THE "PUBLIC RECORD/THIRD PARTY RULE" OF THE DUTY OF CONFIDENTIALITY: SITUATIONS IN WHICH THE RULE ARISES AND ATTITUDES TOWARD ITS APPLICATION

I. INTRODUCTION

Both the attorney-client privilege and the duty of confidentiality exist to protect client information held by an attorney. The former functions as an evidentiary privilege; the latter functions as an ethical duty. Together they comprise the law of client confidentiality. The primary distinction between the two involves the scope of the information that each protects from disclosure, and thus when each can and should arise to protect client information. Out of this primary distinction arises the "public record/third party rule" of the duty of confidentiality: The ethical duty of confidentiality, unlike the attorney-client privilege, is not nullified by the fact that the information involved is part of the public record or by the fact that someone else is privy to it. The rule would appear to be a bright line rule with no room for circumvention. Yet, attorneys continue to propound, in both litigation and ethical disciplinary proceedings, the argument that the duty of confidentiality should be nullified by the fact that the information disclosed is a matter of public record or is held by a third person. As a result, one may expect the "public record/third party rule" to continue to be a viable issue in the law of ethics. Thus, a thorough understanding of the circumstances in which the rule generally arises and the attitudes toward its application is vital.

4. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 cmt. 5 (1983).
5. Id.
7. See discussion infra Part III.
II. THE ATTORNEY-CLIENT PRIVILEGE VERSUS THE ETHICAL DUTY OF CONFIDENTIALITY

The attorney-client privilege is a rule of evidence, the purpose of which is to protect information that a lawyer receives from his client. The privilege will prevent the disclosure of such information by an attorney when compelled to testify as a witness or to produce evidence in an official proceeding. The use of the privilege is limited by the very nature of the information it protects, specifically with regard to who is privy to the information. The attorney-client privilege may not be relied upon to prevent compelled disclosure if a party outside of the attorney-client relationship is privy to the information. Similarly, the attorney-client privilege will also be nullified if the information is a matter of public record.

Unlike the attorney-client privilege, the duty of confidentiality is a broad ethical rule which provides that, subject to certain exceptions, an attorney must keep confidential all information related to the representation of a client. In fact, it is said that the ethical duty of confidentiality encompasses the more limited attorney-client privilege. There are two sources of the duty of confidentiality: the Model Rules of Professional Conduct (Model Rules) and the Model Code of Professional Responsibility (Model Code).

Model Rule 1.6 requires that "[a] lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out representation . . . ."

In addition to client consent, another exception under this rule of confidentiality is that an attorney may make disclosures in order to pre-
vent a client's criminal conduct that the "lawyer believes is likely to result in imminent death or substantial bodily harm." Further, an attorney may reveal client confidences in order to establish "a claim or defense on behalf of the lawyer" with regard to litigation between client and lawyer or litigation against the lawyer arising from the client's conduct.

Similarly, Disciplinary Rule 4-101(B)(1) of the Model Code provides that "a lawyer shall not knowingly 1) [r]eveal a confidence or secret of his client." It is this broad prohibition in Disciplinary Rule 4-101(B) against disclosure from which the general duty of confidentiality arises. The duty of confidentiality as provided for in Canon 4 of the Model Code is subject to several exceptions which are similar to those found in Model Rule 1.6: obtaining client consent; preventing crime by the client; establishing or collecting attorney's fees or defending against "accusation of wrongful conduct"; and as required under the Disciplinary Rules, law, or court order.

The general ethical duty of confidentiality as provided for in Disciplinary Rule 4-101 would appear to be narrower than that of Model Rule 1.6. Model Rule 1.6 brings within its scope all information obtained in the attorney-client relationship, even absent any stipulation by the client that the information be held confidential. In contrast, Disciplinary Rule 4-101 addresses only secrets (and confidences) gathered through the attorney-client relationship that the client has expressly requested be held inviolate or the disclosure of which would be embarrassing to the client or detrimental to the client's case. Such a distinction might raise the question of whether the "public record/third party rule" would apply to the duty of confidentiality as it arises under Disciplinary Rule 4-101. The answer to this question is found in the many cases in which courts have applied the "third party/public record rule" under Disciplinary Rule 4-101, even more frequently than under Model Rule 1.6.

18. Id.
23. See discussion infra Part III.
III. THE PUBLIC RECORD/THIRD PARTY RULE'S APPLICATION

A lawyer looking to the text of Model Rule 1.6 and Disciplinary Rule 4-101 will not find the "public record/third party rule" stated expressly. Ethical Consideration 4-4 basically states the rule and implies that it only has applicability under the duty of confidentiality. Ethical Consideration 4-4 provides that "the attorney client privilege is more limited than the ethical obligation of a lawyer to guard the confidences and secrets of his client. This ethical precept, unlike the evidentiary privilege, exists without regard to the nature or source of information or the fact that others share the knowledge." 25

Numerous cases and ethics opinions further support the conclusion that the "public record/third party rule" is applicable to the duty of confidentiality under Canon 4. 26 Although Model Rule 1.6 contains no such declaration of the rule as does Ethical Consideration 4-1, the rule has been held applicable to the duty of confidentiality under Model Rule 1.6. 27

The "public record/third party rule" has most often arisen in instances where an attorney represents a client in a matter in which the adverse party is a former client. Model Rule 1.9 prohibits the representation of a client where there is a conflict of interest with the former client. Specifically, Model Rule 1.9 prohibits, subject to certain exceptions, an attorney from representing a client in "the same or [in] a substantially related matter" against a former client if the lawyer has "acquired information protected by [the duty of confidentiality of] Rule 1.6 . . . ." 30 However, courts have held that the presumption is that information subject to protection by the duty of confidentiality is always obtained in the former representation. 31 Thus, courts have repeatedly had the opportunity to

26. See infra text accompanying notes 34-47.
28. See infra text accompanying notes 34-52.
29. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.9 (1983).
30. Id.
31. See Monon Corp. v. Wabash National Corp., 764 F. Supp. 1320, 1323 (N.D. Ind. 1991) (holding that "[o]nce a substantial relationship has been found, it is
venture into the realm of ethical considerations in considering motions to disqualify a lawyer who is in violation of Model Rule 1.9.\textsuperscript{32}

The claim that information is a matter of the public record or is known by a third party is usually offered as a defense by the attorney seeking to avoid disqualification under Model Rule 1.9.\textsuperscript{33} Courts have consistently applied the "public record/third party rule" negating the attorney's defense in such cases and have consistently held that the duty of confidentiality is not nullified by the fact that information is part of the public record or by the fact that a third party is privy to it.\textsuperscript{34}

Interestingly, some courts, such as the Second Circuit, have shown no flexibility in applying the rule. The Second Circuit has been especially reluctant to depart from strict application of the rule.\textsuperscript{35} In \textit{NCK Organization, Ltd. v. Bregman},\textsuperscript{36} a former client of an attorney who was an adverse party in the case at hand sought to have the attorney disqualified under Canons 4 and 9 of the Model Code.\textsuperscript{37} The controversy of this declaratory judgment suit arose out of the refusal of the plaintiff to comply with a share purchasing agreement upon the defendant's termination of employment.\textsuperscript{38} The defendant Bregman previously held the positions of director and senior vice president of the plaintiff corporation.\textsuperscript{39} Plaintiffs sought to have Bregman's attorney disqualified because he had previously served as house counsel to the plaintiff corporation.\textsuperscript{40} The plaintiff argued that as house counsel in former similar litigation, Bregman's attorney had become privy to information protected by the duty of confidentiality.\textsuperscript{41} The trial court disqualified Bregman's attorney, and Bregman appealed.\textsuperscript{42} Bregman's attorney argued that no breach of the duty of confidentiality had occurred: "[T]here would be no impropriety since no confidences were involved in which Bregman was not already privy because of his

\textsuperscript{32} See infra text accompanying notes 34-52.
\textsuperscript{33} Id.
\textsuperscript{34} Id.
\textsuperscript{35} NCK Org., Ltd. v. Bregman, 542 F.2d 128, 133 (2d Cir. 1976) (holding that the duty of confidentiality is not nullified by the fact that a third party is privy to the information.).
\textsuperscript{36} 542 F.2d 128 (2d Cir. 1976).
\textsuperscript{37} Id. at 130.
\textsuperscript{38} Id.
\textsuperscript{39} Id.
\textsuperscript{40} Id.
\textsuperscript{41} NCK Org., Ltd., 542 F.2d at 130.
\textsuperscript{42} Id.
former positions at ORG and as director and chief operation officer of NCK. The court held that "[e]ven if, as Randall [Bregman's attorney] asserted, all confidential information to which he as house counsel had access was independently known to Bregman from his own employment or from another source, ORG's privilege in this information as disclosed to its attorney Randall is not thereby nullified."

The Second Circuit again refused to nullify the attorney's duty of confidentiality when an attorney argued that information subject to the duty of confidentiality was known by a third party. In *Emle Industries, Inc. v. Patentex, Inc.*, the plaintiff's attorney had represented the defendant in a former patent suit similar to the suit at hand. The trial court disqualified plaintiff's counsel, and plaintiff appealed. The plaintiff's attorney argued that he had acquired the information prior to his own former representation of the defendant; thus, the information was a matter of public knowledge prior to the time when his duty of confidentiality owed to the former client came into existence. The court refused to accept the attorney's argument, holding that the "notoriety of Burlington's control [issue in case] does not bear even one iota upon the ethical considerations here involved." Therefore, the "public record/third party rule" still applied and disqualification could not be avoided.

The United States Court of Appeals for the Second Circuit is not the only court to have taken this strict stance in the application of the "public record/third party rule." For example, in *Tiuman v. Canant*, the defendant in a civil case, moved to have Burstein, plaintiff's counsel, disqualified on grounds that the counsel was presumed to have received

---

43. Id. at 131.
44. Id. at 133.
45. Emle Indus., Inc. v. Patentex, Inc., 478 F.2d 562 (2d Cir. 1973) (considering a motion to disqualify counsel for representation adverse to a former client under Canon 4 of the Model Code).
46. Id.
47. Id. at 564.
48. Id. at 570.
49. Id. at 572-73.
50. Emle Indus., Inc. 478 F.2d at 573.
51. Id.
53. Id.
confidential information when he represented the defendant Canant in a prior criminal proceeding.\(^{54}\) Canant argued that the information gained by his former attorney Burstein might be used against him in the civil case.\(^{55}\) The plaintiffs, seeking to avoid disqualification of their attorney, argued that the information which Burstein may have received in his criminal representation of Canant was a matter of public record and that Canant himself had relayed this information to the present plaintiffs.\(^{56}\) The District Court for the Southern District of New York quoted the "public record/third party rule" and then held that "[e]ven if all confidential information to which Burstein had access was independently known by the plaintiffs, Canant’s privilege in this information as disclosed to his attorney Burstein is not thereby nullified."\(^{57}\) Thus, it would appear that the "public record/third party rule" again played a central role in the decision of the district court, and once more the result was strict application of the "public record/third party rule."

While the disqualification of an attorney is the most common situation in which the application of "the public record/third party rule" has been addressed, it is not the sole situation.\(^{58}\) The rule can arise in the most obvious contexts. For example, the rule arises when an attorney simply discloses his client’s strategical position to a third party.\(^{59}\) Such a release of information would clearly violate Model Rule 1.6.\(^{60}\) In *Lawyer Disciplinary Board v. McGraw*,\(^{61}\) Attorney General McGraw represented, in his official capacity, the Division of Environmental Protection (DEP) in litigation over landfill requirements which the DEP sought to enforce by declaratory judgment.\(^{62}\) A meeting was held in which the issue of the litigation arose and in which the DEP indicated that its position on the landfill requirements might change.\(^{63}\) The DEP did not authorize McGraw to disclose this information, but nevertheless the possibility of the change in the DEP’s position was released by McGraw in a telephone conversa-

\(^{54}\) *Id.* at *2.*

\(^{55}\) *Id.* at *3.*

\(^{56}\) *Id.*

\(^{57}\) *Id.*

\(^{58}\) See infra text accompanying notes 54-89.


\(^{60}\) *Id.*

\(^{61}\) 461 S.E.2d 850 (W. Va. 1995).

\(^{62}\) *Id.* at 853.

\(^{63}\) *Id.*
tion with a third party.\textsuperscript{64} When the client brought disciplinary action, McGraw argued that representatives of the adverse party were present at the very meeting in which the client indicated it would change its position with regard to the landfill requirements; therefore, the client information was already disclosed to the third party.\textsuperscript{65} McGraw also argued that the client as a state agency would have had to make public, under the Freedom of Information Act, the information discussed in the meeting even though it was subject to the duty of confidentiality.\textsuperscript{66} The court, citing the "public record/third party rule," refused the attorney's argument stating "[c]learly the respondent has confused the evidentiary attorney-client privilege with the ethical duty of attorney-client confidentiality."\textsuperscript{67} The opinion also indicates that a lawyer must take precaution in filing with a court of law or public agency documents, the content of which is already a matter of public record or public knowledge.\textsuperscript{68} McGraw was also charged with an additional count of violating rule 1.6(a) by filing with a motion a memorandum indicating the client's general position; however, this count was dismissed because McGraw was unaware that the motion had been filed as such by a staff member.\textsuperscript{69} This opinion indicates that an attorney should proceed with caution even when filing official motions in a court of law.

Further, the "public record/third party rule" has arisen in situations as elementary as the disclosure of client names and addresses.\textsuperscript{70} While addresses are readily available through directories and various other means, ethical committees have held that an attorney may not release the address of a client.\textsuperscript{71} The State Bar of Michigan addressed this issue within the context of an opposing party's request that an attorney disclose the address of his client so that the client could be served with a bill of cost.\textsuperscript{72} The State Bar analyzed whether the release of the client's address would violate the duty of confidentiality under Rule 1.6 of the Michigan

\textsuperscript{64} Id. at 855.
\textsuperscript{65} Id. at 860-61.
\textsuperscript{66} McGraw. 461 S.E.2d at 861.
\textsuperscript{67} Id.
\textsuperscript{68} Id. at 857.
\textsuperscript{69} Id.
\textsuperscript{70} See infra text accompanying notes 66-72.
\textsuperscript{71} Id.
Rules of Professional Conduct.\textsuperscript{73} This rule is the Michigan equivalent of Disciplinary Rule 4-101.\textsuperscript{74} The Michigan Bar held that

[although names and addresses of clients when the information which appear [sic] in the public record are no longer confidences or secrets, and there may be circumstances of the representation where it is obvious the client does not expect confidentiality, client consent is necessary [sic] would be a prerequisite to disclosure unless one of the exceptions of MRPC 1.6(c) applies.\textsuperscript{75}]

Although the "public record/third party rule" is not stated in its traditional form, it is clearly at work in this decision. This opinion is also important for its espousal of one of the policy justifications for the bright line nature of the "public record/third party rule": that information as seemingly harmless to the client as an address can nevertheless be disadvantageous.\textsuperscript{76}

The Michigan State Bar reached a similar holding in a situation where disclosure of client names, addresses, and account information was requested by the attorney's bank as procedure for approval of a credit loan.\textsuperscript{77} The State Bar held that

names, addresses and telephone numbers of clients of a legal services office are secrets within the meaning of ABA Model Code of Professional Responsibility DR 4-101(a), "... since it might be an embarrassment to the client for any number of reasons to have it revealed that he was a client of the Legal Services Offices." ... Therefore, a lawyer may not give the bank the names and addresses of all account debtors unless the client has consented ... .\textsuperscript{78}

Another situation in which the public record rule has the potential to arise is in the sentencing of criminal defendants.\textsuperscript{79} At the sentencing of a criminal defendant, the court inquires into the defendant's prior convictions.\textsuperscript{80} The California State Bar Commission on Professional Responsibility and Conduct noted that the "public record/third party rule" arises in

\begin{itemize}
\item \textsuperscript{73} Id.
\item \textsuperscript{74} Id.
\item \textsuperscript{75} Id. at *2.
\item \textsuperscript{76} Id. at *3.
\item \textsuperscript{78} Id. at 3.
\item \textsuperscript{79} California St. B. Comm. on Professional Responsibility and Conduct, Formal Op. 1986-87 (1986).
\item \textsuperscript{80} Id.
\end{itemize}
this situation when the court is unaware that the prior conviction exists.\textsuperscript{81} The Commission held that although a prior conviction is a matter of public record, to reveal the conviction without client consent would breach the duty of confidentiality.\textsuperscript{82} This is an example of the "public record/third party rule" coming into conflict with the ethical duties of candor to a tribunal.\textsuperscript{83} Although the Commission did not state the public record/third party rule as a basis for its holding, this is clearly a situation where the rule's reasoning is at work in the decision. The Commission held that the attorney is advised to remain silent when asked by the court whether a prior conviction exists.\textsuperscript{84} The farthest the attorney should go, if he believes the court will rely on his silence as evidence that no prior conviction exists, is to request that the court pursue other means of obtaining information about the defendant's prior conviction.\textsuperscript{85} This situation is an excellent illustration of the distinction between the duty of confidentiality and the attorney-client privilege. Unlike the duty of confidentiality, the attorney-client privilege cannot be relied upon to protect disclosure of the conviction.\textsuperscript{86}

Thus far, the instances in which "the public record/third party rule" has arisen are within the realm of the expected. However, the rule is increasingly becoming an issue within other contexts. The most sensational area in which the duty of confidentiality and thus the "public record/third party rule" comes into play is the trend of attorneys in high profile cases to publish and sell their stories to the media.\textsuperscript{87} Such publications will inevitably include information acquired in the representation of the client. The issue arises as to whether the fact that information which has become public knowledge during the trial of a case will nullify the duty of confidentiality and thus allow the attorney to impart his professional story to the media.\textsuperscript{88} The New York State Bar Association Committee on Professional Ethics wrestled with this very issue when an

\begin{footnotes}
\footnote{81. \textit{Id.}}
\footnote{82. \textit{Id.}}
\footnote{83. \textit{Id.} at 2.}
\footnote{85. \textit{Id.}}
\footnote{86. \textit{Id.} at 1.}
\footnote{87. Rita M. Glavin, \textit{Prosecutors Who Discuss Prosecutorial Information for Literary or Media Purpose: What About the Duty of Confidentiality?} 63 FORDHAM L. REV. 1809 (1995).}
\footnote{88. New York St. B. Ass'n Comm. on Professional Ethics, Op. 606 (1990).}
\end{footnotes}
assistant district attorney sought an advisory opinion as to whether she could sell her media rights and develop a screenplay regarding her prosecution of a high profile criminal case. The Committee held that while there was no technical prohibition against such conduct in the New York Code of Professional Responsibility after the representation ended, the duty of confidentiality still protected client information obtained during the representation:

Even with respect to a representation that has been concluded, the lawyer proposing to sell media rights must be certain to continue to protect the confidences and secrets of the client. DR 4-101(B) prohibits a lawyer from revealing confidences or secrets or using them "for the advantage of himself or of a third person, unless the client consents after full disclosure." This duty of confidentiality exists without regard to whether others share the information or whether it is part of the public record or available from another source.

It becomes apparent that strict compliance with the "public record/third party rule" is the normal approach taken by both courts and state bar ethical committees. Occasionally, however, the "public record/third party rule" is not strictly applied. The Alaska Bar Association Ethics Committee departed from the traditional approach in considering whether a lawyer could provide "courtesy copies of pleadings or other documents in the public record to other lawyers, or may engage in general 'shop talk' about pending or past cases." Deciding that this conduct was not prohibited by the Alaska Rules of Professional Conduct, the Committee held that the focus of the inquiry as to whether information of a client found in the public record can be disclosed should be what harm is done to the client. The Committee noted that the policy behind such a harm-based analysis is to allow the instant conduct to "educate new lawyers, to circulate information about important developments in the law, and to maintain courteous relations between the learned practitioners of our sometimes fractious profession. Literal application of Rule 1.6 would ban these valuable routes of intra-professional communi-

89. Id.
90. Id. at 2-3 (citations omitted).
92. Id. at 1.
93. Id.
The Committee went as far as to suggest that a literal interpretation of the "public record/third party rule" would also "create morbid secrecy among overscrupulous lawyers, and, by trivializing it, would detract from the soundness of the confidentiality principle." This ethics opinion was written in 1995 and raises the question of whether this may be the analysis of the "public record/third party rule" toward which ethical committees may be moving in the future. This question is especially pertinent in light of the present public fascination with media accounts and literary publications addressing the legal representation of high profile clients.

Alaska Bar Opinion 95-1 has not been the only instance in which departure from the strict application of the "public record/third party rule" has been espoused:

[T]he expectation of confidentiality posited by the rationale of loyalty to client justifies prohibiting a lawyer from revealing information only if it poses a risk of harm to a client's interests. Yet MR 1.6 of the Model Rules, if read literally, goes much farther and prohibits a lawyer from revealing all client information, the good or neutral along with the potentially harmful. The only imaginable reason for such a universal prohibition is to provide prophylactic protection against lawyer misjudgments about which revelations are potentially harmful to a client's interest.

On the other hand, the policies behind strict adherence to the "public record/third party rule" are still viable as well. A vital policy still underlies this prophylactic nature of the "public record/third party rule" of the duty of confidentiality. Model Rule 1.6 and Canon 4 recognize the primary policy of fostering an open attorney-client relationship. Comment 4 of Model Rule 1.6 explains that "[t]he, client is thereby encouraged to communicate fully and frankly with the lawyer even as to embar-

94. Id.
95. Id.
96. CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 301 (1986).
97. Emile Indus., Inc. v. Patentex, Inc., 478 F.2d 562, 570-71 (2d Cir. 1973) (holding "[w]ithout strict enforcement of such high ethical standards, a client would hardly be inclined to discuss his problems freely and in depth with his lawyer . . . .")
98. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1983); MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 4 (1981).
rassing or legally damaging subject matter." Similarity, Ethical Consideration 4-1 of Canon 4 of the Model Code emphasizes that "[a] client must feel free to discuss whatever he wishes with his lawyer and a lawyer must be equally free to obtain information beyond that volunteered by his client." As a result, a strict application of the "public record/third party rule" results in a client's receiving the necessary assurances that information pertaining to his representation will be used for that purpose alone. Furthermore, the attorney may avoid making determinations on a case by case basis regarding the disclosure of client information thus opening himself up to differing opinions of both clients and ethical disciplinary committees. Candor between client and attorney, essential to the function of the adversarial system, is thus upheld, and the public's trust in the Bar bolstered. One of the factors that may perpetuate this unresolved dichotomy over the two applications of the "public record/third party rule" is the existence of strong policy arguments for either approach.

IV. CONCLUSION

There has been no resolution as to whether strict adherence to the "public record/third party rule" or a harm based analysis approach should prevail. The weight of authority would indicate that the legal community can continue to expect courts to strictly apply the "public record/third party rule" with regularity. However, growth of the harm based analysis is not out of the realm of possibility. With such differences in attitudes as to the application of the rule, an attorney can be assured of only one thing: The rule that the duty of confidentiality, unlike the attorney-client privilege, is not nullified by the fact that the information is contained in the public record or by the fact that a third party is privy to it will continue to be a viable issue in the law of ethics well into the future.

Foster Cobbs Arnold

99. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1983).
100. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 4-1 (1981).