. (Citations on file with the author).

97% of these lawyers discussed the legal consequences of the act.¹⁶³ Over 57% of the lawyers discussed the likelihood that the client would be apprehended.¹⁶⁴ Approximately 41% discussed the morality of the act.¹⁶⁵ Almost one-quarter of the lawyers threatened to withdraw from the representation.¹⁶⁶ About 12% explicitly threatened to disclose the information in order to prevent the act.¹⁶⁷

Lawyers chose to talk about practical reasons for not committing the wrongful acts rather than engage in philosophical discussions. Less than half of the lawyers talked about the morality of the act, even when bodily harm was at issue.¹⁶⁸ As one lawyer noted

Discussing the morality of the act is, in my view[,] an extremely poor strategy. First, morality is rarely a high priority for persons engaged in criminal acts or who are desperate to avoid or terminate prosecution. Second, discussions of morality can sound pompous [and]/or condescending to a client[,] thereby breaking down the channel of communication between us. In these situations, it is my view that maintaining communication and client confidence is the only effective means of preventing the client from taking the [wrongful] action. . . .¹⁶⁹

Although it has been suggested that exceptions to confidentiality may be desirable because they will encourage more frequent moral dialogue between attorney and client,¹⁷⁰ these responses indicate that many lawyers will avoid such dialogues even when disclosure is required.

163. Table 17B (97.3%).

164. *Id.* (57.2%).

165. *Id.* (41.2%).

166. *Id.* (24.6%).

167. Tables 17B, 17F & 17G.

168. *See supra* notes 159, 165 and accompanying text.

169. I.D. No. 542, Question 13f. As another lawyer explained, "Usually explanation of the chance of exposure hazard and increased sentence, without getting philosophical, helps him quickly see the light back to the truth and planned theory of the case, letting the chips fall where they may." I.D. No. 576, Question A.C. *See also* I.D. No. 338, 506, at Question 34.

170. *E.g.*, Zacharias, *supra* note 6, at 404.

b. *Clients Abandoned Their Plans After Talking With Their Lawyers*

The New Jersey lawyers reported that most of their clients did not commit the anticipated wrongful acts.¹⁷¹ More than 60% of the lawyers who reported that their clients did not cause the anticipated bodily harm believed that they were responsible for dissuading their clients.¹⁷² Most of those lawyers believed that they dissuaded their clients by using reasoning other than the threat to disclose their clients' plans.¹⁷³ More than three-fourths of the attorneys whose clients did not commit anticipated wrongful acts that were likely to result in financial injury or property damage believed that they dissuaded their clients by using reasoning other than the threat to disclose.¹⁷⁴

The lawyers' comments confirm that they believe that they are able to dissuade their clients from committing wrongful acts. As one lawyer noted,

I can't conceive of a situation where I would be obliged t[o] report a client. Twenty years ago [when] working Legal Aid Landlord-Tenant a Portuguese speaking . . . man came to the New York office carrying a gun. His mother had been served with a dispossession notice. He was going to kill the landlord. If

171. Tables 19 & 20. Of the lawyers who believed that their clients were going to commit wrongful acts likely to result in substantial bodily harm, 78.8% reported that their clients did not ultimately commit the acts. Table 19. Of the lawyers who believed that their clients were going to commit acts likely to result in substantial financial injury or property damage, 53.5% reported that their clients did not commit the anticipated acts. Table 20.

172. Table 10 (61.5%).

173. *Id.* Twenty-eight out of 52 lawyers (53.8%) believed that they dissuaded their clients by using reasoning other than the threat to disclose. Another 7.7% thought that their clients did not commit the acts at least in part because they had threatened to disclose. Other reasons why the clients did not commit the wrongful acts included that the lawyer was wrong about the client's intentions, the client had no opportunity, the client calmed down, the plan was too difficult and the time for the act had not yet arrived.

174. Table 10A (77.1%). An additional 13.5% of the lawyers thought that the client did not commit the act at least in part because they had threatened to disclose. *Id.*

I could talk him out of his gun [and] his intentions without knowing one word of Portuguese[,] I can dissuade anyone.¹⁷⁵

Several other lawyers expressed the same basic sentiment, although somewhat less colorfully.¹⁷⁶

On the surface, these lawyer responses appear to support some of the basic assumptions underlying the justifications for maintaining client confidentiality in the context of future client wrongdoing. Nevertheless, this information provides only a partial picture.¹⁷⁷ Even if most lawyers regularly try to dissuade clients from committing wrongful acts and even if they succeed, it does not necessarily follow that they are able to do so *because* of confidentiality rules or *because* of mandatory disclosure. To understand the interplay between the rules and efforts to dissuade, it is necessary to step back and consider how the confidentiality and disclosure rules are discussed and used in practice.

3. *Attorney Discussions About Confidentiality and Disclosure Rules*

a. *Lawyers Talk More About Confidentiality Than About Its Exceptions*

The New Jersey study revealed that lawyers talked with their clients about confidentiality more than previously reported, but they do not talk much about the exceptions. More than 95% of the lawyers said that in the last twelve months they

175. I.D. No. 178, Question A.C.

176. As another lawyer wrote, "I am of the old school of confidence which clients have in their attorneys and believe I am persuasive enough to stop them from taking any action which would get them in trouble or harm someone else either financially or bodily harm." I.D. No. 124, Question 39. *See also* I.D. Nos. 273, 275, at Question 39; I.D. No. 576, at Question A.C..

177. Although the responses suggest that virtually all of the lawyers who "reasonably believed" that their clients intended to commit a wrongful act attempted to dissuade their clients, *see supra* notes 156, 162-69 and accompanying text, this finding should be interpreted cautiously. Other survey responses suggest that some attorneys took steps to insure that they never obtained enough information to form a "reasonable belief" that their clients were going to commit a wrongful act. *See infra* notes 198-203 and accompanying text.

personally informed at least *some* of their clients of the confidentiality of their communications.¹⁷⁸ Criminal defense attorneys were significantly more likely to tell *most* of their clients about the confidentiality of their communications than other lawyers.¹⁷⁹ Even lawyers who did not practice a substantial amount of criminal law discussed confidentiality with their clients with some frequency: over 41% of those lawyers discussed confidentiality with more than half of their clients within the preceding twelve month period.¹⁸⁰

While the vast majority of lawyers told at least some of their clients about confidentiality, most of them did not tell their clients about the disclosure rules. Over 65% of the New Jersey lawyers informed none of their clients in the last twelve months about an attorney's obligation to disclose client confidences to prevent a client from committing a wrongful act.¹⁸¹ Another 23% of the respondents stated they had informed less than 10% of their clients of this disclosure obligation.¹⁸²

178. Table 24. Lawyers were asked, "[w]hat percentage of your clients do you personally inform of the confidentiality of their communications to you?" See Appendix *infra* Survey Question 6.

179. Table 26. Over 52% of the lawyers who devoted a substantial portion of their practice to criminal defense work said that during the last 12 months they personally informed more than three-quarters of their clients about confidentiality. *Id.* In contrast, about one-third of the other lawyers informed more than three-quarters of their clients about confidentiality during the same time period. *Id.*

180. Table 26 (41.8%). These numbers may actually understate the percentage of clients who are told of confidentiality by lawyers because they may exclude long-time clients who have previously been told about the rule. In addition, they do not reflect the clients who may have been told of confidentiality by another lawyer who works with the survey respondent.

In the Tompkins County study, only 17.7% of the lawyers informed their clients of attorney-client confidentiality in half or more of their cases. See Zacharias, *supra* note 6, at 382. The differences between the two studies may be due in part to the fact that the Tompkins County lawyers were engaged in a rural, more personal law practice than many of the New Jersey lawyers; the Tompkins County lawyers may have felt less need to encourage client trust than the New Jersey lawyers.

181. Table 30 (65.4%).

182. *Id.* Only 5% of the respondents said that they communicated this information to more than three-fourths of their clients. *Id.*

The lawyers' failure to inform clients about the disclosure rule cannot be attributed to a belief that clients already know about the rules. Like the Tompkins County lawyers, most New Jersey lawyers did not believe that their clients understood that attorneys may be required to disclose client confidences.¹⁸³

Many New Jersey lawyers seem to discuss confidentiality in order to develop client trust and to encourage the free flow of client information.¹⁸⁴ At the same time, most lawyers do not discuss the subject of mandatory disclosure unless they must do so, apparently because they feel that discussions about confidentiality exceptions interfere with client trust.¹⁸⁵ These lawyers seem to believe they will obtain less than full disclo-

183. See Zacharias, *supra* note 6, at 386-87. The New Jersey lawyers were asked what percentage of their clients they believed understood that "there are circumstances under which a lawyer may be obligated to disclose attorney client confidences to a third party without the client's consent?" See Appendix *infra* Survey Question 7. Approximately 20% of the lawyers believed that *none* of their clients understood that there were circumstances under which a lawyer may be obligated to disclose client confidences without a client's consent. Table 27A. Another 40% of the respondents believed that less than 10% of their clients understood that a lawyer could be obligated to disclose. *Id.* As the Tompkins County study revealed, lawyers' views are not necessarily an accurate reflection of actual client understanding of the rule, see Zacharias, *supra* note 6, at 387, but they shed insight into lawyers' conduct.

184. Indeed, the fact that criminal defense attorneys tell a greater number of their clients about confidentiality than most lawyers suggests that they may experience more difficulty obtaining client trust and information than other lawyers. See MANN, *supra* note 7, at 40-55. On the other hand, this theory is difficult to reconcile with the responses indicating that public defenders were significantly less likely to inform their clients about confidentiality than were other criminal defense lawyers. Table 27. Public Defenders should be interviewed to help interpret these findings.

185. As one corporate lawyer explained:

My experience is that clients are more forthcoming if they know that their communications cannot be disclosed. This presents the attorney with the opportunity to discuss the situation [with] the client and prevent the act from occurring. My experience has proven this to be successful. These discussions would never take place if the client knew they could be disclosed and an opportunity might be lost.

I.D. No. 478, Question A.C.

sure from their clients if they promise anything less than complete confidentiality.¹⁸⁶

It appears that some lawyers do not mention the disclosure rules to their clients unless they are obviously relevant to a particular client or to clients seeking a particular type of representation.¹⁸⁷ For example, lawyers who practiced family law and those who practiced criminal law were significantly more likely than other lawyers to discuss this confidentiality exception with at least some of their clients within the past year.¹⁸⁸ One reason for this finding may be that they encounter clients who are contemplating future wrongdoing more often than other practitioners.¹⁸⁹

A similar explanation may account for the finding that lawyers who have had at least one client who they reasonably believed was going to commit a wrongful act likely to result in financial injury or property damage were more likely to tell at least some of their clients about the mandatory disclosure rule than lawyers who had never encountered the problem.¹⁹⁰ Exposure to the problem of future client wrongdoing on one occasion may cause a lawyer to be more sensitive to the problem,

186. *E.g.*, I.D. No. 779, Question A.C. As one attorney explained, "[i]f I started explaining the fine points of attorney-client privilege [sic] [clients] would begin to suspect they could not trust me." I.D. No. 538, Question A.C.

187. As one lawyer noted in response to the question about advising clients of the mandatory disclosure rules, "most clients do not have situations that would call for such advice." I.D. No. 59, Question 35. *See also* I.D. No. 69, Question 35 (indicating that the attorney tells 75% or more "of criminal clients"). Another lawyer who noted that criminal tax fraud issues arise in matrimonial cases informed a large percentage "of matrimonial clients" about the mandatory disclosure rule. I.D. No. 400, at Question 35.

188. Tables 18, 31, 31A & 31B.

189. Table 47. Moreover, family law practitioners reportedly encounter a lot of talk about future wrongdoing, even if it never comes to pass. *See supra* note 149.

190. Tables 18, 18A and 22.

to learn of the disclosure obligation,¹⁹¹ and to alert future clients to the disclosure rules.

b. Discussions of Mandatory Disclosure Rules May Inhibit Client Communications

As previously noted, lawyers who tell clients about the disclosure rule seem to do so because they anticipate that they may become relevant in the course of the representation. The survey responses indicate that attorneys who inform clients about mandatory disclosure rules may be doing so at times that may inhibit client communications about future wrongdoing or may be doing so in ways that insure such communications never occur.

Approximately one-quarter of the attorneys who told any of their clients about New Jersey's mandatory disclosure rules did so at the first substantive meeting with the client.¹⁹² Another 42% of the lawyers did so when they believed that the client "might be about to discuss" a future criminal or fraudulent act.¹⁹³ Thus, over two-thirds of the lawyers who advise any of their clients of the mandatory disclosure rules are telling them about the rules at the beginning of the representation or when they believed that a client might be *about to* discuss a future crime or fraud.¹⁹⁴

191. It was clear from the attorneys' responses that some lawyers had no idea that they are currently required to disclose to prevent a client from committing wrongful acts. *See, e.g.*, I.D. Nos. 366, 367, 385, at Question A.C.

192. Table 32 (25.2%). The lawyers who reported that they told 75% or more of their clients about mandatory disclosure rules usually did so at the first substantive meeting with their clients. Table 33 (76.9% inform at first meeting).

193. Table 32 (42.1%).

194. Lawyers who practiced a substantial amount of family law were somewhat more likely to tell their clients of the rule at the first substantive meeting than lawyers in other practice areas. Table 34. It may be that family law practitioners anticipate that the subject of client wrongdoing will be raised with varying levels of seriousness during the relationship and wish to be sure clients understand the rules up front. Even though criminal defense lawyers also have reason to anticipate that the subject of wrongdoing may be raised, they may have more pressing concerns in the first meeting, including the immediate need to establish

On the one hand, this approach unquestionably promotes client autonomy. If a client's communications are not protected, clients are entitled to know it before they speak.¹⁹⁵ On the other hand, by discussing the mandatory disclosure requirements at the first substantive meeting with the client or when the lawyer thinks that the client might be about to discuss future wrongdoing, the lawyer reduces the likelihood that clients will say any more about the subject. For example, one lawyer noted that "[t]he client is advised of my obligation prior to my obtaining *any* knowledge."¹⁹⁶ The lawyer had not encountered clients who were going to commit a wrongful act, "perhaps because of [the lawyer's] position" with respect to informing clients of the disclosure rules.¹⁹⁷

A small number of lawyers take their discussions about disclosure one step farther and explicitly warn clients to say no more about future wrongful acts.¹⁹⁸ Some of these attorneys employ methods of information control to avoid learning of facts that may interfere with their ability to represent their clients.¹⁹⁹ For example, when one criminal defense lawyer be-

trust in order to obtain information. See MANN, *supra* note 7, at 39-40.

195. See *supra* note 62 and accompanying text.

196. I.D. No. 38, Question 34.

197. *Id.* at Question A.C. Another lawyer similarly would "[i]nform [the] client that I have a duty to report to [the] authorities any illegal act that I have been informed by [the] client that [the] client plans to commit. This usually forestalls admission." I.D. No. 711, Question 34.

198. Several attorneys responded in this way to a question which asked "[i]n your current practice, if a client's statements cause you to begin to suspect that a client might be planning to commit" a future crime or fraud, what do you do? See Appendix *infra* Survey Question 34. Of 697 respondents, 3.3% explicitly stated that they would stop their clients from talking. Table 23A. Although some lawyers read this question as a hypothetical question, it was clear that others were answering based upon actual practice. See, e.g., I.D. Nos. 144, 510, at Question 34.

199. Kenneth Mann has described the technique of "information control" in some detail. As he noted:

Attorneys do not want to be viewed by a client as unethical, nor do they want to go home thinking that their work is an obstruction of justice. To accomplish this end, they have acquired techniques for controlling what clients will talk about with them. Each of these techniques limits the frame of inquiry and can serve the attorney's interest of not receiving information.

gins to suspect that the client might be about to discuss future wrongdoing, the lawyer "stop[s] the client. I don't want to know."²⁰⁰ The lawyer added, "I discourage my clients from discussing any matter which may lead to my knowledge of any planned or contemplated future activity. I like to concern myself strictly with the defense of the matter for which I am retained."²⁰¹

Other attorneys appear to cut off client communications because of concerns about maintaining confidentiality. When one lawyer begins to suspect that a client might be about to discuss future wrongful conduct, the lawyer "warn[s] the client that the attorney-client privilege might not protect the communication and that [he] should not be told."²⁰² Similarly, another lawyer would "[i]nform him not to tell me anything like that because of my duty to inform the authorities."²⁰³

These efforts at information control enable attorneys to avoid professionally difficult situations, but they may also cut off any opportunity for lawyers to dissuade clients from committing future wrongful acts. As the attorneys' comments indicate, some lawyers cut off the communication in this way *because* there is a duty to disclose.

4. *The Use and Abuse of the Disclosure Requirement*

a. *Lawyers Are Not Threatening to Disclose to Prevent Harm to Others*

Most New Jersey lawyers report that they are not using threats to disclose to dissuade their clients from committing

MANN, *supra* note 7, at 106. Techniques that lawyers use to avoid acquiring unwanted information include limiting the time frame of the discussion and controlling the client's dialogue by literally saying, "[s]top, I don't want to hear about that." *Id.* at 107-09.

200. I.D. No. 510, Question 34.

201. *Id.* at 510, Question A.C.; *see also* I.D. No. 699, Question 34. Interestingly, the responses did not reflect that criminal defense lawyers were any more likely than other lawyers to believe that they would stop clients from talking if they began to suspect that a client is about to discuss wrongful conduct.

202. I.D. No. 277, Question 34; *see also* I.D. Nos. 587, 627, at Question 34.

203. I.D. No. 147, Question 34; *see also* I.D. No. 194, Question 34.

wrongful acts. Less than 20% of the lawyers who discussed with their clients their belief that their clients were going to cause substantial bodily harm to another explicitly threatened to disclose the information in order to prevent the act.²⁰⁴ Only 12% of the lawyers who discussed with their clients their belief that their clients intended to cause substantial injury to the financial interests or property of another explicitly threatened to disclose information to prevent the act.²⁰⁵

The lawyers' reports of their threats to disclose may not tell the entire story because they do not reveal whether clients understood other statements by their lawyers as threats to disclose. For example, lawyer responses do not reveal whether lawyers' discussions with clients about the lawyers' disclosure obligations were perceived by clients as implicit threats to disclose. As one lawyer noted, "I would not indicate that I would disclose client information [because] client would perceive same as threat. Client would thereby be unwilling to confide in me if he believed I would disclose such information."²⁰⁶

In addition to the lawyers who explicitly threatened to disclose client information to prevent substantial harm to others, no more than another 15% of the lawyers may have discussed their duty to disclose with clients whom they believed were going to cause substantial harm.²⁰⁷ It is not known whether

204. Tables 16A & 16E (19.6%). Public defenders explicitly threatened to disclose client confidences to prevent bodily harm more often than lawyers in other practice settings. Table 49. This could be due, in part, to the fact that public defenders do not rely upon client referrals for their business or upon high levels of client satisfaction for continued employment. The higher percentage of public defenders who threatened to disclose may also be due to respondent self-selection. See *supra* notes 112, 139 and accompanying text.

205. Tables 16A & 17F (11.8%).

206. I.D. No. 54, Question 39.

207. Almost 11% of the lawyers with clients who were likely to cause bodily harm (10.9%) and almost 15% of the lawyers with clients who were likely to cause financial injury or property damage (14.4%) indicated that they discussed the subject of confidentiality in ways that the lawyers did not describe as threats. Tables 16A, 16G, 17B & 17C. It is difficult to determine exactly how many of those lawyers who spoke with their clients discussed their obligation to disclose because some did not provide sufficient information. The attorneys were asked whether they

clients perceived this information as a threat to disclose, a warning to say no more, or both.

Thus, explicit or implicit threats to disclose were used by no more than 30% of the New Jersey lawyers.²⁰⁸ Relatively few of the lawyers thought that their threats to disclose caused their clients to abandon their plans.²⁰⁹

b. *Many Lawyers Are Not Disclosing Client Information to Prevent Harm to Others*

Few New Jersey lawyers reported that they had ever disclosed client information in order to prevent a client from committing a wrongful act. This finding is not in itself surprising, since disclosure is a last resort and is not required until the lawyer "reasonably believes" disclosure is necessary to prevent the act.²¹⁰ Consequently, lawyers are not required to disclose when their clients abandon or cannot execute the wrongful plans. Nevertheless, nine years after the adoption of RPC 1.6(b), many lawyers were not disclosing client confidences to prevent wrongful acts, even when disclosure was necessary to prevent substantial harm to others.

Many of the sixty-seven lawyers who believed that their clients were going to commit wrongful acts likely to result in future death or bodily injury had reason to conclude that disclosure was not necessary to prevent the wrongful act.²¹¹

discussed "the confidentiality of your conversation with your client" and were then asked to "describe what you said." See Appendix *infra* Survey Question 13d. Some of the attorneys who indicated that they discussed confidentiality with their clients did not provide an explanation of what they said and so it is not possible to determine whether they told their clients about their disclosure obligation or told them—as some lawyers clearly did—that the information would be kept confidential. Tables 16A & 17B.

208. See *supra* notes 204-05 and accompanying text; see also *supra* note 207.

209. See Table 10 (7.7% of clients dissuaded from causing bodily injury by threats to disclose); Table 10A (13.5% of clients dissuaded from causing financial injury or property damage by threats to disclose).

210. See RPC 1.6(b)(1), *supra* note 49.

211. Table 10. Thirty-two lawyers reported that they dissuaded their clients and four reported that the client had no opportunity to commit the act (usually because the client was incarcerated). Thus, thirty-six

Twelve of the sixty-seven lawyers disclosed client information to an "authority" or opposing lawyer to prevent the wrongful act,²¹² but at least twelve other lawyers who had a duty to disclose to prevent the harm failed to do so.²¹³ Thus, only about half of those lawyers who were required to disclose under RPC 1.6(b) to prevent death or substantial bodily harm had in fact made disclosure.²¹⁴

Attorneys disclosed their clients' plans far less frequently to prevent substantial harm to the financial interests or property of another. Only 100 of the approximately 190 lawyers who encountered clients whom they believed were going to cause financial injury or property damage indicated that the anticipated acts did not occur.²¹⁵ Only eight lawyers arguably disclosed client information to prevent the wrongful acts.²¹⁶ Additional attorney disclosures might have prevented substantial harm; twenty-two lawyers who did not disclose reported that the wrongful act was committed²¹⁷ and another sixty-two did not know if the act had occurred.²¹⁸ Thus, less than 9% of the

lawyers had valid reasons to conclude that disclosure was not required. *Id.* Six other lawyers reported that the wrongful acts did not occur because they were wrong about their client's intentions or their clients calmed down, Table 10, but it was not clear from the survey responses whether they reached this conclusion before the wrongful act was supposed to occur—in which case there was no duty to disclose—or afterwards.

212. Table 35.

213. Of those 12 lawyers who did not disclose, eight of the lawyers did not know whether their clients committed the acts and four of the lawyers reported that their clients subsequently committed the wrongful acts. Table 19. Some of the six lawyers described *supra* note 211, may have also had a duty to disclose, but they are not counted here.

214. One of the lawyers who failed to disclose reported that the client committed murder.

215. Table 20.

216. Table 20A. In fact, eight overstates the level of disclosure under Rule 1.6(b). Although Rule 1.6(b) requires disclosure to the "proper authorities," at least four of the eight disclosures were not made to "authorities," but were made to persons who were allied with the client such as relatives of the client and other professionals retained by the client.

217. Table 20.

218. *Id.* The large number of attorneys who did not know whether their clients committed the act may be due to a combination of factors. First, most of these acts involved fraud, which may be difficult for law-

lawyers who should have disclosed under RPC 1.6(b) to prevent financial injury or property damage arguably made disclosure substantial.²¹⁹

Although the level of non-disclosure is higher than might have been predicted,²²⁰ it is not surprising that lawyers were more willing to reveal client confidences to prevent death or bodily injury than they were to prevent substantial harm to the financial interest or property of another. This may be explained by the strong cross-cultural ethic concerning the preservation of life²²¹ and the strong bar ethic concerning protection of client confidences.²²² Those views seem to affect attorney behavior far more than the existence of RPC 1.6(b).

i. RPC 1.6(b) Is Not the Primary Reason Why Lawyers Disclose Client Information

The mandatory disclosure rule seemed to have some effect on the New Jersey attorneys who disclosed client information to prevent harm to others, but the effect is difficult to measure.

yers to detect, even after being warned that it may occur. Second, lawyers may deliberately choose not to look for evidence of client fraud to avoid possible liability. Third, many attorneys may have withdrawn from the representation before the client decided whether to commit the act. See *infra* notes 254-55 and accompanying text.

219. The wrongful act that was most often not disclosed by the lawyers was financial fraud in divorce cases. See I.D. Nos. 27, 146, 155, 280, 751, at Question 23. Again, it is important to note that there may be a disproportionate number of these cases because of the lawyer population surveyed.

220. The degree of non-disclosure is greater than might have been predicted based upon the Tompkins County study, in which lawyers were asked whether a "good attorney" would disclose information in various hypothetical situations. See Zacharias, *supra* note 6, at 392-93. More than 65% of the Tompkins County lawyers indicated that a good attorney would disclose information under certain circumstances to prevent bodily harm and more than half of the lawyers indicated that a good attorney would disclose to prevent one instance of financial injury. *Id.* The responses of the New Jersey lawyers suggest that there is a substantial difference between what a hypothetical "good attorney" would do and what a real life lawyer will do when confronted with a real client and a very serious problem.

221. JOHN Q. WILSON, *THE MORAL SENSE* 17 (1993).

222. Koniak, *supra* note 8, at 1427-31.

Virtually all of the lawyers who disclosed client information to prevent substantial harm indicated that they would have disclosed even if disclosure were optional under the Rules of Professional Conduct.²²³ At the same time, most of the lawyers ranked compliance with the Rules of Professional Conduct as one of the most important reasons why they disclosed.²²⁴

The most important reason cited by the disclosing attorneys for revealing client information to prevent bodily harm was concern about the intended victim.²²⁵ As one attorney explained, "[t]here didn't have to be any rule. I just know there wouldn't be any question about what I would do."²²⁶ Concern about compliance with the Rules of Professional Conduct was ranked second by most of those lawyers.²²⁷

The lawyers who disclosed to prevent substantial injury to the financial interests or property of another ranked concern about compliance with the Rules of Professional Conduct as slightly more important than concern about the victim.²²⁸ Concern for the client seemed to be another important reason for disclosing, particularly when bodily harm was at stake.²²⁹ Other reasons cited by the disclosing lawyers for revealing

223. Ten of the twelve lawyers who disclosed to prevent bodily harm said they would have disclosed client information even if disclosure were optional under the Rules of Professional Conduct, one would not have disclosed and one was unsure. Table 36. Six of the eight lawyers who disclosed client information to prevent financial injury or property damage said they would have disclosed anyway, one was not sure and one did not answer that question. Table 37.

224. Tables 35 & 35B.

225. Table 35. Eleven of the twelve lawyers who disclosed client information to prevent bodily harm did so at least in part because of concern for the victim. *Id.* Eight of those lawyers ranked this concern as the number one reason why they made disclosure. *Id.*

226. Telephone Interview with Attorney A, *supra* note 3.

227. Table 35.

228. Table 35B. Of the eight lawyers who disclosed their clients' intention to cause financial injury, seven lawyers cited compliance concerns as one of the reasons for disclosure, and two lawyers ranked it as the number one reason. *Id.* Six lawyers also cited concern for the victim as a reason for disclosure and two of those lawyers said it was the number one reason why they disclosed. *Id.*

229. Three of the lawyers who disclosed to prevent bodily harm ranked it as the second most important reason for disclosing. Tables 35 & 35B.

client information to prevent harm included concern about criminal prosecution, concern about the lawyer's civil liability and concern about reputation.²³⁰

While moral concerns about the victim seemed to underlie most attorney disclosures to prevent bodily harm, the eight lawyers who disclosed to prevent injury to financial interests or property seemed to disclose in order to protect themselves. Five of those lawyers indicated that concern about their reputations was one of the reasons why they disclosed and two lawyers ranked it as the second most important reason.²³¹ Three lawyers ranked concern about civil liability as the third most important reason why they disclosed.²³²

Although not easily measurable, the mandatory disclosure rule seems to have some impact on attorney decisions to disclose client confidences to prevent serious harm.²³³ With the use of RPC 1.6(b) to create civil standards of liability, the importance of the rule to lawyer decision-making will undoubtedly grow.²³⁴ For the moment, though, RPC 1.6(b) appears not to be the primary reason why lawyers disclose when lawyers are confronted with clients who contemplate future wrongdoing.

ii. *Lawyer Opinions and Failure to Comply With the Disclosure Rule*

Lawyers offered a variety of reasons for not disclosing client information to prevent harm to others, but most of these reasons relate to a basic disagreement with the disclosure rule.²³⁵ For example, lawyers who did not disclose client in-

230. *Id.*

231. In contrast, concern about reputation was cited by only one of the attorneys who revealed client information to prevent bodily harm. Table 35.

232. Table 35B. Most of these lawyers disclosed a crime or fraud already in progress, *id.*, and may have been concerned that they could be viewed as personally involved in the wrongful conduct.

233. At least one of the lawyers would not have disclosed to prevent bodily harm if disclosure were optional under the Rules of Professional Conduct. Table 36.

234. *See infra* note 305.

235. The reasons for not disclosing client information to prevent sub-

formation to prevent harm often indicated that they did not do so because of the perceived importance of maintaining client trust. One public defender who did not reveal the intention of a client to commit a crime noted concerns about the client "losing confidence in my representation of him" and the "reputation of working for prosecutor."²³⁶ The public defender concluded, "Once you lose your reputation for fighting for your client regardless of the information that you receive from him, it leaves you in a vulnerable position."²³⁷ Another lawyer who did not disclose the intention of a client to commit a murder also cited a similar concern about maintaining a reputation for being someone who could be trusted with a client's most sensitive matters.²³⁸

The relatively low number of lawyer disclosures to prevent harm to others may reflect fundamental disagreement with the disclosure rules.²³⁹ Some lawyers noted that they would "never" advise a client that they would disclose a confidential discussion.²⁴⁰ As one lawyer wrote, "if I felt someone was about to disclose a plan to commit a future crime I would tell them not to inform me because I believe that an attorney should not be placed in the position of becoming an informant under *any*

stantial harm are not always philosophical. At least one lawyer did not disclose out of fear of retribution. I.D. No. 132, Question 39. Another lawyer explained "if I ever spoke of [organized crime] people and their business I would never get any work and probably a beating which would be deserved." I.D. No. 23, Question 39. Although no survey question specifically focused on the impact of fear of retribution on attorney disclosure, there is no question that it is a problem for some lawyers. See *supra* note 4 and accompanying text.

236. I.D. No. 13, Question A.C.

237. *Id*; see also I.D. No. 615, Question A.C.

238. The concern about reputation can take two different forms. For some lawyers, it was a concern that their clients would trust them so that they could provide the best possible representation. I.D. No. 13, Question A.C. For others, it was the less high-minded, but no less real concern about the impact of disclosure on the ability to earn a living. I.D. No. 758, Question A.C.

239. Professors Hazard and Hodes have suggested that the New Jersey Professional Responsibility Rules would provoke "significant civil disobedience" and lack of respect for the rules. See THE LAW OF LAWYERING, *supra* note 9, AP4:104 at 1265.

240. I.D. No. 54, Question 39; see also I.D. No. 430, Question A.C.

circumstances."²⁴¹ Even nine years after the adoption of RPC 1.6, these feelings about maintaining the sanctity of client confidentiality remained firmly rooted in the bar.²⁴²

Lawyer ambivalence about mandatory disclosure to prevent substantial harm was confirmed by opinion questions. When attorneys were asked whether they believed that the New Jersey Rules of Professional Conduct should require lawyers to disclose client confidences if necessary to prevent a client from committing a criminal act that was likely to result in substantial harm to others, they responded as follows:

TABLE A

Lawyers' Support of Disclosure Requirements to Prevent Crimes Likely to Result in Harms to Others

<u>Type of Harm</u>	<u>Yes</u>	<u>No</u>
Death or Substantial Bodily Harm	87.8%	10.8%
Substantial Financial Injury	53.5%	46.4%
Substantial Property Injury	54.8%	45.2%
Substantial Harm to Environment	60.3%	39.7%

As the numbers reflect, there is strong support for requiring disclosure when a lawyer believes that death or bodily injury is likely to result.²⁴³ In contrast, only a bare majority of the lawyers supported a mandatory disclosure requirement to prevent criminal acts likely to result in substantial injury to the financial interest or property of another.²⁴⁴ Significantly fewer criminal defense attorneys favored mandatory disclosure rules to prevent wrongful acts than other attorneys.²⁴⁵

241. I.D. No. 587, Question A.C.

242. *E.g.*, I.D. No. 751, Question A.C. (referring to the attorney-client privilege as "sacred").

243. Table 45.

244. *Id.*; see also I.D. No. 670, Question 37. There was somewhat more support for disclosure to prevent substantial environmental harm, which may be due to the perceived permanence of environmental damage or its relationship to bodily injury. See I.D. No. 586, Question A.C.; I.D. No. 640, Question 37.

245. Table 21B. The significance level increased even further among

The numbers changed considerably when lawyers were asked whether there should be mandatory disclosure where a client's fraudulent or illegal, but non-criminal acts were likely to result in substantial injury to others.²⁴⁶

TABLE B

Lawyers' Support of Disclosure Requirements to Prevent Fraudulent or Illegal Acts Likely to Result in Harm to Others

<u>Type of Harm</u>	<u>Yes</u>	<u>No</u>
Substantial Financial Injury	30.8%	69.2%
Substantial Property Injury	30.9%	69.1%
Substantial Harm to Environment	38.4%	61.6%

By large margins, New Jersey attorneys did not support mandatory disclosure of fraudulent or illegal (but non-criminal) acts to prevent substantial harm to the financial interests or property of another.²⁴⁷

Lawyers' views about mandatory disclosure seem to directly affect compliance. Far fewer attorneys disclosed to prevent financial injury or property damage than to prevent bodily harm.²⁴⁸ Lawyer disagreement with rules requiring disclosure to prevent substantial financial injury and property damage undoubtedly affect their willingness to disclose client confidences to prevent such acts.²⁴⁹ This disagreement with the rule, when coupled with the small chance that the lawyer who

lawyers who practiced 40% or more criminal law. Table 21A.

246. The question was intended to incorporate the language of RPC 1.6(b), which refers to "criminal, illegal or fraudulent" acts. See Appendix *infra* Survey Question 38. As some attorneys noted, most serious fraud is also a crime. I.D. No. 697, Question 38. Other attorneys noted that they had difficulty with the concept of an illegal but non-criminal act. *E.g.*, I.D. Nos. 66, 152, 621, at Question 38.

247. Table 45.

248. See *supra* notes 214, 219 and accompanying text.

249. The Tompkins County lawyers also seemed less inclined to think that disclosure should occur when financial injury rather than bodily injury was at stake. Zacharias, *supra* note 6, at 401.

does not disclose will ever be detected,²⁵⁰ may explain why disclosure in this context is infrequent.

iii. *Lawyers Withdraw in Some Cases Rather Than Disclose*

For many years, withdrawal from representation was the prescribed course for lawyers who faced a variety of problems with their clients.²⁵¹ Although New Jersey lawyers did not withdraw often when their clients were contemplating bodily harm, many attorneys withdrew from the representation rather than disclose client confidences when substantial injury to the financial interests or property of another was at stake.

Only 5% of the sixty-seven attorneys who discussed with their clients their belief that the clients were going to commit acts likely to result in substantial bodily harm threatened to withdraw from the representation.²⁵² None of the sixty-seven lawyers who believed their clients were going to commit the wrongful acts actually withdrew from the representation without also disclosing client information to prevent the wrongful act.²⁵³

In contrast, lawyers confronted with clients who were going to commit wrongful acts likely to result in financial harm or property damage were much more likely to threaten withdrawal and to actually withdraw from the representation. Almost 25% of the attorneys confronted with such clients threatened to withdraw, as compared to 12% who threatened to disclose.²⁵⁴ Twenty-six of the total lawyers who encountered such clients ultimately withdrew from the representation rather than dis-

250. See *infra* notes 303-05 and accompanying text.

251. For example, under the Code of Professional Responsibility, withdrawal was required when continued employment would result in the violation of a disciplinary rule and was permitted when the client persisted in action involving the lawyer's services that the lawyer believed was criminal or fraudulent. CPR, *supra* note 31, at DR 2-110.

252. Tables 16A, 16A(1), and 16C (4.9%). In contrast, approximately 20% of the lawyers who talked with their clients threatened to disclose. Tables 16A & 16E.

253. Table 16D.

254. Compare Tables 17B & 17E (24.5%) with Table 17F (12.2%). Six of the lawyers who encountered the problem (3.2%) both threatened to disclose and threatened to withdraw. *Id.*

close; only eight lawyers disclosed client confidences when disclosure was required.²⁵⁵

The low number of withdrawals when clients were contemplating bodily harm may reflect a moral judgment that the lawyers should not simply remove themselves from the situation and allow an innocent party to be physically harmed. In cases not involving physical harm, the traditional importance that lawyers attach to maintaining client confidences seemed to take priority over moral concerns. As one attorney noted:

The attorney-client relationship is very important. Clients should be able to divulge all confidences to their attorney without fear of disclosure. . . . If, as a result of the information received, the attorney no longer can or will represent the client, all parties can terminate the relationship and move on with no potential retribution to either side as a result of the information learned.²⁵⁶

These lawyers' responses indicate that lawyers generally prefer to remove themselves from the representation rather than to reveal client confidences to prevent future client wrongdoing, at least where injury to the financial interests or property of another are at stake.²⁵⁷

255. Tables 20A & 51. The 26 lawyers who withdrew reported that their clients committed the wrongful acts or that they did not know whether their clients had done so.

256. I.D. No. 30, Question A.C. Another lawyer noted, "A lawyer[-]client relationship is fragile and needs sensitivity in particulars. A black and white ethical rule is impossible to follow. Lawyers should *never* allow a client to believe that they would accept illegal conduct and the greatest sanction to [a] client is your threat to withdraw from representation." I.D. No. 70, Question A.C.; *see also* I.D. Nos. 283, 385, at Question A.C.

257. This general preference for withdrawal was supported by the responses of lawyers who were asked about what they do in their current practice if they *begin to suspect* that a client might be planning to commit a future criminal or fraudulent act that is likely to substantially harm another. *See* Appendix *infra* Survey Question 34. In response to this open-ended question, which many lawyers read as hypothetical, 3.6% of the lawyers indicated that they would threaten to disclose and 13.2% said that they would disclose client information. Table 23A. In contrast, 7.5% of the lawyers said that they would threaten to withdraw and 18.5% said that they would in fact withdraw from the representation. Table 23A. The lawyers' answers to this question at times made it difficult to distinguish explicit threats to disclose from actual disclosure and

5. *Lawyer Handling of Future Harm Problem Often Has Little Adverse Impact on Relationships with Clients*

One objection to any attorney disclosure rule is the impact that an exception will have on the attorney-client relationship. The lawyers' responses suggest that they believe the ways in which they handle the problem of future client wrongdoing have relatively little adverse impact on the attorney-client relationship.

More than 75% of the attorneys who believed their clients were going to cause substantial bodily injury to another reported that their handling of the situation had no apparent impact on their relationships with their clients.²⁵⁸ Less than 20% of the lawyers reported that their clients were less cooperative or that the relationship prematurely terminated.²⁵⁹ A small number of the lawyers responded that their relationships with their clients actually improved.²⁶⁰

Client relations became more strained when injury to the financial interests or property of another was at stake. This increased strain may have occurred because clients were seeking to have their lawyers facilitate the wrongful conduct or because clients could not conduct the wrongful acts without their attorneys' assistance. About 55% of the attorneys who had clients who they believed were going to commit wrongful acts likely to result in such injury said that their handling of the situation had no apparent impact on their relationships with their clients.²⁶¹ Almost 10% of the lawyers reported that their client was less forthcoming or less cooperative.²⁶² Ap-

threats to withdraw from actual withdrawal from the representation, but it is clear that more attorneys believed that they would consider withdrawal from the representation rather than disclosure of client confidences.

258. Table 41.

259. *Id.*

260. *Id.* (3.1%). This was a write-in response to "other" and may have been noted more frequently if the option had been specifically provided. See Appendix *infra* Survey Question 33f. One lawyer explained that "when an attorney gives a forceful 'no,' the client usually backs down [and] holds attorney in higher regard." See I.D. No. 19, Question 33f.

261. Table 42.

262. *Id.*

proximately 24% reported that the client prematurely terminated the relationship or the attorney withdrew from the representation.²⁶³ Five percent of the lawyers said that their relationships with their clients were enhanced.²⁶⁴

Surprisingly, the lawyers who threatened to disclose their clients' plans but did not actually disclose reported that they did not necessarily experience a deterioration of their relationships with their clients. Of the seven attorneys who threatened to disclose to prevent bodily harm but did not ultimately disclose, five reported no apparent impact on their relationships with their clients.²⁶⁵ The same was less true of the nineteen lawyers who threatened to disclose in order to prevent financial injury or property damage, but who did not ultimately disclose. Only ten of those lawyers reported no adverse impact on their relationships with their clients.²⁶⁶

When bodily injury was at stake, the lawyers who actually disclosed client information damaged their relationships with their clients less than might be imagined. Of the twelve attorneys who disclosed to prevent bodily harm, five reported no apparent impact on their relationships with their clients and one reported that the relationship was enhanced.²⁶⁷ Three of those six lawyers had warned their clients that they would disclose before disclosing, lending support to psychological research suggesting that this approach may better preserve the relationship.²⁶⁸ On the other hand, of the eight lawyers who disclosed to prevent financial injury or property damage, five reported that their relationships with their clients were termi-

263. *Id.*

264. *Id.*; Table 52.

265. Table 16E.

266. Tables 17F and 52.

267. Table 44. It should be noted that at least one of the five lawyers who experienced no adverse impact noted that the client did not learn of the disclosure. I.D. No. 17, Question 20f.

268. There is evidence that when psychotherapists warn potential victims that patients may cause harm, the warning does not damage the therapeutic relationship if the doctor and patient discuss the warning ahead of time and the warning is justified. James C. Beck, *When the Patient Threatens Violence: An Empirical Study of Clinical Practice After Tarasoff*, 10 BULL. OF THE AAPL 189, 199 (1982).

nated.²⁶⁹ Obviously, to thoroughly investigate what types of attorney behavior negatively affects attorney-client relations, interviews with clients must be performed.

V. REEXAMINING THE EXPERIMENT

The New Jersey study reveals how some lawyers respond to the problem of clients who plan to cause serious harm to others. The study's results do not indicate the full impact of RPC 1.6(b) on attorney conduct,²⁷⁰ but they can be used to begin to evaluate how a mandatory disclosure rule affects attorneys and their clients. Although further empirical research in this area is needed, some tentative suggestions are made that may better accommodate the interests at stake.

A. *Do Mandatory Disclosure Rules "Work?"*

This question cannot be answered on the basis of the New Jersey study alone. The findings suggest, however, that mandatory disclosure rules may not achieve their major objective: the prevention of harm.²⁷¹ In addition, mandatory disclosure rules may not substantially affect lawyers' views of their obligations to disclose.

1. *The Disclosure Rule Does Not Clearly Prevent Harm*

The New Jersey study does not clearly demonstrate that a mandatory disclosure rule prevents harm to others. Although the vast majority of lawyers tried to dissuade their clients from committing wrongful acts, whether any of them did so *because* of the existence of the mandatory disclosure rule is uncertain. Moreover, the theory that lawyers will be better able to dis-

269. Table 35B.

270. A true legal impact study typically requires a comparison of events in the jurisdiction before and after the rule was enacted, a comparison of jurisdictions with the two different rules or a combination of the two approaches. See Richard Lempert, *Strategies of Research Design in the Legal Impact Study: The Control of Plausible Rival Hypotheses*, 1 LAW & SOC'Y REV. 111, 112 (1966-67).

271. Landesman, *supra* note 66, at 207-08; see *supra* text accompanying note 70.

suade their clients from wrongdoing if they can tell their clients that they are required to disclose is not borne out in practice. Most lawyers did not attempt to use the disclosure rule to dissuade client wrongdoing.²⁷² Threats to disclose were not a major reason why clients abandoned plans to commit wrongful acts.²⁷³

Instead, it appears that some lawyers believe that the myth of strict confidentiality enables them to dissuade clients from wrongdoing. As one lawyer noted:

My experience is that clients are more forthcoming if they know their communications cannot be disclosed. This presents the attorney with the opportunity to discuss the situation with the client and prevent the act from occurring. My experience has proven this to be successful. These discussions would never take place if the client knew they could be disclosed and an opportunity might be lost.²⁷⁴

Clients need to be interviewed to determine to what extent this view of confidentiality is accurate.

It also appears that when lawyers reach the end of the line with their clients and cannot persuade them to abandon their wrongful plans, most lawyers surveyed did not disclose their clients' plans. The few lawyers who disclosed client information to prevent harm believed they would have done so regardless of whether they were required to do so by the Rules of Professional Conduct.²⁷⁵ Even when attorney disclosure did occur, it did not always prevent the occurrence of the wrongful act.²⁷⁶

272. Less than 30% of the lawyers threatened to disclose or discussed confidentiality with their clients who were contemplating wrongdoing and it is not clear how many of those lawyers actually told their clients that they were *obligated* to disclose. See *supra* notes 204-05, 207-08 and accompanying text.

273. See *supra* note 209 and accompanying text.

274. I.D. No. 478, Question A.C.; see also I.D. Nos. 481, 530, at Question A.C.

275. Only one lawyer who disclosed would not have disclosed if disclosure were optional under the Rules of Professional Conduct. See *supra* note 223 and accompanying text.

276. For example, two lawyers who reported that they disclosed client information to prevent bodily harm indicated that the wrongful act occurred anyway. I.D. No. 17, Question 15 (removing children from the

These observations do not fully answer the question of whether mandatory disclosure rules prevent harm to others. New Jersey lawyers may try harder than lawyers in other states to dissuade their clients from committing wrongful acts *because* of the obligation to disclose client information if they fail. In addition, threats to disclose possibly are more effective in New Jersey than they would be in a state with different disclosure rules. To test these hypotheses, however, it would be necessary to compare the responses of New Jersey lawyers to those of attorneys in a state with permissive disclosure rules. It would also be useful to compare client responses from the two states to explore the reasons and the extent to which clients believed their attorneys prevented them from committing wrongful acts.

2. *The Disclosure Rule and the Lawyer's Role*

The New Jersey study does not clearly reveal whether RPC 1.6 has had an effect on lawyers' views of their obligation to disclose to prevent harm to others. It does show that bar support for mandatory disclosure rules appears not much stronger among those attorneys who were admitted to the New Jersey bar after the adoption of RPC 1.6 than those who were admitted before 1984.²⁷⁷ The similarity of the opinions suggests that the prevailing bar culture or subcultures concerning confidentiality may be more powerful than the impact of legal education on lawyers.²⁷⁸

court's jurisdiction to frustrate the spouse's visitation); I.D. No. 341, Question 15 (driving while intoxicated).

277. The only significant differences were that the newer lawyers more strongly supported the mandatory disclosure rule to prevent bodily harm and to prevent illegal acts that would result in environmental harm. Table 46.

278. On the one hand, this finding is somewhat surprising, since law schools typically teach the range of alternative rules governing the problem of client wrongdoing, and practitioners believe that they learned sensitivity to ethical issues essentially in law schools. See, e.g., BRYANT G. GARTH & JOANNE MARTIN, LAW SCHOOLS AND THE CONSTRUCTION OF COMPETENCE, Tables 4-8 (American Bar Foundation Working Paper No. 9212 1992). On the other hand, it may be that the view of the lawyer as defender of the client against the world, e.g., FREEDMAN, *supra* note 58,

Lawyers' written comments suggest that their views about their obligations as lawyers and the role of individual morality are quite varied. Some lawyers persist in the view that their role as protector of the client usurps any consideration of moral issues, even to the point of remaining silent knowing a client plans to commit a wrongful act.²⁷⁹ Other lawyers firmly believe that the client's interests do not supersede the attorney's own morality.²⁸⁰ One lawyer made it quite clear that his or her morality could not be legislated: "I would not 'give up' a client unless I believed that a particular individual would certainly be killed. Then I would act out of a sense of my own morality, not because of a court rule."²⁸¹ These comments are purely anecdotal; to determine whether RPC 1.6 has in fact affected lawyers' views of their role and their disclosure obligations, lawyers in a state without a mandatory disclosure rule should also be surveyed.

B. Tinkering with the Experiment

The New Jersey study provides a fascinating glimpse at the ways in which attorneys deal with clients whom they believe are about to harm others, but its findings cannot be over-generalized. In view of the number and importance of the open questions, it would be premature to suggest that mandatory disclosure rules should be scuttled or embraced. Nevertheless, some consideration should be given to tinkering with the rules.

at 4, is so ingrained within the population surveyed that it overpowers other rules. See generally Fred C. Zacharias, *Specificity in Professional Responsibility Codes: Theory, Practice and the Paradigm of Prosecutorial Ethics*, 69 NOTRE DAME L. REV. 223, 268 n.130 (1993) (noting that if a highly specific rule seems indefensible to a subculture of lawyers based on their shared experiences, then the lawyers may feel free to ignore that rule).

279. Another attorney who did not disclose to prevent harm explained, "I hold sacred the attorney-client privilege."

280. One lawyer wrote, "[p]ersonally, I would rather surrender my license than look the other way while a client commits civil fraud or a criminal act." I.D. No. 770, Question A.C.; see also I.D. Nos. 173, 180, 285, 366, at Question A.C.

281. I.D. No. 538, Question A.C.

1. *Being Honest with Clients About the Disclosure Rules*

The New Jersey study confirmed that lawyers do not tell most of their clients about the disclosure rules, even though they do not believe their clients understand the rules.²⁸² While scholars agree that clients have a right to know about attorney disclosure rules,²⁸³ lawyers do not usually talk about the rules, apparently because they fear that such discussions will interfere with client trust and the client's willingness to talk freely with counsel.²⁸⁴

A lawyer's deliberate failure to inform a client of the disclosure rule is deceptive and the deception carries costs for both lawyer and client.²⁸⁵ The costs of deception include client distrust of lawyers, loss of client autonomy, and damage to lawyers' internal standards of integrity.²⁸⁶

282. See *supra* notes 182-83 and accompanying text. Professor Zacharias made a similar observation based upon the Tompkins County study. The primary difference between the New Jersey study and the Tompkins County study is that the New Jersey study suggests that many lawyers deliberately perpetuate the myth of strict confidentiality by telling their clients about confidentiality while the Tompkins County study indicated that few lawyers told their clients about confidentiality. See Zacharias, *supra* note 6, at 382-83.

283. See *supra* note 62. Some scholars have also argued that conversations about the lawyer's disclosure obligations will allow the lawyer to "displa[y] his trustworthiness in concrete terms." Hodes, *supra* note 62, at 786; see also Pizzimenti, *supra* note 16, at 485 n.200. This argument is not completely convincing. A client may trust that a lawyer will be forthright about the rules governing their relationship, but not trust that the client's thoughts can be freely and safely shared with the lawyer.

284. See *supra* notes 185-86 and accompanying text.

285. Pizzimenti, *supra* note 16, at 482-83 (referring to policy of not disclosing limits on confidentiality as an "ongoing practice of deception"). Deception has been defined by Sissela Bok as "messages meant to mislead [others] . . . through gesture, through disguise, by means of action or inaction, even through silence." SISSELA BOK, LYING: MORAL CHOICE IN PUBLIC AND PRIVATE 14 (1979).

286. Lisa G. Lerman, *Lying to Clients*, 138 U. PA. L. REV. 659, 679-83 (1990); Pizzimenti, *supra* note 16, at 478-80. The full consequences of the deception become apparent when considering that some New Jersey lawyers disclosed client information without having told their clients about the disclosure rule. *E.g.*, I.D. No. 8, Questions 12, 17; I.D. No. 100, Questions 13, 17.

Rules governing lawyers that require systematic deception of clients to achieve the rule's goals impose too many costs on lawyers, on clients and, ultimately, on society to be desirable.²⁸⁷ When mandatory disclosure rules are adopted, it should be with the understanding that clients are entitled to know about these rules before they speak about future wrongdoing. Moreover, lawyers should be required to tell their clients about the rules prior to any such communication by the client.

State rules of professional conduct should specify when, how, and to whom this information about the disclosure obligation is to be provided,²⁸⁸ because lawyers do not know what to do.²⁸⁹ If the rules of professional conduct required lawyers to discuss the disclosure rule with their clients, then the lawyer's professional obligations would be clearer to both lawyer and client.

It is easy to say that clients should be told about this confidentiality exception, but much more difficult to decide who should learn of the rule and to devise a palatable and meaningful way to tell clients. In theory, all clients should be told explicitly about the disclosure rule because all are entitled to know the rules that govern their communications with their lawyers.²⁹⁰ As a practical matter, such a requirement could

287. See *supra* text accompanying note 286. Some additional costs are described in Lerman, *supra* note 286, at 679-83.

288. The ABA at one time considered requiring that similar information be given to clients, but the idea was abandoned. The Discussion Draft of the Model Rules contained a feature requiring lawyers to advise clients about "the relevant legal and ethical limitation to which the lawyer is subject" when the lawyer becomes concerned that the client expects prohibited assistance. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.4 (Discussion Draft January 30, 1980); see Hodes, *supra* note 62, at 786-87. All that remains is Model Rule 1.4, which requires lawyers to "explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.4(b) (1983).

289. As one lawyer noted, "It would be unfair to a client to disclose information if the holes in the attorney-client privilege had not been discussed with the client in advance. Lawyers need better training in this." I.D. No. 689, Question A.C. See also I.D. No. 588, Question A.C.

290. Indeed, in view of the empirical evidence that many clients may

confuse many clients and seriously interfere with the development of client trust, thereby affecting lawyers' ability to represent their clients.²⁹¹

The subject of how best to advise clients about the contours of the attorney confidentiality rules is beyond the scope of this Article, but it would seem that the "who" to tell should include, at a minimum, those clients who are told about confidentiality by their lawyers and those clients whom lawyers believe might contemplate future wrongdoing during the representation.²⁹² The "what" to tell clients should include specific mention of the lawyer's desire to discuss the client's questions about the legality of the client's contemplated conduct so as not to discourage client communications. By inviting clients to discuss the legality of contemplated conduct, lawyers may retain the opportunity to dissuade clients from committing wrongful acts.

2. *Being Clear with Lawyers About the Withdrawal Rules*

It is not surprising that many lawyers withdraw from the representation rather than disclose information to prevent their clients from committing wrongful acts. Disclosure is risky

not understand that there are exceptions to confidentiality, *see supra* notes 93, 96, 183 and accompanying text, rules should be developed to insure that clients are told about all confidentiality exceptions that may come into play for the particular client.

291. The difficulty presented by an across-the-board requirement that lawyers advise all clients of the disclosure obligation is perhaps best illustrated by the challenges facing public defenders. Public defenders reportedly have a great deal of difficulty establishing client trust, but they also encounter significantly more clients whom they believe will commit bodily harm than other lawyers. In addition, public defenders were less likely to believe their clients understood confidentiality exceptions than other lawyers. Table 29; *see supra* note 142 and accompanying text. Although it has been suggested that all criminal defendants be advised of the disclosure exception, *see Pizzimenti, supra* note 16, at 486-87, careful thought must be given to whether a more flexible rule about whom to tell about the disclosure rule might be preferable.

292. It has been suggested that the lawyer should evaluate the likelihood that information within a confidentiality exception may be confided and if it is likely, the exception should be discussed with the client. *Id.* at 486-87.

and unpleasant for a variety of reasons.²⁹³ Withdrawal reduces those risks, while permitting the lawyer to feel like she has signalled disapproval (at least to the client) of the wrongful conduct.²⁹⁴

Lawyers should not be permitted to circumvent their obligation to disclose by quietly withdrawing from the representation. Withdrawal without disclosure does not prevent harm; at best it may delay it and at worst it leaves better educated clients who can then enlist a new lawyer's unwitting assistance with the wrongful acts. An affirmative statement should be added to codes of professional conduct clarifying that lawyers cannot satisfy their obligations to disclose by withdrawing from the representation.²⁹⁵ This statement should reduce the incidence of lawyers who withdraw from the representation without making disclosure to prevent client wrongdoing. In addition, a separate bar examination ethics component or Continuing Legal Education requirement in states with mandatory disclosure rules may also help insure that lawyers better familiarize themselves with the particular state's disclosure requirements.²⁹⁶

293. See *supra* notes 3-4 and accompanying text.

294. Rates of withdrawal in New Jersey may also be due to confusion about the rule. RPC 1.16(a)(1) requires withdrawal if "the representation will result in violation of the Rules of Professional Conduct or other law." N.J. RULES OF PROFESSIONAL CONDUCT Rule 1.16 (1984). Lawyers may reason that if they do not disclose, their continued representation will violate RPC 1.6(b), but if they withdraw from the representation, they will have no duty to disclose the plans of their former client.

295. This suggestion is based in part on my experiences with practicing lawyers who indicate that they are often unclear about their professional obligations, but that they vaguely recall the rule of thumb "when in doubt—withdraw."

296. Law schools tend to teach the ABA codes, and the Multi-state Professional Responsibility Bar Examination ("MPRE") is also based on those rules. As a result, some lawyers may never learn about the mandatory disclosure requirements in the state in which they practice unless they have reason to research the rule.

3. *Reconsidering Mandatory Disclosure to Prevent Financial Injury or Property Damage*

Although further empirical research is needed, the New Jersey study suggests that a mandatory disclosure requirement may be defensible—if not desirable—to prevent a client from causing death or serious bodily harm.²⁹⁷ At the same time, the study also suggests that mandatory rules to prevent other types of harm should be carefully scrutinized because their costs may significantly outweigh their benefits.²⁹⁸

The bar does not strongly support a rule requiring disclosure to prevent a client from committing a wrongful act that will cause substantial injury to the financial interest or property of another.²⁹⁹ Disapproval of the rule seems to modestly contribute to the failure to attempt to dissuade clients from wrongdoing³⁰⁰ and to the failure to comply with the disclosure requirement.³⁰¹

Undoubtedly, the failure to comply with RPC 1.6(b) is fueled by the difficulty of detection and the lack of enforcement of the rule.³⁰² No formal disciplinary action has been taken against a lawyer for failure to comply with Rule 1.6(b).³⁰³ The lack of

297. Even though it is not clear that mandatory disclosure rules prevent bodily harm, *see supra* notes 272-76 and accompanying text, they can be defended on the grounds that they are supported by the bar and are often obeyed, if only because lawyers believe that disclosure is the moral thing to do. *See supra* notes 225-26 and accompanying text.

298. Mandatory disclosure rules should not be retained because they "cannot hurt." There are costs to employing rules that purport to affect conduct but are not enforced. Zacharias, *supra* note 278, at 257 n.102.

299. *See supra* notes 244, 247 and accompanying text.

300. *See supra* notes 239-41 and accompanying text. Disapproval of the rule caused some lawyers to tell their clients to stop talking about wrongful plans so that the lawyers were not placed in a position where they would be required to disclose. As a result, those lawyers did not learn of the plans and lost an opportunity to dissuade their clients from wrongdoing.

301. *See supra* notes 236-38, 248-49 and accompanying text.

302. Traditionally, the effectiveness of laws turns on the likelihood and degree of sanctions. Zacharias, *supra* note 278, at 239 n.47. As Professor Zacharias notes, although other factors bear on decisions to comply with code rules, the likelihood of enforcement is undoubtedly one of them. *Id.* at 252 & n.91.

303. Letter from Stephen W. Townsend, Clerk of the Supreme Court of

enforcement signals to lawyers that the rule need not be obeyed. While fear of civil liability may improve compliance, such lawsuits are relatively rare.³⁰⁴

Although lawyer disapproval of the rule, failure to comply, and lack of enforcement are not necessarily reasons to change it, they do raise serious issues.³⁰⁵ Lawyer disapproval of RPC 1.6(b) may engender wider disrespect of the Rules of Professional Conduct and foster the view among lawyers that it is acceptable to pick and choose which of those rules they will obey.³⁰⁶ If lawyers do not obey the rules that govern them, there is a danger of a loss of legitimacy of their efforts to regulate themselves³⁰⁷ and a further loss of public trust in lawyers.

Rather than require disclosure to prevent non-bodily harm and have that rule disregarded, a permissive disclosure rule with a withdrawal *requirement* (where withdrawal is possible) may better protect the interests at stake. The withdrawal requirement should be coupled with code language suggesting that if disclosure is not made to an authority or to the intend-

New Jersey, to Leslie C. Levin (July 14, 1993) (on file with the *Rutgers Law Review*). It is unclear whether the absence of disciplinary action is due entirely to the difficulty of detection or whether it is also because the bar has declined to enforce the rule. For example, a member of New Jersey's Disciplinary Review Board stated that the Board had avoided sanctioning lawyers based on alleged violations of the controversial RPC 3.3(a)(5) (dealing with disclosure to the tribunal) because of fundamental bar disagreement with the rule. *See supra* notes 49 & 52.

304. There is only one reported case upholding a claim for failure to disclose based upon New Jersey's RPC 1.6(b). *See Philadelphia Reserve Supply Co. v. Nowalk & Assoc.*, 1992 U.S. Dist. LEXIS 12745 (E.D. Pa. Aug. 25 1992).

305. The likelihood that rules of professional responsibility will be obeyed continues to affect the decisions to adopt particular code provisions. *See e.g.*, Daniel J. Capra et al., *The Attorney's Duties to Report Misconduct of Other Attorneys and to Report Fraud on a Tribunal*, 47 THE REC. ASSOC. OF THE BAR OF THE CITY OF N.Y. 905, 927 (1992).

306. *See generally* Zacharias, *supra* note 278, at 265 n.117 (noting that if particular rules never result in disciplinary proceedings, then it may cause lawyers to treat all rules as empty).

307. Although lawyers are no longer entirely self-regulating, they remain actively involved in their own regulation. *See Koniak, supra* note 8, at 1395-1402.

ed victim, then it should be made to a successor lawyer so that a new lawyer does not unwittingly facilitate a wrongful scheme.

For substantially the same reasons that clients should be told about mandatory disclosure rules,³⁰⁸ clients are entitled to know about permissive disclosure rules before they speak about future wrongdoing. While a permissive disclosure rule and the attendant need to advise the client of the rule would create some of the same potential problems raised by a mandatory disclosure scheme, a permissive rule may interfere less with lawyers' opportunities to dissuade clients from wrongdoing. Undoubtedly, knowledge of the possibility that a lawyer will disclose will deter some clients from speaking. It seems likely, however, that fewer clients would be deterred from speaking by a permissive disclosure rule and that fewer lawyers would discourage their clients from speaking if the disclosure rule were not a mandatory one.

A permissive disclosure rule would not necessarily reduce the number of lawyer disclosures to prevent financial injury or property damage.³⁰⁹ At the same time, a permissive rule may not substantially reduce lawyers' efforts to dissuade their clients from wrongdoing, because in many instances, their failure to dissuade will result in economic loss occasioned by withdrawal.³¹⁰ Moreover, the impact of a withdrawal threat on a client should not be underestimated; withdrawal would give

308. See *supra* notes 283-87 and accompanying text. Although mandatory disclosure rules arguably create a higher level of likelihood that the client information will be disclosed, a client is also entitled to know that a lawyer *may* reveal client information, unless the lawyer is confident that she would never reveal this information under any circumstances.

309. The few New Jersey attorneys who did disclose to prevent non-bodily harm often did so out of self-interest and would have disclosed even without mandatory rules. See *supra* notes 223, 231-32 and accompanying text.

310. It is quite possible that there will, however, be some lessening in efforts to dissuade. As previously noted, it is not possible to assess from the New Jersey study how many lawyers attempted to dissuade their clients because of the existence of a mandatory disclosure rule. See *supra* p.120. A withdrawal rule possibly may result in fewer efforts to dissuade wrongdoing because lawyers view withdrawal as less drastic than disclosure.

some clients pause, if only because of the cost and delay involved in changing lawyers.³¹¹

A permissive disclosure, when coupled with and the threat of withdrawal also signal to the client the seriousness with which the attorney views the conduct, and signal to the public that lawyers will not tacitly abide conduct that will harm the financial interests or property of another. Finally, a permissive disclosure rule might increase respect for the Rules of Professional Conduct and cause lawyers to take disclosure rules concerning the prevention of bodily harm more seriously.

CONCLUSION

What was once tagged as part of a radical experiment has not clearly resulted in radical changes in the thinking or conduct of the lawyers surveyed. On the contrary, many attorneys continue to believe that the sanctity of client confidentiality outweighs other important values. As a result, some lawyers have remained silent while clients committed crimes or frauds that seriously harmed others. Others have tried to avoid learning about their clients' plans.

At the same time, the New Jersey study reveals that most lawyers try hard and in good faith to cope with this very difficult problem. While they are not always forthcoming about their disclosure obligations, and often resist disclosure, their comments reflect a real commitment to attempting to dissuade their clients from committing wrongful acts.

The results of the New Jersey study raise a number of issues for further theoretical consideration and empirical research. For example, given the evidence that lawyers attempt to dissuade their clients from wrongdoing and that clients may be dissuaded by their lawyers' efforts, it becomes all the more important to determine how clients' communications with their lawyers are affected by knowledge that lawyers are subject to mandatory disclosure requirements. Further research is needed to determine whether opportunities to dissuade are in fact

311. The fact that one-quarter of the New Jersey lawyers threatened their clients who were contemplating causing financial injury or property damage with withdrawal reflects that they believe it is effective. See *supra* note 254 and accompanying text.

lost after clients learn of the disclosure rule, or alternatively, whether clients talk with their counsel because their need for advice outweighs their concern about disclosure.

Empirical research in this area is difficult and admittedly imperfect; it is tempting to rely instead upon theories based on intuitive assumptions about lawyer conduct. Unfortunately, the problem of client wrongdoing is not theoretical, and the New Jersey study suggests that lawyer response to client plans to commit wrongful acts cannot be predicted based solely upon intuition. If empirical evidence is collected carefully and interpreted cautiously, it cannot help but advance the debate about the rules that should govern lawyers confronted with clients who intend to harm others.

APPENDIX A**SURVEY OF NEW JERSEY LAWYERS**

Thank you for participating in this survey on an anonymous basis. The survey is being sent to New Jersey lawyers in order to learn about their practices relating to attorney-client confidentiality and to learn about their experiences with clients who they believe intend to commit criminal, illegal or fraudulent acts that are likely to cause substantial harm to others. Completion of the survey should take less than 10 minutes.

For most of the questions, please circle the letter that corresponds to the answer most closely representing your view. Unless otherwise indicated, please select only one answer per question. Space has been provided at the end of the questionnaire to include any comments you may have.

This survey seeks to determine the practices and views of the New Jersey bar in the aggregate and there is no need or reason to identify individual participants. Thus, you are not identified on this questionnaire and your anonymity is insured. A business reply envelope is enclosed for your convenience.

I. BACKGROUND INFORMATION

1. In what type of office do you practice?
 - a. Solo practitioner.
 - b. Small law firm (2-20 lawyers).
 - c. Medium law firm (more than 20 lawyers).
 - d. Corporation.
 - e. Legal services/public defender.
 - f. Other: _____.
2. In what area(s) do you practice? (If you identify more than one practice area, indicate the percentage of your time devoted to each area in the corresponding "percentage" column).

Percentage

- a. Commercial Litigation.
- b. Corporate.
- c. Criminal Law.
- d. Family Law.
- e. Personal Injury.
- f. Real Estate.
- g. Tax.
- h. Trusts and Estates.
- i. Other: _____

3. In what year did you graduate from law school? 19__
4. How long have you been a member of the New Jersey bar?
- a. Less than 5 years.
 - b. 5 to 10 years.
 - c. 11 to 20 years.
 - d. 21 to 30 years.
 - e. Over 30 years.
5. Are you a member of the bar of any other state? _____
- If yes, which state(s) _____

II. ATTORNEY-CLIENT CONFIDENTIALITY RULES

Please answer Question Nos. 6-7 based upon your communications and observations during the last 12 months.

6. What percentage of your clients do you personally inform of the confidentiality of their communications to you?
- a. None of your clients.
 - b. Less than 10% of your clients.
 - c. 10% to 25% of your clients.
 - d. 26% to 50% of your clients.
 - e. 51% to 75% of your clients.
 - f. More than 75% of your clients.

7. What percentage of your clients do you believe understand that there are circumstances under which a lawyer may be obligated to disclose attorney-client confidences to a third party without the client's consent?
- a. None of your clients.
 - b. Less than 10%.
 - c. 10% to 25%.
 - d. 26% to 50%.
 - e. 51% to 75%.
 - f. More than 75%.

**III. DANGER OF DEATH OR SUBSTANTIAL BODILY
HARM TO ANOTHER**

8. On how many occasions since January 1, 1985 have you reasonably believed that a client was going to commit a specific criminal, illegal or fraudulent act in the near future that was likely to result in death or substantial bodily harm to an identifiable third party? (Circle the number of occasions).

0 1 2 3 4 5 6 7 8 9 10+

If the answer to Question No. 8 was "0," skip to Question No. 21.

9. On how many of those occasions identified in Question No. 8 did you attempt to dissuade your client from committing the act that was likely to result in death or substantial bodily harm to another? (Circle the number of occasions).

0 1 2 3 4 5 6 7 8 9 10+

Question Nos. 10-20 are addressed to the most recent occasion on which you believed that your client was going to commit a criminal, illegal or fraudulent act

that was likely to result in death or substantial bodily harm to another.

10. What was the anticipated act? _____

11. What caused you to believe that your client was going to commit the act? _____

12. Once you formed your belief, did you discuss it with your client?

- a. Yes.
- b. No.
- c. I don't recall.

13. If the answer to Question No. 12 was "yes," what did you discuss with your client? (Circle more than one letter if applicable):

- a. The legal consequences of the act.
 - b. The morality of the act.
 - c. The likelihood that your client would be apprehended.
 - d. The confidentiality of your conversation with your client (if so, describe what you said) _____
 - e. Any actions you intended to take to prevent the act (if so, describe what you said) _____
 - f. Other: _____
- _____

14. If you did not discuss with your client your belief that the client was going to commit an act that was likely to result in death or substantial bodily harm to another, what were the reasons why you did not discuss it?

-
-
15. Did your client subsequently commit the anticipated act?
- a. Yes.
 - b. No.
 - c. I don't know.
16. If the answer to Question No. 15 was "no," why do you think that your client did not commit the act?
- a. You were wrong about your client's intentions.
 - b. You told your client that you would disclose information to someone else in order to prevent the act.
 - c. You dissuaded your client from committing the act by using other reasoning.
 - d. You disclosed client information to someone else in order to prevent the act.
 - e. Other: _____
-

If you did not disclose client information to someone else in order to prevent the anticipated act, skip to Question No. 20.

17. If you disclosed client information to someone else in order to prevent the anticipated act, to whom did you disclose?
- a. The intended victim(s).
 - b. A relative of the client.
 - c. A mental health professional.
 - d. The police.
 - e. A prosecutor or judge.
 - f. Other: _____
18. If you disclosed client information in order to prevent the act, why did you do so? (Circle only the applicable answers and rank them in importance in the corresponding

"rank" column, with "1" reflecting the most important reason).

- | | <u>Rank</u> |
|-----------------------------------------------------------------|-------------|
| a. Concern about client. | _____ |
| b. Concern about own civil liability. | _____ |
| c. Concern about own criminal prosecution. | _____ |
| d. Concern about intended victim(s). | _____ |
| e. Concern about compliance with Rules of Professional Conduct. | _____ |
| f. Concern about reputation in community. | _____ |
| g. Other: _____ | _____ |
19. Do you believe that you would have disclosed client information on this occasion if disclosure were optional under the Rules of Professional Conduct?
- a. Yes.
b. No.
20. What impact, if any, did your handling of this situation have on your ongoing relationship with your client?
- a. The incident had no apparent impact.
b. The client was less forthcoming with information.
c. The client was less cooperative in general.
d. The client prematurely terminated the relationship.
e. You withdrew from the representation.
f. Other: _____
- IV. DANGER OF SUBSTANTIAL INJURY TO FINANCIAL INTEREST OR PROPERTY OF ANOTHER**
-
21. On how many occasions since January 1, 1985 have you reasonably believed that a client was going to commit a specific criminal, illegal or fraudulent act in the near future that was likely to result in substantial injury to the financial interest or property of an identifiable third party? (Circle the number of occasions).

0 1 2 3 4 5 6 7 8 9 10+

If the answer to Question No. 21 was "0," skip to Question No. 34.

22. On how many of those occasions identified in Question No. 21 did you attempt to dissuade your client from committing the act that was likely to result in substantial injury to the financial interest or property of another? (Circle number).

0 1 2 3 4 5 6 7 8 9 10+

Question Nos. 23-33 are addressed to the most recent occasion on which you believed that a client was going to commit a criminal, illegal or fraudulent act that was likely to result in substantial injury to the financial interest or property of another.

23. What was the anticipated act? _____

24. What caused you to believe that your client was going to commit the act? _____

25. Once you formed your belief, did you discuss it with your client?

- a. Yes.
- b. No.
- c. I don't recall.

26. If the answer to Question No. 25 was "yes," what did you discuss? (Circle more than one letter if applicable):

- a. The legal consequences of the act.
- b. The morality of the act.
- c. The likelihood that your client would be apprehended.

- d. The confidentiality of your conversation with your client (if so, describe what you said)_____
- e. Any actions you intended to take to prevent the act (if so, describe what you said)_____
- f. Other:_____
27. If you did not discuss with your client your belief that the client was going to commit an act that was likely to result in substantial injury to the financial interest or property of another, what were the reasons why you did not discuss it?
- _____
- _____
- _____
28. Did your client subsequently commit the anticipated act?
- a. Yes.
- b. No.
- c. I don't know.
29. If the answer to the Question No. 28 was "no," why do you think that your client did not commit the act?
- a. You were wrong about your client's intentions.
- b. You told your client that you would disclose information to someone else in order to prevent the act.
- c. You dissuaded your client from committing the act by using other reasoning.
- d. You disclosed client information to someone else in order to prevent the act.
- e. Other:_____

If you did not disclose client information to someone else in order to prevent the anticipated act, skip to Question No. 33.

30. If you disclosed client information to someone else in order to prevent the anticipated act, to whom did you disclose?

- a. The intended victim(s).
- b. A relative of the client.
- c. A mental health professional.
- d. The police.
- e. A prosecutor or judge.
- f. Other: _____

31. If you disclosed client information in order to prevent the act, why did you do so? (Circle only the applicable answers and rank them in importance in the corresponding "rank" column, with "1" reflecting the most important reason).

Rank

- a. Concern about client. _____
- b. Concern about own civil liability. _____
- c. Concern about own criminal prosecution. _____
- d. Concern about intended victim(s). _____
- e. Concern about compliance with Rules of Professional Conduct. _____
- f. Concern about reputation in community. _____
- g. Other: _____

32. Do you believe that you would have disclosed client information on this occasion if disclosure were optional under the Rules of Professional Conduct?

- a. Yes.
- b. No.

33. What impact, if any, did your handling of the situation have on your ongoing relationship with your client?

- a. The incident had no apparent impact.
- b. The client was less forthcoming with information.
- c. The client was less cooperative in general.
- d. The client prematurely terminated the relationship.

- e. You withdrew from the representation.
- f. Other: _____

V. ATTORNEY VIEWS AND PRACTICES

34. In your current practice, if a client's statements cause you to begin to suspect that the client might be planning to commit a criminal, illegal or fraudulent act that is likely to substantially harm another, what do you do?

35. In the past 12 months, what percentage of your clients have you personally informed that an attorney is obligated to disclose client confidences if disclosure is necessary to prevent a client from committing a criminal, illegal or fraudulent act that is likely to substantially harm another?

- a. None of your clients.
- b. Less than 10%.
- c. 10% to 25%.
- d. 26% to 50%.
- e. 51% to 75%.
- f. More than 75%.

36. If you inform clients of the attorney's obligation described in Question No. 35, when do you usually do so?

- a. At the first substantive meeting with the client.
- b. When the client asked about confidentiality.
- c. When you believed that the client might be about to discuss a future criminal, illegal or fraudulent act.
- d. When you believed that the client might be about to commit a criminal, illegal or fraudulent act that would substantially harm another.
- e. Other: _____

Please answer "yes" or "no" for each sub-section of Question Nos. 37 and 38.

37. Do you believe that the Rules of Professional Conduct should require lawyers to disclose client confidences if disclosure is necessary to prevent a client from committing a criminal act that is likely to result in

	<u>Yes</u>	<u>No</u>
a. Death or substantial bodily harm to another?	—	—
b. Substantial injury to the financial interest of another?	—	—
c. Substantial injury to the property of another?	—	—
d. Substantial harm to the environment?	—	—

38. Do you believe that the Rules of Professional Conduct should require lawyers to disclose client confidences if disclosure is necessary to prevent a client from committing a fraudulent or illegal (but non-criminal) act that is likely to result in

	<u>Yes</u>	<u>No</u>
a. Substantial injury to the financial interest of another?	—	—
b. Substantial injury to the property of another?	—	—
c. Substantial harm to the environment?	—	—

Your response to the final question would be very much appreciated if you have the time to provide it, but if not, please return this survey as completed to this point.

39. If you confronted situations since January 1, 1985 (other than those described in your answers to Question Nos. 10-20 and 23-33) in which you believed that your client was

going to commit a criminal, illegal or fraudulent act that was likely to substantially harm another, but you did not disclose client information to anyone, what were your reasons in each instance for not disclosing?

Situation #1

Situation #2

Situation #3

Please write on back if more space is required.

ADDITIONAL COMMENTS:
