

Washington's New Rules of Professional Conduct: A Balancing Act

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I. INTRODUCTION

What should an attorney do if she is faced with a client who insists on perjuring himself?¹ What if an attorney's client informs her that he is planning on committing a violent crime? Petty theft? This Comment deals with the question of when an attorney should and must reveal client confidences to prevent or remedy fraudulent or criminal conduct. More particularly, this Comment addresses how Washington's new Rules of Professional Conduct address these issues.²

In 2003, the American Bar Association (ABA) promulgated amended Model Rules of Professional Conduct (2003 Model Rules).³ Subsequently, Washington began re-evaluating its own Rules of Profes-

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1. *State v. McDowell*, 681 N.W.2d 500, 504–05 (Wis. 2004). Three days into a criminal trial, defense counsel for Mr. McDowell expressed to the court his concerns that Mr. McDowell would testify untruthfully. *Id.* at 500. The court advised defense counsel that he had two choices: (1) he could recommend to his client that he not testify untruthfully; or (2) defense counsel could take the middle ground by calling Mr. McDowell to testify in the narrative form. *Id.* The court advised defense counsel that he did not have the option of withdrawing because the trial was already underway. *Id.* Defense counsel conferred with his client and reported to the court that his client would be truthful on the stand. *Id.* However, when Mr. McDowell took the stand his attorney did not use the traditional question and answer format. *Id.* at 506–07. Consequently, the Wisconsin Supreme Court held that Mr. McDowell's attorney provided ineffective assistance of counsel because defense counsel may not substitute narrative questioning for the traditional question and answer format unless counsel knows that the client intends to testify falsely. *Id.* at 504.

2. WASH. RULES OF PROF'L CONDUCT R. 1.6, 3.3 (2006).

3. 2005 SELECTED STANDARDS ON PROFESSIONAL RESPONSIBILITY 1 (Thomas D. Morgan & Ronald D. Rotunda eds., 2005).

sional Conduct (1985 Washington RPC).⁴ The Washington State Bar Association (WSBA) Board of Governors appointed the Special Committee for the Evaluation of the Rules of Professional Conduct (Ethics 2003 Committee) to consider whether Washington should adopt the ABA's 2003 Model Rules of Professional Conduct.⁵ The Ethics 2003 Committee ultimately recommended adopting the ABA's 2003 Model Rules with a few changes ("proposed rules");⁶ consequently, by order dated July 10, 2006, the Washington Supreme Court adopted most of the ABA's 2003 Model Rules (2006 Washington RPC, or "adopted rules"), which became effective September 1, 2006.⁷

Permissive and mandatory revelations of client confidences are governed by two rules, 1.6 and 3.3.⁸ The Ethics 2003 Committee originally recommended adoption of Model Rule 3.3, Candor Toward the Tribunal, verbatim,⁹ and adoption of Model Rule 1.6, Confidentiality of

4. See WASH. STATE BAR ASS'N, REPORT AND RECOMMENDATION OF THE SPECIAL COMMITTEE FOR EVALUATION OF THE RULES OF PROFESSIONAL CONDUCT (ETHICS 2003) TO THE BOARD OF GOVERNORS 4 (2004), available at <http://www.wsba.org/lawyers/groups/ethics2003/reportpart1.doc> [hereinafter WSBA REPORT].

5. *Id.*

6. *Id.* at 9–15.

7. Press Release, Wash. State Bar Ass'n, Special Committee for the Evaluation of the Rules of Professional Conduct (Ethics 2003 Committee): Current Status (July 14, 2006), <http://www.wsba.org/lawyers/groups/ethics2003/default.htm> ("By order dated July 10, the Supreme Court approved the proposed Ethics 2003 amendments to the Rules of Professional Conduct The amended rules will be effective on September 1, 2006."); *Ethics 2003 Amendments to Rules of Professional Conduct Adopted*, WASH. STATE BAR NEWS, August 2006, at 44.

8. See WASH. RULES OF PROF'L CONDUCT R. 1.6, 3.3 (2006).

9. WSBA REPORT, *supra* note 4, at 179, available at <http://www.wsba.org/lawyers/groups/ethics2003/reportpart3.doc>. The full text of 2003 Model Rule 3.3 is as follows:

(a) A lawyer shall not knowingly:

- (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
- (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
- (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging, or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, withdrawal or disclosure to the tribunal.

(c) The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

Information, with minor changes.¹⁰ Adoption of Model Rules 1.6 and 3.3 would have reversed the previous Washington rule concerning attorney candor to the tribunal.¹¹ Washington's previous 1985 version of Rule 3.3¹² preserved a lawyer's duty to keep client confidences, governed by Rule 1.6,¹³ over a lawyer's duty to be truthful to the court, governed by Rule 3.3.¹⁴ The 1985 Washington Rules of Professional Conduct (1985

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

MODEL RULES OF PROF'L CONDUCT R. 3.3 (2003).

10. WSBA REPORT, *supra* note 4, at app. D, at 1–6, available at <http://www.wsba.org/lawyers/groups/ethics2003/appendixd.doc>. The full text of Model Rule 1.6 is as follows:

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

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

- (1) to prevent reasonably certain death or substantial bodily harm;
- (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
- (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
- (4) to secure legal advice about the lawyer's compliance with these Rules; to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil action against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or
- (5) to comply with other law or a court order.

MODEL RULES OF PROF'L CONDUCT R. 1.6 (2003).

11. See WSBA REPORT, *supra* note 4, at 13.

12. WASH. RULES OF PROF'L CONDUCT R. 3.3 (1985), available at http://www.courts.wa.gov/court_rules/?fa=court_rules.list&group=ga&set=RPC.

13. *Id.* at R. 1.6.

14. *Id.* at R. 3.3. The full text of Washington's 1985 Rule 3.3 is as follows:

(a) A lawyer shall not knowingly:

- (1) Make a false statement of material fact or law to a tribunal;
- (2) Fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client unless such disclosure is prohibited by rule 1.6;
- (3) Fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel;
- (4) Offer evidence that the lawyer knows to be false.

(b) The duties stated in section (a) continue to the conclusion of the proceeding.

(c) If the lawyer has offered material evidence and comes to know of its falsity, the lawyer shall promptly disclose this fact to the tribunal unless such disclosure is prohibited by rule 1.6.

Washington RPC) guaranteed that, if these two duties conflicted, the duty of protecting client confidences prevailed.¹⁵ If the 2003 Model Rules 1.6 and 3.3 had been adopted, the presumption would have been reversed, and the duty of truthfulness to the court would have trumped the duty of confidentiality.¹⁶ Wisely, the Washington Supreme Court chose not to follow the WSBA's recommendations and, for the most part, maintained the balance between Rule 1.6 confidences and Rule 3.3 candidness.¹⁷

The discrepancies between the rules proposed by the Ethics 2003 Committee and those ultimately adopted by the court are symptoms of the current hot-button debate in lawyer ethics concerning lawyers acting simultaneously as private advocates and public servants.¹⁸ Too often the ethics debate is framed by rhetoric based on legal or theoretical maxims, causing the debate to be ensconced in ethical catchphrases: "lawyers must be zealous advocates"; "lawyers owe a duty to the court."¹⁹ Someday, perhaps, legal scholars and practitioners will break out of the rhetoric and embrace a new way of thinking and talking about legal ethics.²⁰

(d) If the lawyer has offered material evidence and comes to know of its falsity, and disclosure of this fact is prohibited by rule 1.6, the lawyer shall promptly make reasonable efforts to convince the client to consent to disclosure. If the client refuses to consent to disclosure, the lawyer may seek to withdraw from representation in accordance with rule 1.15.

(e) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

(f) In an ex parte proceeding, a lawyer shall inform the tribunal of all relevant facts known to the lawyer that should be disclosed to permit the tribunal to make an informed decision, whether or not the facts are adverse.

(g) Constitutional law defining the right to assistance of counsel in criminal cases may supersede the obligations stated in this rule.

Id.

15. *See id.*

16. WSBA REPORT, *supra* note 4, at 13.

17. *See* Press Release, Wash. State Bar Ass'n, Supreme Court Adopts "Ethics 2003" Amendments to Rules of Professional Conduct (July 2006), available at <http://www.wsba.org/lawyers/groups/ethics2003/rpcarticle0706.pdf> [hereinafter WSBA Press Release] ("The Supreme Court opted to retain Washington's variant approach which prohibits any disclosure to the tribunal that is not permitted by RPC 1.6.").

18. Compare WSBA REPORT, *supra* note 4, at 36–40, 89–92, with WASH. RULES OF PROF'L CONDUCT R. 1.6, 3.3 (2006); *see* W. Bradley Wendel, *Civil Obedience*, 104 COLUM. L. REV. 363, 367–72 (2004) (describing the "remarkably stable debate [that] has developed in legal ethics between those who argue that a lawyer should always act on the balance of first-order moral reasons as they would apply to a similarly situated nonlawyer actor, and those who believe that a lawyer is prohibited from taking into account certain ordinary first-order moral reasons because of some feature of the lawyer's role, such as the obligations of partisanship and neutrality.").

19. *See* WASH. RULES OF PROF'L CONDUCT pmbl. cmt. 8 (2006) ("[A] lawyer can be a conscientious and ardent advocate on behalf of a client and at the same time assume that justice is being done.").

20. *See* William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1083 (1988). Professor Simon argues that we should adopt a discretion driven system of legal ethics, with

However, this Comment does not address or propose radical changes. Rather, this Comment embraces the usual rhetoric and the realities that practicing lawyers face.

Washington lawyers will soon confront a bevy of new ethical rules, and this Comment explores two of those rules: Rule 1.6 and Rule 3.3.²¹ This Comment explores the critical changes to Rule 1.6 and Rule 3.3, discusses how those changes will affect Washington lawyers, and argues that although adopted Rules 1.6 and 3.3 continue Washington's tradition of balancing candor and confidentiality, Rule 3.3 should be expanded to permit *permissive* disclosures of client confidences.

Part II begins by exploring the history of the Rules of Professional Conduct. Part II then briefly turns to the origins of the modern debate over candor and confidentiality and focuses on two of the most essentially opposed and well known scholars on the issue, Judge Marvin Frankel and Professor Monroe Freedman.²² Part III dissects Washington's newly adopted RPC, focusing on Rules 1.6 and 3.3.²³ Part IV suggests that although the new rules mostly balance a client's interest in confidentiality with a court's interest in candor, attorneys should be given the discretion to reveal client confidences when necessary. In conclusion, Part V proposes a slightly different version of Rule 3.3. This different version would give lawyers support in making decisions that maintain the delicate balance between candor and confidentiality.

II. THE HISTORY OF LEGAL ETHICS

The purpose of this section is to explain the evolution of codified ethical laws. First, this section will look at the beginnings of legal ethics in America and briefly survey how the ethics laws have addressed attorney candor. Second, this section will examine the history of attorney-

attorneys ultimately seeking to "do justice." *Id.* His basic maxim is that "[t]he lawyer should take those actions that, considering the relevant circumstances of the particular case, seem most likely to promote justice." *Id.* at 1090. Professor Simon also argues that categorical rules, such as those the ABA promulgates, fail to adequately address the realities of practicing lawyers. *Id.* at 1092.

21. "I suspect that most lawyers, when they hear 'ethics' think, first, that something cosmically boring is about to be said, which one would only listen to in order to satisfy a bar admission or continuing legal education requirements; or else that they are about to hear some unwelcome news about a conflict of interest disqualifying them from taking on a client." Robert W. Gordon, *Why Lawyers Can't Just Be Hired Guns*, in *ETHICS IN PRACTICE: LAWYER'S ROLES, RESPONSIBILITIES, AND REGULATIONS* 43 (Deborah L. Rhode ed., 2000).

22. Many legal scholars have tackled the issue of confidentiality and candor. *See generally* Carol Rice Andrews, *Standards of Conduct for Lawyers: An 800-Year Evolution*, 57 SMU L. REV. 1385 (2004) (outlining the evolution of standards of conduct for lawyers and discussing scholars who have contributed to or commented on those standards).

23. *See* WASH. RULES OF PROF'L CONDUCT R. 1.6, 3.3 (2006).

client confidences, and look at the recent history of the debate through the lens of Judge Frankel and Professor Freedman.

*A. The Codification of Ethical Guidelines of Advocacy,
Candor and Confidentiality*

Confidentiality rules enable lawyers to be more effective advocates in the American adversary system.²⁴ Historically, state bars have governed codified ethics laws.²⁵ The codified attorney-client ethics laws developed relatively recently in American legal history.²⁶ In the early twentieth century, states slowly began to adopt the rules, and it is only recently that the code has had such a large impact on how attorneys practice.²⁷

Early writings on legal ethics urged both candor to the court and devotion to the client.²⁸ In 1836, one of the first American writers on legal ethics, Professor David Hoffman, drafted “Fifty Resolutions in Regard to Professional Deportment,” which, in essence, espoused a view of maintaining faithfulness to the client except under certain circumstances.²⁹ Professor Hoffman wrote, “I will never permit professional zeal to carry me beyond the limits of sobriety and decorum . . .,”³⁰ and “[s]hould my client be disposed to insist on captious requisitions, or frivolous and vexatious defences, they shall be neither enforced nor countenanced by me.”³¹ But he also wrote, “To my clients I will be faith-

24. Carolyn Crotty Guttilla, *Caught Between a Rock and a Hard Place: When Can or Should an Attorney Disclose a Client's Confidence?*, 32 SUFFOLK U. L. REV. 707, 713 (1999) (“Both the [attorney-client] privilege and confidentiality rules enable a lawyer to be more effective in the adversarial process. Historically, however, courts have governed the privilege while bar associations have controlled the scope of confidentiality.”).

25. *Id.*

26. *Id.* at 714. The codification of attorney ethics is traced back to the late 1800's. *Id.*

27. See Geoffrey C. Hazard Jr., *The Future of Legal Ethics*, 100 YALE L.J. 1239, 1251–52 (1991) (discussing the eventual legalization of the code and how the crucial step in effecting that change occurred in 1970).

28. See, e.g., DAVID HOFFMAN, *Fifty Resolutions in Regard to Professional Deportment*, in A COURSE OF LEGAL STUDY: ADDRESSED TO STUDENTS AND THE PROFESSION GENERALLY 752 (2d ed., William S. Hein & Co. 1968) (1846); G. SHARSWOOD, AN ESSAY ON PROFESSIONAL ETHICS 169 (5th ed. 1884); see generally Hazard Jr., *supra* note 27, at 1249–52 (discussing Hoffman and Sharswood in detail).

29. HOFFMAN, *supra* note 28, at 752; LaRue T. Hosmer & Daniel C. Powell, *Schafer's Dilemma: Client Confidentiality vs. Judicial Integrity: A Very Different Proposal for the Revision of Model Rule 1.6*, 49 LOY. L. REV. 405, 428 (2003) (noting that, “in short, Hoffman’s message was to stay with the client except under unnamed circumstances.”).

30. HOFFMAN, *supra* note 28, at 752.

31. *Id.* at 754.

ful; and in their causes, zealous and industrious.”³² Ultimately, Hoffman advocated subordinating client loyalty to the goals of justice.³³

George Sharswood closely followed Hoffman in 1884 with “An Essay on Professional Ethics.”³⁴ Sharswood’s piece was a recording of good lawyering practices, written for new members of the bar to learn what the older, wiser members presumably already knew.³⁵ Sharswood, like Hoffman, simultaneously urged zealous advocacy and professional and moral restraint.³⁶ One commentator notes that the early writers on legal ethics, in insisting on candor, truth, simplicity, and professional zeal, did not recognize the potential for fealty conflict.³⁷ However, because these writings were mostly recordings of normative lawyer practices, and no professional sanctions followed from disobedience,³⁸ the conflicts in the ethical principles were probably not of great consequence to practicing attorneys.

The State of Alabama followed the lead of Sharswood and Hoffman and in 1887 became the first state to adopt an official code of ethics.³⁹ The Alabama Code of Ethics reflected the earlier writings in that professional standards of legal conduct depended on the mores and honesty of individual lawyers rather than on the rules and sanctions of the profession.⁴⁰ Thus, there were no official professional repercussions for violating a provision of the Alabama Code of Ethics.⁴¹

32. *Id.* at 758.

33. James A. Cohen, *Lawyer Role, Agency Law, and the Characterization of “Officer of the Court,”* 48 BUFF. L. REV. 349, 366–67 (2000) (discussing Hoffman’s treatise as having religious overtones in the larger context of traditional American treatment of “officers of the court”).

34. SHARSWOOD, *supra* note 28.

35. Hazard Jr., *supra* note 27, at 1250 (“Sharswood saw himself as imparting the mores of right-thinking members of the bar”).

36. Hosmer & Powell, *supra* note 29, at 428–29. *See also* SHARSWOOD, *supra* note 28, at 73–74. George Sharswood wrote that an attorney “should never unnecessarily have a personal difficulty with a professional brother. He should neither give nor provoke insult Let him shun most carefully the reputation of a sharp practitioner.” *Id.* And, as to client advocacy, he wrote, “Entire devotion to the interest of the client, warm zeal in the maintenance and defence [sic] of his rights, and the exertion of his utmost learning and ability—these are the higher points, which can only satisfy the truly conscientious practitioner.” *Id.* at 78–80.

37. Hosmer & Powell, *supra* note 29, at 428–29 (noting that the “authors of these early guiding principles that cautioned against the danger of professional zeal and recommended the cultivation of truth, simplicity, and candor also emphasized, but apparently did not recognize, they created the clear potential for fealty conflict, the ideal of a focus of effort on behalf of the client.”).

38. Hazard Jr., *supra* note 27, at 1249–50.

39. GEOFFREY C. HAZARD & DEBORAH L. RHODE, *THE LEGAL PROFESSION: RESPONSIBILITY AND REGULATION* 108 (3d ed. 1994).

40. Hosmer & Powell, *supra* note 29, at 429 (finding that Alabama’s code continued the earlier beliefs that professional standards should be based on an attorney’s moral discretion rather than professional sanctions).

41. *Id.*

In 1908, the American Bar Association adopted the first national Canons of Professional Ethics ("Canons"), which were based mostly on the Code of Ethics adopted by the Alabama Bar Association.⁴² The Canons, unlike the modern ABA Model Rules of Professional Conduct, were not accompanied by disciplinary guidelines,⁴³ and were defined as "statements of axiomatic norms, expressing in general terms the standards of professional conduct expected of lawyers in their relationships with the public, with the legal system, and with the legal profession."⁴⁴ The Canons were subjected to several piecemeal changes for about seventy years, and along the way most states eventually adopted their own modified version.⁴⁵

In 1969, the ABA substantially revised the Canons and produced the first Code of Professional Responsibility.⁴⁶ This was the first set of rules that legally mandated certain behavior from lawyers.⁴⁷ The new standards were in the form of rules rather than a list of ethical considerations and were given legal effect in malpractice and misconduct proceedings.⁴⁸ Even so, the balance between confidentiality and candor remained relatively constant. The 1969 Model Code "did not represent a substantial change from the Canons of 1908 in the area of confidentiality. An attorney had discretion to reveal confidences or secrets to collect a fee, defend against an accusation, or to prevent a crime."⁴⁹

The Canons underwent another major reconstruction in 1983, when the ABA adopted the basic structure of the modern version of the Model Rules of Professional Conduct (1983 Model Rules).⁵⁰ The 1983 Model Rules was the first version subject to public debate concerning the confidentiality requirements.⁵¹ The most recent revision, and the one discussed at length in this article, was published in 2003.⁵² By 2003, all but four states had adopted an ethical code significantly similar to that put

42. MODEL RULES OF PROF'L CONDUCT, preface (2003).

43. Hosmer & Powell, *supra* note 29, at 431.

44. MODEL CODE OF PROF'L RESPONSIBILITY, preliminary statement (1981).

45. See MODEL RULES OF PROF'L CONDUCT, preface (2003).

46. MODEL CODE OF PROF'L RESPONSIBILITY, preface (1969).

47. Hazard Jr., *supra* note 27, at 1251. The 1970 Code consisted of three tiers. *Id.* The first tier consisted of ethical pronouncements called "Canons." *Id.* The second consisted of comments speaking to the profession's traditional ethical rhetoric and were called "Ethical Considerations." *Id.* The third tier consisted of disciplinary laws known as "Disciplinary Rules." *Id.* The first two tiers were considered admonitory, but third tier violations were enforced with court-imposed penalties. *Id.*

48. *Id.*; Hosmer & Powell, *supra* note 29, at 431.

49. Hosmer & Powell, *supra* note 29, at 432 (citing MODEL RULES OF PROF'L CONDUCT DR 4-101 (1980)).

50. MODEL RULES OF PROF'L CONDUCT preface (2003).

51. Limor Zer-Gutman, *Revising the Ethical Rules of Attorney-Client Confidentiality: Towards a New Discretionary Rule*, 45 LOY. L. REV. 669, 669 (1999).

52. MODEL RULES OF PROF'L CONDUCT (2003).

forth by the ABA.⁵³ As of November 2005, most states had undertaken a review of the 2003 Model Rules, and several states were in the process of supplanting code-based structures with Model Rules-based systems.⁵⁴ Across the country, there has been a push for uniformity.⁵⁵

B. The Pendulum Swings Between Candor and Confidentiality

Since 1836, the conflict between client confidentiality and candor toward the court has never been resolved.⁵⁶ Lawyers and legal ethics scholars still struggle to find a rule that allows maximum justice within our adversary system.⁵⁷ Over the last century, the rules governing client confidentiality and lawyer candor have undergone gradual changes. The first code adopted by the ABA in 1908, consisting of thirty-two Canons, recognized that lawyers have “an obligation to represent the client with undivided fidelity and not to divulge his secrets or confidences.”⁵⁸ Later versions also included a duty to protect client confidences, and the duty was eventually extended to apply even after the attorney-client relationship ended.⁵⁹ However, the ABA codes always recognized exceptions to the duty of confidentiality, and there never was an absolute directive to maintain client confidences.⁶⁰

These exceptions expanded and contracted over the years. For instance, Canon 41 in the 1908 Standard Code stated the following:

When a lawyer discovers that some fraud or deception has been practiced, which has been unjustly imposed upon the court or a party, he should endeavor to rectify it; at first by advising the client, and if his client refuses to forego the advantage thus unjustly

53. *Id.* at preface. Progress on the adoption is available at http://www.abanet.org/cpr/mrpc/alpha_states.html (last visited Feb. 28, 2006). Note that the chart only indicates where the states are in the process of review, it does not note whether the states chose to adopt the ABA Model Rule language.

54. WSBA REPORT, *supra* note 4, at 4.

55. Susan E. Carroll, *Caught Between a Rock and a Soft Place: Regulating Legal Ethics to Police Corporate Governance in the United States and Hong Kong*, 14 PAC. RIM L. & POL'Y J. 35, 43 (2005) (noting that while there has been a “strong push for national uniformity, federalism concerns continue to block standardization of state legal ethics.”).

56. Zer-Gutman, *supra* note 51, at 669 (declaring that “the ethical duty of confidentiality has always been controversial”).

57. See, e.g., Fred C. Zacharias & Bruce A. Green, *Reconceptualizing Advocacy Ethics*, 74 GEO. WASH. L. REV. 1 (2005) (providing another perspective on the history and future of advocacy ethics, by focusing on the roots of the nineteenth century debate and how those roots have been assimilated and explained successfully).

58. See Hosmer & Powell, *supra* note 29, at 429 (describing the history of the Codes).

59. *Id.* at 429–30.

60. *Id.* at 430.

gained, he should promptly inform the injured person or his counsel, so that they may take appropriate steps.⁶¹

However, later versions were viewed as more pro-client and pro-confidentiality.⁶² For example, the 1969 revisions allowed an attorney to reveal confidences or secrets *only* in order to collect a fee, defend against an accusation, or prevent a crime.⁶³ But, the 1983 Model Rules revealed another shift; this time away from confidentiality and toward candor.⁶⁴ The Model Rules adopted by the ABA in 1983 showed “an erosion of the overwhelming pro-client, pro-confidentiality approach to attorney-client communications.”⁶⁵ Accordingly, the 1983 Model Rules subjected attorneys to possible professional discipline for not disclosing to the court what would otherwise be “contemptuous to conceal.”⁶⁶

The ABA’s most recent overhaul, dubbed “Ethics 2000,” continued on the pro-candor path by making changes to almost every rule,⁶⁷ one of which allows more “whistle-blowing” options for lawyers revealing client confidences in the face of future harm or client fraud.⁶⁸ In addition, 2003 Model Rule 3.3 increases a lawyer’s obligation of candor to the tribunal by eliminating the requirement of materiality.⁶⁹ The Commission “deleted the requirement of materiality⁷⁰ that now qualifies a lawyer’s

61. MODEL CANONS OF PROF’L ETHICS, Canon 41 (1967).

62. Crotty Guttilla, *supra* note 24, at 707–08 (noting that pre-1983 codes were pro-client).

63. MODEL CODE OF PROF’L RESPONSIBILITY DR 4-101 (1980).

64. Daniel Walfish, *Making Lawyers Responsible for the Truth: The Influence of Marvin Frankel’s Proposals for Reforming the Adversary System*, 35 SETON HALL L. REV. 613, 635 (2005) (remarking that recently “the pendulum of the main duty of candor rule has begun to swing in the direction of more truthfulness.”).

65. Crotty Guttilla, *supra* note 24, at 708.

66. Harry I. Subin, *The Lawyer as Superego: Disclosure of Client Confidences to Prevent Harm*, 70 IOWA L. REV. 1091, 1098 (1985). Rule 1.6 required attorneys to safeguard client secrets except in very limited circumstances. MODEL RULES OF PROF’L RESPONSIBILITY R. 1.6 (1983). Yet Rule 3.3(a)(4) provided that “[i]f a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.” *Id.* at R. 3.3(a)(4). The Model Rules required disclosure of confidential information concerning fraud on the court when the attorney was the one who offered that evidence to the court. *Id.* However, the Model Rules were unclear on whether the attorney was required to disclose false evidence that the lawyer did not offer to the court. *See id.* Thus, if a criminal defendant lied on the stand in a “narrative” form, without prompting or sanction from the attorney, the attorney was most likely not required to disclose that client confidence to the court. *Id.* For a description of the narrative form of testimony, see *infra* note 104.

67. Rice Andrews, *supra* note 22, at 1449.

68. *Id.* at 1450 (pointing out that the “Ethics 2000 commission had proposed more aggressive ‘whistle-blowing’ provisions, to allow lawyers to reveal certain client frauds, but the House of Delegates approved only modest additional exceptions to the duty of confidentiality.”).

69. Margaret Colgate Love, *The Revised ABA Model Rules of Professional Conduct: Summary of the Work of Ethics 2000*, 15 GEO J. LEGAL ETHICS 441, 464 (2002) (briefly examining the substantive changes in the 2003 Model Rules).

70. A few Washington cases exist that discuss the meaning of the term “material.” Generally, “material facts” are those facts upon which the outcome of the litigation depends in whole or in part.

obligation in 3.3(a)(1) not to make a false or misleading statement of fact or law to a tribunal,”⁷¹ and the lawyer’s duty to remedy the situation does not depend on whether the lawyer knowingly or purposefully offered the false evidence.⁷² However, as noted above, Washington has resisted the “pro-candor” tide shift and retains a more “pro-client” proclivity.⁷³ Because of this, Washington is an outlier among the other states.⁷⁴

There are two prominent theories regarding the limitation of, or expansion of exceptions to, the attorney-client duty of loyalty. One theory is that an erosion of attorney-client confidentiality will result in a less effective legal system.⁷⁵ The opposing theory is that the privilege will lead to a negative societal view of the legal profession because it appears as if the attorney is “covering up” for a client who has indeed committed a criminal or civil wrong.⁷⁶ Additionally, expansion of attorney-client confidentiality leads to unjust legal results because the “truth” may be hidden.⁷⁷ In the candor-confidentiality discussion, the Freedman-Frankel debate is probably the most well known.⁷⁸

C. The Frankel and Freedman Debate of Candor Versus Confidentiality

In 1974, Judge Marvin Frankel, who had become frustrated with the “trickery and obfuscation” of the American court system, proposed a radically different version of the candor rule to the American Bar Asso-

E.g., *In Re Disciplinary Proceeding Against Dynan*, 152 Wash. 2d 601, 613, 98 P.3d 444, 450 (2004). Also, a materially false statement in the perjury context is any false statement which could have affected the course or outcome of the proceeding. *Id.*

71. *Colgate Love*, *supra* note 69, at 464.

72. *Id.*

73. *See* WSBA Press Release, *supra* note 17.

74. *See infra* note 133 and accompanying text.

75. *See, e.g.*, NACDL, *Chamber of Commerce, ACLU, ABA, Corporate Counsel Ally in Support of Attorney-Client Privilege*, CHAMPION, Dec. 29, 2005, at NACDL Column, available at <http://www.westlaw.com>, 29-DEC Champion 8. For example, the “privilege waiver amendment weakens, rather than enhances, internal compliance programs. If employees are concerned about whether attorney-client protections will be honored during internal investigations, they won’t be as candid and forthcoming, undermining one of the most effective means of detecting corporate misconduct.” *Id.* at 9. *See also* WASH. RULES OF PROF’L CONDUCT pmbl. cmt. 8 (2006) (“[A] lawyer can be sure that preserving client confidences ordinarily serves the public interest because people are more likely to seek legal advice, and thereby heed their legal obligations, when they know their communications will be private.”).

76. *See, e.g.*, Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1040 (1975) (“Our relatively low regard for truth-seeking is perhaps the chief reason for the dubious esteem in which the legal profession is held.”).

77. *See, e.g., id.* at 1040–41. Frankel declares that he is “among those who believe the laity have ground to question our service in the quest for truth.” *Id.* at 1041.

78. *Walfish*, *supra* note 64, at 618 (providing an in-depth discussion of the debate between Judge Frankel and Monroe Freedman).

ciation.⁷⁹ In proposing the rule, Judge Frankel was, in part, responding to the uproar caused by Professor Monroe Freedman's 1966 publication of an article in which Freedman argued that a criminal defense lawyer has a duty to: (1) destroy an adverse witness, even if he knows that the witness is telling the truth; (2) put a witness on the stand even though he knows the witness will commit perjury; and (3) give his client legal advice even though he believes his advice will tempt the client to commit perjury.⁸⁰ The Freedman-Frankel debate in turn sparked numerous legal ethicists to theorize about the different roles each rule would play in the American adversarial system.⁸¹ Although Freedman's version of the candor rule was more widely accepted in the years following his proposals, and Frankel's more soundly derided, the underpinnings of Frankel's suggestions are slowly beginning to take prominence while Freedman's are now being questioned.⁸²

1. Frankel

Judge Frankel proposed several amendments to the rules governing lawyer ethics that differ notably from the most widely accepted candor ethics.⁸³ Frankel's amendments would have required a lawyer to: (1) disclose all relevant evidence and prospective witnesses, even when the lawyer does not intend to offer that evidence and those witnesses; (2) prevent or report any untrue statement by a client or witness, or any omission of material fact, that makes other statements misleading; and (3) at trial, examine witnesses with the purpose and design of eliciting the whole truth.⁸⁴ As a member of the commission reviewing the ABA's Code of Professional Ethics, Frankel succeeded in introducing most of these provisions into the 1979 draft of the Model Rules of Professional Conduct.⁸⁵ For example, the 1979 draft comments declared that "[t]he duty to represent a client vigorously, and therein to maintain confidences of the client, is qualified by the advocate's duty of candor to the tribunal."⁸⁶ However, the Commission ultimately did not officially release the

79. *Id.* at 613–14 (2005) (Judge Frankel wrote that the "adversary system rates truth too low among the values that institutions of justice are meant to serve.").

80. Walfish, *supra* note 64, at 617 (citing Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469, 1469 (1966)).

81. *Id.* at 619–26. Walfish outlines several key commentators' positions on the Frankel-Freedman debate. *Id.* For example, he discusses Harry Subin's 1987 response to Frankel's critique, and Professor John Mitchell's response to Subin's response. *Id.* at 619–21.

82. *Id.* at 626–28 (although Frankel's ideas are resurfacing, commentators fail to cite Frankel as a source for change).

83. *Id.* at 629–35 (detailing Frankel's proposals).

84. *Id.* at 613–14.

85. *Id.* at 629.

86. *Id.* at 630.

1979 draft because it was met with fierce opposition.⁸⁷ Monroe Freedman was shown a copy of the draft and, immediately outraged, denounced the draft and leaked it to the press.⁸⁸ The reaction of lawyers and theorists was equally negative to the proposed duty of candor and limits on the attorney-client confidentiality protection.⁸⁹ Consequently, Frankel's proposals were cut back in the next few drafts.⁹⁰ The duty of candor provision in the final 1983 version contained few of the restraints that Frankel pushed for.⁹¹

Judge Frankel's ideals, however, have recently re-emerged in the legal community. A less stringent version of his proposals can be seen in the ABA 2003 Model Rules, which offer a broader candor rule than the previous versions of the Model Rules.⁹² For example, under the 2003 Model Rules the duty to maintain client confidences is now qualified by the advocate's duty of candor to the tribunal.⁹³ Also, a lawyer may not make any false statement, regardless of materiality, and a lawyer must correct a previous false statement of material fact.⁹⁴ Additionally, the lawyer must remedy the effects of false evidence offered by the lawyer, client or witness.⁹⁵ This last revision is a dramatic departure from the previous rules, where a lawyer was not required to remedy the effects of false evidence offered by a client or witness.⁹⁶ Nevertheless, the "[s]tandards of legal ethics are still a far cry from those Frankel envisioned . . . [because the] ABA standards, which have been changed many times over the past thirty years, do not impose a high standard of truthfulness, nor are they worded strongly [enough]."⁹⁷

2. Freedman

Freedman's treatise, *Lawyers' Ethics in an Adversary System*, tackles the issue of how "lawyers should respond when faced with a forced choice between violating the moral imperative to be truthful and the moral imperatives to keep promises and to respect confidences received in trust."⁹⁸ According to Freedman, when faced with that choice, the dig-

87. *Id.*

88. *Id.*

89. *Id.* at 630–31.

90. *Id.* at 634.

91. *Id.*

92. See Colgate Love, *supra* note 69, at 464 (describing in detail the changes in Rule 3.3).

93. MODEL RULES OF PROF'L CONDUCT R. 3.3 (2003).

94. *Id.*

95. *Id.*

96. See MODEL RULES OF PROF'L CONDUCT R. 3.3 (1983).

97. Walfish, *supra* note 64, at 636–37.

98. MONROE H. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* preface (1975).

nity of the individual takes precedence over the interests of the state;⁹⁹ thus, keeping promises prevails. Our system requires absolute candor between a lawyer and her client as a “client cannot be expected to reveal to the lawyer all information that is potentially relevant, including that which may well be incriminating, unless the client can be assured that the lawyer will maintain all such information in the strictest confidence.”¹⁰⁰ Complete trust and disclosure between lawyer and client is necessary because the adversary system “assumes that the most efficient and fair way of determining the truth is by presenting the strongest possible case for each side of the controversy before an impartial judge or jury,”¹⁰¹ and it is impossible for a lawyer to present the strongest case without all the information the client has to give.

In his treatise, Freedman parses the conflict into what he calls the “trilemma”: the duty of the lawyer to know everything, to keep it in confidence, and to reveal it to the court.¹⁰² To resolve this conflict, he proposes a rule in favor of absolute client confidentiality.¹⁰³ As a consequence, a criminal defense attorney, faced with a client who insists on perjuring himself, “has a professional responsibility as an advocate in an adversary system to examine the perjurious client in the ordinary way and to argue to the jury, as evidence in the case, the testimony presented by the defendant.”¹⁰⁴

Freedman’s theories, however, were not accepted without criticism,¹⁰⁵ and the ABA has never gone so far as to adopt similar rules.

99. *Id.* at 2.

100. *Id.* at 5.

101. *Id.* at 9.

102. *Id.* at 28.

103. *See id.* at 40–41.

104. *Id.* Thus, Freedman soundly rejected the “narrative” solution found in the ethical standards of the time. *See id.* Under the narrative approach, the attorney calls the defendant to the witness stand but does not engage in the usual question and answer exchange. *See People v. Johnson*, 62 Cal. App. 4th 608, 620–29, 72 Cal. Rptr. 2d 805 (1998) (discussing the narrative alternative, along with other proposed solutions to the “trilemma”). Instead, the attorney permits the defendant to testify in a free narrative manner. *Id.* at 624. In closing arguments, the attorney does not rely on any of the defendant’s false testimony. *Id.*

105. *See, e.g.,* Norman Lefstein, *Client Perjury in Criminal Cases: Still in Search of an Answer*, 1 GEO. J. LEGAL ETHICS 521, 524–25 (1988) (arguing that “Professor Freedman’s analysis is predicated on an indefensible premise”); Donald Liskov, *Criminal Defendant Perjury: A Lawyer’s Choice Between Ethics, the Constitution, and the Truth*, 28 NEW ENG. L. REV. 881, 905 (1994) (opining that “Freedman’s approach may seem practical. However, in practice, a lawyer’s use of this approach may likely end in disciplinary action.”); Teresa Stanton Collett, *Understanding Freedman’s Ethics*, 33 ARIZ. L. REV. 455, 456 (1991) (contending that Freedman’s conclusion is the result of a fundamental misunderstanding of the role of the lawyer because the role of the lawyer is not to “win” the unwinnable case, nor to legally extort more for the client than the client is entitled to under the law, but rather to voice the client’s perspective artfully and persuasively so that a just resolution can be reached).

Rather, the ABA offers a rule that is somewhat closer to the translucent rule offered by Frankel than the opaque rule offered by Monroe.¹⁰⁶ The next Part explores how the 2006 Washington Rules differ from the ABA's by compelling attorneys to both be truthful, as Frankel proposed, and be loyal advocates, as Monroe proposed.

III. AN EXAMINATION OF WASHINGTON'S RULES 1.6 AND 3.3

The previous version of the Washington Rules of Professional Conduct was adopted in June of 1985.¹⁰⁷ The court adopted a slightly altered version of the ABA 1983 Model Rules of Professional Conduct, and chose not to adopt any of the ABA official comments.¹⁰⁸ Lawyers in Washington practiced under the 1985 RPC for over twenty years. However, in 2003, because of the substantial changes made to the ABA Model Rules, the WSBA established the Ethics 2003 Committee to review the 1985 rules.¹⁰⁹ After much debate, the Confidentiality Subcommittee of the Ethics 2003 Committee voted to adopt Rule 3.3 of the ABA 2003 Model Rules verbatim and Rule 1.6 with changes.¹¹⁰ The Washington Supreme Court chose to deviate from the Committee's recommendations on both rules.¹¹¹

This Part takes an in-depth look at Washington's 1985 version of Rules 3.3 and 1.6 and compares that version to Washington's recently adopted RPC. First, the Ethics 2003 Committee debate is examined. Second, the 1985 RPC is compared to Washington's newly adopted RPC, focusing on Rules 1.6 and 3.3, and the ABA 2003 Model Rules are compared to Washington's newly adopted RPC, also focusing on Rules 1.6 and 3.3.

106. See discussion *supra* notes 79–104 and accompanying text.

107. Stuart Watt, *Confidentiality Under the Washington Rules of Professional Conduct*, 61 WASH. L. REV. 913, 913 n.1 (1986) (detailing Rules 1.6 and 3.3 of the 1985 Washington Rules of Professional Conduct). One of the main concerns when adopting the 2006 Washington RPC was adoption of the comments; the Washington Supreme Court specifically asked the Ethics 2003 Committee's opinion about the importance of comments. Letter from Justice Charles W. Johnson, Chair of Supreme Court Rules Committee (July 12, 2005), available at <http://www.wsba.org/lawyers/groups/ethics2003/ethics2003letter.pdf>.

108. *Id.* at n.7.

109. WSBA REPORT, *supra* note 4, at 4.

110. *Id.* at app. D, at 7, available at <http://www.wsba.org/lawyers/groups/ethics2003/appendixd.doc>. The Subcommittee split regarding Rule 3.3. *Id.* However, Rule 3.3(a)(1) was adopted by a vote of 6–2; Rule 3.3(a)(2) was adopted unanimously because it was the same as Washington's RPC 3.3 (a)(3); Rule 3.3(a)(3) was adopted by a vote of 9–3; Rule 3.3(b) was adopted by a vote of 10–2; and Rule 3.3(c) was adopted by a vote of 8–2. *Id.* at 7–9.

111. See WASH. RULES OF PROF'L CONDUCT R. 1.6, 3.3 (2006); see also WSBA Press Release, *supra* note 17.

A. The Ethics 2003 Committee's Debate and the Washington Supreme Court's Decision to Not Adopt Model Rules 1.6 and 3.3

The Ethics 2003 Committee was appointed to undertake a "comprehensive study and evaluation of the revised ABA Model Rules, to consider the suitability of adopting the ABA Ethics 2000 revisions, and to evaluate the desirability of other appropriate changes to Washington's RPC."¹¹² The Ethics 2003 Committee recommended that Washington follow the 2003 version of the ABA Model Rules unless there was a compelling reason for deviating from them.¹¹³ Hence, the ABA Model Rules were to serve as a "guiding beacon" of uniformity to the Committee, as the Committee wished to bring Washington in line with the rest of the country.¹¹⁴ However, the Ethics 2003 Committee deviated from that uniformity when the Model Rules were silent on a subject that has "traditionally and successfully" been litigated in Washington, or where an existing Washington rule was clearly more suitable.¹¹⁵

The Confidentiality Subcommittee (Subcommittee) in charge of evaluating whether to adopt Model Rule 3.3 was divided on what course to take.¹¹⁶ The members of the Subcommittee recognized that adopting the ABA rule would "involve a major change in Washington law."¹¹⁷ Eventually the Subcommittee voted to adopt the ABA Model Rule 3.3 in its entirety with the expectation that it would reverse Washington's presumption that confidentiality trumped candor, so that "candor to a tribu-

112. WASH. STATE BAR ASS'N, GR 9 COVER SHEET, SUGGESTED AMENDMENTS TO THE RULES OF PROFESSIONAL CONDUCT (RPC), <http://www.wsba.org/lawyers/groups/ethics2003/ethics2003gr9coversheet.doc> (last visited July 1, 2006).

113. WSBA REPORT, *supra* note 4, at 6.

114. *Id.*

115. *Id.* For example, the Committee decided not to adopt two provisions of Model Rule 1.6. *Id.* at 10–11. The Committee concluded that 2003 Model Rule 1.6(b)(6) and 2003 Model Rule 1.6(b)(3) were "incompatible with the duty of confidentiality as established in Washington." *Id.* at 11. First, Model Rule 1.6(b)(6) would permit a lawyer to reveal confidential client information "to comply with other law," and the Committee concluded that lawyers "should not be placed in the dilemma of having to assess the validity" of a provision of "other law." *Id.* The Committee was "wary" of the provision being used as an "ideological tool" for the regulation of the practice of law by non-judicial branches of government. *Id.* Second, Model Rule 1.6(b)(3) would permit a lawyer to reveal confidential information to "mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client used the lawyer's services." *Id.* The Committee concluded that the public interest in preventing fraud was attenuated when the fraud is already complete. *Id.* At that point, "the balance of interests shifts back to the traditional duties of lawyer-client loyalty and confidentiality." *Id.*

116. *Id.* at app. D, at 7, available at <http://www.wsba.org/lawyers/groups/ethics2003/appendixd.doc>; see *supra* note 110.

117. WSBA REPORT, *supra* note 4, at app. D, at 7, available at <http://www.wsba.org/lawyers/groups/ethics2003/appendixd.doc>.

nal would prevail over a lawyer's obligation to maintain confidentiality."¹¹⁸

The Subcommittee considered Model Rule 3.3 in conjunction with Model Rule 1.6 (Confidentiality of Information) to determine how the two rules would work together to proscribe mandatory and permissive disclosure of client information in a variety of situations.¹¹⁹ The Committee's proposed version of Rule 1.6 (which differed from 2003 ABA Model Rule 1.6)¹²⁰ provided that a lawyer may reveal, among other things, client information "relating to the proceeding" to (1) prevent the client from committing a crime,¹²¹ (2) prevent the client from committing a fraud reasonably certain to result in substantial financial injury when using the lawyer's services,¹²² and (3) prevent reasonably certain death or substantial bodily harm.¹²³ These revelations were not mandatory, as the proposed rule used permissive language such as "may."¹²⁴ However, unless that revelation fit into one of the prescribed categories, the lawyer *was* compelled ("shall") to keep client information relating to the representation confidential.¹²⁵ Thus, under a pure analysis using proposed Rule 1.6, the lawyer was not required to reveal any client information; rather, the lawyer was supported by the rule if she chose to reveal the information in order to prevent one of the socially unacceptable client behaviors.¹²⁶

Washington's proposed Rule 3.3, however, narrowed the scope of proposed Rule 1.6. When a lawyer faced client fraud or perjury to a tribunal the lawyer's revelations changed from optional to mandatory. The language of proposed Rule 3.3 was compulsory ("shall"), and covered lawyer misrepresentations, client misrepresentations, and witness misrepresentations to the court.¹²⁷ Whereas proposed Rule 1.6 allowed a lawyer to determine whether revealing client information was the best recourse for client fraud involving third parties, proposed Rule 3.3 did not give the lawyer a choice when client fraud involved the court. If a lawyer knew

118. *Id.*

119. *Id.*, at app. E, at 35, available at <http://www.wsba.org/lawyers/groups/ethics2003/appendix.doc>. ("The subcommittee is working diligently to sort out the interplay of rules 1.6, 3.3(c), and 4.1 with respect to when a lawyer may disclose client crimes and fraud.")

120. *Id.*, at 146, available at <http://www.wsba.org/lawyers/groups/ethics2003/reportpart3.doc>. For example, proposed Rule 1.6 permits disclosure of client confidences to prevent any crime, whereas Model Rule 1.6 limits disclosure to prevent only certain types of crimes. *Id.* at 148.

121. WASH. RULES OF PROF'L CONDUCT R. 1.6(b)(2) (Proposed Official Draft 2004).

122. *Id.* at R. 1.6(b)(3).

123. *Id.* at R. 1.6(b)(1).

124. *Id.* at R. 1.6.

125. *Id.*

126. *Id.*

127. *Id.* at R. 3.3(a)(3).

that a person intended to engage, was engaging, or had engaged in criminal or fraudulent conduct “related to the proceeding,” the lawyer was required to take reasonable remedial measures.¹²⁸ In fact, proposed Rule 3.3(c) expressly authorized violations of proposed Rule 1.6 in order to comply with 3.3(a) and 3.3(b).¹²⁹

During one of its meetings, the Confidentiality Subcommittee discussed striking a balance in crafting rules that foster a strong attorney-client relationship without increasing the negative perception of lawyers hiding behind the confidentiality protection when a client intends to commit a crime.¹³⁰ Certain members of the Subcommittee were worried that too broad a rule in either Rule 1.6 or Rule 3.3 would erode the attorney-client privilege,¹³¹ while other members stressed the need to stay true to the 2003 Model Rules in order to uphold public expectations of attorney honesty.¹³² In addition, several members expressed discomfort with the idea that Washington would be an outlier, as, at the time, forty-two other states required disclosure to the court of Rule 1.6 confidences in certain circumstances.¹³³ In sum, most of the Subcommittee debate over the Model Rule version of Rule 3.3 centered on the mandatory nature of the rule, the sacredness of the attorney-client privilege, and the public perception of the rule.

As noted above, however, the Washington Supreme Court chose not to adopt the Committee’s recommendations.¹³⁴ The next section explores Washington’s adopted rules and compares those rules to the 1985 RPC and the 2003 Model Rules.

128. *Id.* at R. 3.3(b).

129. *Id.* at R. 3.3(c) (“The duties stated in paragraphs (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.”).

130. WSBA REPORT, *supra* note 4, at app. E, at 35, available at <http://www.wsba.org/lawyers/groups/ethics2003/appendix.doc>. The minutes of the July 9, 2003 meeting indicate that one of the members of the Subcommittee pointed out that the Subcommittee wanted to strike a balance in crafting rules that fostered a strong attorney-client relationship without augmenting the perception that a lawyer can hide behind client confidentiality. *Id.*

131. *Id.* at 38. For example, on September 23, 2003, Mr. Ehrlichman urged the Subcommittee to focus on the fundamental principle of client trust that confidences shared with lawyers will be protected. *Id.* He also speculated that there are efforts underway to erode the attorney-client privilege by the federal government. *Id.*

132. *Id.* at 49. For example, Professor David Boerner argued on October 8, 2003, that Washington adopt the ABA Model Rules in order to stay consistent with other states and to stay internally consistent within the rules of ethics. *Id.*

133. *Id.* at 35, 40. On July 9, 2003, Professor Boerner pointed out that Washington is an outlier among other states when it comes to candor to the tribunal. *Id.* at 35. At a later meeting on September 3, 2003, Mr. Brusichio pointed out that forty-two other states have stricter disclosure rules than Washington. *Id.* at 40.

134. See WSBA Press Release, *supra* note 17.

*B. Comparison of Washington's 1985 Rules 1.6 and 3.3
with Washington's 2006 Rules 1.6 and 3.3*

1. Rule 1.6

In this section Washington's 1985 RPC Rule 1.6 is compared to recently adopted Rule 1.6 and both are compared to the 2003 Model Rules.

All three Rule 1.6 provisions differ significantly. First, 2006 Washington RPC Rule 1.6 mostly parallels 2003 Model Rule 1.6, but retains some significantly unique Washington provisions.¹³⁵ As in the 1985 Washington RPC Rule 1.6, a lawyer shall not reveal information relating to the client unless authorized either explicitly or impliedly by the client to do so.¹³⁶ However, the list of permissible situations in which a lawyer may reveal information has expanded,¹³⁷ and some of the key terminol-

135. Compare MODEL RULES OF PROF'L CONDUCT R. 1.6 (2003), with WASH. RULES OF PROF'L CONDUCT R. 1.6 (2006). The complete text of Washington's adopted Rule 1.6 is as follows:

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer to the extent the lawyer reasonably believes necessary:

- (1) shall reveal information relating to the representation of a client to prevent reasonably certain death or substantial bodily harm;
- (2) may reveal information relating to the representation of a client to prevent the client from committing a crime;
- (3) may reveal information relating to the representation of a client to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services;
- (4) may reveal information relating to the representation of a client to secure legal advice about the lawyer's compliance with these Rules;
- (5) may reveal information relating to the representation of a client to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client;
- (6) may reveal information relating to the representation of a client to comply with a court order; or
- (7) may reveal information relating to the representation of a client to inform a tribunal about any client's breach of fiduciary responsibility when the client is serving as a court-appointed fiduciary such as a guardian, personal representative, or receiver.

WASH. RULES OF PROF'L CONDUCT R. 1.6 (2006).

136. WASH. RULES OF PROF'L CONDUCT R. 1.6(a) (2006).

137. Compare WASH. RULES OF PROF'L CONDUCT R. 1.6(b) (1985), with WASH. RULES OF PROF'L CONDUCT R. 1.6(b) (2006).

ogy has changed.¹³⁸ Also, Washington has adopted its first mandatory disclosure rule.¹³⁹

First, and perhaps most insignificantly, the phrase “confidences or secrets” has been removed and replaced with the word “information”¹⁴⁰ (following the lead of the 2003 Model Rules).¹⁴¹ “Information” is not defined, but is much broader than “confidences or secrets.”¹⁴² Comment 19, which is unique to Washington, indicates that the phrase “information related to the proceeding” should be interpreted broadly, and should include the old phrase “confidences or secrets.” Comment 4 also provides support for the supposition that adopted Rule 1.6 protects more types of information than previous Rule 1.6: the prohibition against revealing information relating to the representation of a client “also applies to disclosures by a lawyer that do not in themselves reveal protected information but could reasonably lead to the discovery of such information by a third person.”¹⁴³ The comments specifically point out that a lawyer may use a hypothetical to discuss client secrets, so long as there is no chance the listener could guess which client the lawyer was discussing.¹⁴⁴

Second, Washington has adopted most of the Model Rule’s permissive disclosure provisions. Under 2006 Washington Rule 1.6, a lawyer may¹⁴⁵ reveal confidential information for the following reasons: (1) to prevent a client from committing a crime;¹⁴⁶ (2) to prevent, mitigate, or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client’s commission of a crime or fraud in furtherance of which the client has used

138. See *infra* notes 140–43 and accompanying text.

139. See *infra* notes 159–65 and accompanying text.

140. WASH. RULES OF PROF’L CONDUCT R. 1.6(a) (2006).

141. MODEL RULES OF PROF’L CONDUCT R. 1.6(a) (2003).

142. Under the old rules, “confidence” referred to information protected by the attorney-client privilege under applicable law, and “secret” referred to other information gained in the professional relationship that the client requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client. WASH. RULES OF PROF’L CONDUCT terminology (1985). See also WASH. RULES OF PROF’L CONDUCT R. 1.6 cmt. 19 (2006) (defining “confidence” and “secret” similarly to the 1985 definition).

143. WASH. RULES OF PROF’L CONDUCT R. 1.6 cmt. 4 (2006).

144. *Id.* (“A lawyer’s use of a hypothetical to discuss issues relating to the representation is permissible so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or the situation involved.”).

145. A lawyer’s decision not to disclose the information does not violate this Rule. *Id.* at R. 1.6 cmt. 15.

146. *Id.* at R. 1.6(b)(2). Any crime counts, from murder to shoplifting. *Id.* However, only information relating to crimes which have not yet been committed may be revealed. *Id.* This exception is vastly different from the Model Rule, which permits a lawyer to reveal information to prevent the client from committing a crime “that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used the lawyer’s services.” MODEL RULES OF PROF’L CONDUCT R. 1.6(b)(2) (2003).

the lawyer's services;¹⁴⁷ (3) to secure legal advice about compliance with the rules;¹⁴⁸ (4) to establish a defense on behalf of the lawyer in a controversy between the lawyer and client;¹⁴⁹ (5) to comply with a court order;¹⁵⁰ and (6) to inform the tribunal of a breach of the client's court-appointed fiduciary duties.¹⁵¹ Most of these provisions were present in the 1985 Rule in some form or other.¹⁵² Additional permissive disclosures not present in 1985 Washington RPC Rule 1.6 include the following: (1) preventing reasonably certain death or substantial bodily harm;¹⁵³ and (2) preventing, mitigating, or rectifying substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services.¹⁵⁴

Noticeably, Washington has chosen to retain the unique provision allowing disclosures for any crime, from murder to shoplifting.¹⁵⁵ Under Washington's Rule, information relating to any crimes which have not yet been committed may be revealed.¹⁵⁶ The broad permissive disclosure provision is different from the Model Rule, which only permits a lawyer to reveal information to prevent the client from committing a crime "that is reasonably certain to result in a substantial injury to the financial interests or property of another and in furtherance of which the client has used the lawyer's services" or is "reasonably certain [to result] in death or substantial bodily harm."¹⁵⁷ The 2003 Ethics Committee recommended retaining Washington's unique, expansive rule in addition with the added provision of "reasonably certain" death or bodily harm because "there are imaginable circumstances . . . in which noncriminal acts may result in reasonably certain death or substantial bodily harm"¹⁵⁸

147. WASH. RULES OF PROF'L CONDUCT R. 1.6(b)(3) (2006). The Ethics 2003 Committee did not want to adopt all of Model Rule 1.6(b)(3). WSBA REPORT, *supra* note 4, at 11. The Committee concluded that "although the public interest is heightened when a lawyer is in a position to prevent future fraud, that urgency is attenuated when the fraud is already complete." *Id.* Thus, the Committee thought omitting the "past-fraud" exception would strike the appropriate balance. *Id.* Obviously, the Washington Supreme Court disagreed because it adopted the Model Rule version. Compare WASH. RULES OF PROF'L CONDUCT R. 1.6(b)(3) (2006), with MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(3) (2003).

148. WASH. RULES OF PROF'L CONDUCT R. 1.6(b)(4) (2006).

149. *Id.* at R. 1.6(b)(5).

150. *Id.* at R. 1.6(b)(6).

151. *Id.* at R. 1.6(b)(7).

152. See WASH. RULES OF PROF'L CONDUCT R. 1.6(b), (c) (1985).

153. WASH. RULES OF PROF'L CONDUCT R. 1.6(b)(1) (2006).

154. *Id.* at R. 1.6(b)(3).

155. *Id.* at R. 1.6(b)(2).

156. *Id.*

157. MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(1), (2).

158. WSBA REPORT, *supra* note 4, at 148, available at <http://www.wsba.org/lawyers/groups/ethics2003/reportspart3.doc>.

Third, the Washington Supreme Court has decided to adopt a provision that has no parallel in either the proposed rules or the Model Rules: a mandatory disclosure to prevent reasonably certain death or substantial bodily harm.¹⁵⁹ This new provision is a dramatic departure from the 1985 RPC.¹⁶⁰ All the “exceptions” in the previous Rule 1.6 were permissive¹⁶¹ and none specifically addressed death or bodily harm.¹⁶² Previously, Rule 1.6 allowed disclosures to prevent the commission of a crime.¹⁶³ The new rule allows for (and requires) more comprehensive disclosures because a lawyer must now reveal confidences where harm is likely even though the crime has already been committed.¹⁶⁴ Or, indeed, even if the harm is not related to a crime, the lawyer is required to report the potential harm to authorities.¹⁶⁵

Fourth, the Washington Supreme Court has also chosen not to follow Model Rule 1.6(b) and permit a lawyer to reveal information to comply with “other law.”¹⁶⁶ The court omitted the phrase because it would authorize the lawyer to decide when to waive confidentiality and that right belongs to the client.¹⁶⁷

2. Rule 3.3

When adopting the RPC in 1985, the supreme court chose not to follow the ABA’s 1983 version of Rule 3.3.¹⁶⁸ The 1983 ABA Model

159. Compare WASH. RULES OF PROF’L CONDUCT R. 1.6(b)(1) (2006), with WASH. RULES OF PROF’L CONDUCT R. 1.6 (1985), and MODEL RULES OF PROF’L CONDUCT R. 1.6(b)(1) (2003). This is a dramatic change from Washington’s 1985 RPC. By contrast, the counterpart Model Rule designates this as a permissive rather than a mandatory disclosure. MODEL RULES OF PROF’L CONDUCT R. 1.6(b)(1) (2003). Comment 6 provides an example: “a lawyer who knows that a client has accidentally discharged toxic waste into a town’s water supply must reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life threatening or debilitating disease.” WASH. RULES OF PROF’L CONDUCT R. 1.6 cmt. 6 (2006).

160. Compare WASH. RULES OF PROF’L CONDUCT R. 1.6 (2006), with WASH. RULES OF PROF’L CONDUCT R. 1.6 (1985).

161. WASH. RULES OF PROF’L CONDUCT R. 1.6(b) (1985).

162. *Id.*

163. *Id.* at R. 1.6(b)(1).

164. See WASH. RULES OF PROF’L CONDUCT R. 1.6(b)(1) (2006). Under the new rules, if the crime has been committed but there is a future chance of harm because of the criminal act, the lawyer must report the act. See *id.* Under former Rule 1.6, if the crime had already passed, there was no provision allowing the attorney to reveal the client conduct even to prevent reasonably certain death or bodily harm. See WASH. RULES OF PROF’L CONDUCT R. 1.6(b) (1985).

165. See WASH. RULES OF PROF’L CONDUCT R. 1.6(b)(1) (2006) (there is no qualification under the new rule that the information has to be related to a client’s criminal conduct; any information that would prevent a reasonably certain death or substantial bodily harm qualifies).

166. Compare WASH. RULES OF PROF’L CONDUCT R. 1.6(b)(6) (2006), with MODEL RULES OF PROF’L CONDUCT R. 1.6(b)(6) (2003).

167. WASH. RULES OF PROF’L CONDUCT R. 1.6 cmt. 24 (2006).

168. Watt, *supra* note 107, at 913 (noting that the subject area of confidentiality, in particular, differed from the ABA Model Rules).

Rule 3.3(a)(4) provided that “[i]f a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.”¹⁶⁹ In addition, that duty applied even if the lawyer was required to violate Rule 1.6 and reveal client confidences.¹⁷⁰ For example, if a lawyer unwittingly offered false evidence, and then came to know of that falsity, the lawyer had a subsequent duty to remedy the situation, even if it meant disclosing information considered confidential under Rule 1.6.¹⁷¹ The remedies required of the lawyer consisted of convincing the client to come clean, withdrawing from representation, or disclosing the fraud to the court.¹⁷² But, under the 1983 ABA Model Rules, if a lawyer had not been the one to offer the evidence, but knew the evidence was false, the lawyer was not required, nor allowed, to remedy the situation.¹⁷³

Washington’s 1985 version of RPC Rule 3.3 parted ways with the ABA’s 1983 version when it came to revealing client confidences.¹⁷⁴ Washington’s candor rule paralleled the ABA’s 1983 Rule 3.3 in most respects, except it made an allowance for information that would normally be classified as confidential under Rule 1.6.¹⁷⁵ Washington’s 1985 Rule 3.3(a)(2) read exactly the same as the 1983 Model Rule 3.3(a)(2), except that the Washington rule added “unless such disclosure is prohib-

169. MODEL RULES OF PROF’L CONDUCT R. 3.3(a)(4) (1984). The full text of the 1983 ABA Model Rule 3.3 is as follows:

(a) A lawyer shall not knowingly:

- (1) make a false statement of material fact or law to a tribunal;
- (2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;
- (3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly or adverse to the position of the client and not disclosed by opposing counsel; or
- (4) offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.

(b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.

(c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

Id. at R. 3.3.

170. *Id.*

171. *See id.*

172. *See id.* at R. 3.3 cmts.

173. *See id.* at R. 3.3.

174. Compare MODEL RULES OF PROF’L CONDUCT R. 3.3 (1984), with WASH. RULES OF PROF’L CONDUCT R. 3.3 (1985).

175. *See id.*

ited by Rule 1.6.”¹⁷⁶ In addition, the 1985 Washington RPC also contained a provision with no parallel in the ABA version:

If the lawyer has offered material evidence and comes to know of its falsity, and disclosure of this fact is prohibited by Rule 1.6, the lawyer shall promptly make reasonable efforts to convince the client to consent to disclosure. If the client refuses to consent to disclosure, the lawyer may seek to withdraw from the representation in accordance with Rule 1.15.¹⁷⁷

Thus, Washington’s former candor rule favored protecting client confidences over revealing fraud or perjury to the court.¹⁷⁸ Washington’s former rule, however, was on par with the ABA’s rule with regard to *lawyer* candor (as compared to lawyers’ remedies for client untruthfulness).¹⁷⁹ A lawyer in Washington had an affirmative duty not to knowingly offer false evidence, or knowingly put a witness on the stand who was going to lie. However, the lawyer did not have an affirmative duty to disclose to the court that her witness had lied on the stand, or destroyed relevant documents, if the lawyer had come to know of that information because of Rule 1.6 confidences.¹⁸⁰

Washington’s 2006 RPC Rule 3.3 is almost exactly the same as the 1985 RPC Rule 3.3; the court chose to retain Washington’s variant approach, which prohibits any disclosure to the tribunal that is not permitted by Rule 1.6.¹⁸¹ However, there are several minor changes to Rule

176. Compare MODEL RULES OF PROF’L CONDUCT R. 3.3(a)(2) (1984) (“[A lawyer shall not knowingly] fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client.”), with WASH. RULES OF PROF’L CONDUCT R. 3.3(a)(2) (1985) (“[A lawyer shall not knowingly] [f]ail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client unless such disclosure is prohibited by rule 1.6.”).

177. WASH. RULES OF PROF’L CONDUCT R. 3.3(d) (1985).

178. See *id.* at R. 3.3.

179. Compare MODEL RULES OF PROF’L CONDUCT R. 3.3 (1984), with WASH. RULES OF PROF’L CONDUCT R. 3.3 (1985).

180. WASH. RULES OF PROF’L CONDUCT R. 3.3 (1985); see generally Watt, *supra* note 107, at 922–24 (describing in detail the intricacies of Rule 3.3).

181. See WASH. RULES OF PROF’L CONDUCT R. 3.3 (2006); see WSBA Press Release, *supra* note 17. The complete text of adopted rule 3.3 is as follows:

(a) A lawyer shall not knowingly:

- (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
- (2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client unless such disclosure is prohibited by Rule 1.6;
- (3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
- (4) offer evidence that the lawyer knows to be false.

3.3.¹⁸² First, former Rule 3.3 stated, “A lawyer shall not knowingly make a false statement of material fact or law to a tribunal.”¹⁸³ The rule now states, “A lawyer shall not knowingly make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer.”¹⁸⁴ Note, the word “material” has been deleted, so that a lawyer may not knowingly make any false statement of fact or law, regardless of materiality.¹⁸⁵ Additionally, if a lawyer comes to know of a false statement previously made, the lawyer must correct that statement, but only if it was material.¹⁸⁶

The rest of the provisions are the same as the former rule.¹⁸⁷ For example, a lawyer may not offer evidence that the lawyer knows to be false;¹⁸⁸ if a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall promptly disclose this fact to the tribunal unless disclosure is prohibited by Rule 1.6.¹⁸⁹ When disclosure is in fact prohibited by Rule 1.6, the lawyer should try and convince the client to consent to disclosure;¹⁹⁰ if this fails, the lawyer may seek to withdraw.¹⁹¹ Also, a lawyer may choose to refuse to offer evidence that the lawyer reasonably believes is false, but is not obligated to refuse to offer such evidence.¹⁹²

(b) The duties stated in paragraph (a) continue to the conclusion of the proceeding.

(c) If the lawyer has offered material evidence and comes to know of its falsity, the lawyer shall promptly disclose this fact to the tribunal unless such disclosure is prohibited by Rule 1.6.

(d) If the lawyer has offered material evidence and comes to know of its falsity, and disclosure of this fact is prohibited by Rule 1.6, the lawyer shall promptly make reasonable efforts to convince the client to consent to disclosure. If the client refuses to consent to disclosure, the lawyer may seek to withdraw from the representation in accordance with Rule 1.16.

(e) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.

(f) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

WASH. RULES OF PROF'L CONDUCT R. 3.3 (2006).

182. Compare WASH. RULES OF PROF'L CONDUCT R. 3.3 (2006), with WASH. RULES OF PROF'L CONDUCT R. 3.3 (1985).

183. WASH. RULES OF PROF'L CONDUCT R. 3.3(a)(1) (1985).

184. WASH. RULES OF PROF'L CONDUCT R. 3.3(a)(1) (2006).

185. See *id.*

186. See *id.*

187. Compare WASH. RULES OF PROF'L CONDUCT R. 3.3 (2006), with WASH. RULES OF PROF'L CONDUCT R. 3.3 (1985).

188. WASH. RULES OF PROF'L CONDUCT R. 3.3(a)(4) (2006).

189. *Id.* at R. 3.3(c).

190. *Id.* at R. 3.3(d).

191. *Id.* at R. 3.3(d).

192. *Id.* at R. 3.3(e).

Strangely, the Washington Supreme Court struck the provision that read “[c]onstitutional law defining the right to assistance of counsel in criminal cases may supersede the obligations stated in this rule.”¹⁹³ The court also did not adopt the Model Rule’s parallel provision, “A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.”¹⁹⁴ The Washington comments provide that the duties in paragraph (a) apply to all lawyers, including defense counsel in criminal cases.¹⁹⁵ Thus, a criminal defense counsel, and all other counsel, must refuse to offer false evidence, including perjured testimony.¹⁹⁶ If a client insists on testifying falsely and the attorney cannot prevent the client from testifying falsely, the attorney must alert the court to the potential problem and seek to withdraw.¹⁹⁷ However, the attorney cannot reveal what constitutes the actual Rule 1.6 confidence; rather, the attorney must waive a red flag for the judge in a general sort of way.¹⁹⁸ In this respect, among others, the 2003 ABA Model Rule 3.3 differs from the ABA 1983 Model Rule 3.3, and the 2006 Washington RPC Rule 3.3.¹⁹⁹

Another disparity among the rules is the treatment of non-lawyers who offer false evidence. All the rules mandate that if a lawyer came to know of the false material that the *lawyer* had offered as evidence, then the lawyer had a duty to take reasonable remedial measures.²⁰⁰ Remedial measures included persuading the client to rectify the situation, or, if

193. WASH. RULES OF PROF’L CONDUCT R. 3.3(g) (1985).

194. MODEL RULES OF PROF’L CONDUCT R. 3.3(a)(3) (2003).

195. WASH. RULES OF PROF’L CONDUCT R. 3.3 cmt. 7 (2006).

196. *See id.*

197. *See id.* at cmt. 6, 7, 11; *State v. Berrysmith*, 87 Wash. App. 268, 275, 944 P.2d 397, 401 (1997). The *Berrysmith* court wrote:

[A] lawyer who reasonably believes that his or her client intends to commit perjury and cannot be dissuaded from that course is ethically bound to withdraw unless the court, after being so advised, refuses to permit withdrawal. The question for the court, therefore, is whether the lawyer *reasonably believes* that the client intends to commit perjury and cannot be dissuaded, and not whether the client in fact intends to commit perjury and cannot be dissuaded.

Berrysmith, 87 Wash. App. at 275, 944 P.2d at 401.

198. *See* MODEL RULES OF PROF’L CONDUCT R. 3.3(c)–(d) (2003). If the lawyer offers false evidence, he must disclose that fact to the court, unless disclosure is prohibited by Rule 1.6. *Id.* If disclosure is prohibited, the attorney may seek to withdraw. *Id.* Regardless, the attorney may not help the client perpetuate a fraud upon the court; thus, the only alternative is to make a “noisy withdrawal.” *See id.* at R. 1.2(d).

199. Compare MODEL RULES OF PROF’L CONDUCT R. 3.3 (1983), with MODEL RULES OF PROF’L CONDUCT R. 3.3 (2003), and WASH. RULES OF PROF’L CONDUCT R. 3.3 (2006).

200. Compare MODEL RULES OF PROF’L CONDUCT R. 3.3(a)(4) (1983), with MODEL RULES OF PROF’L CONDUCT R. 3.3(a)(3) (2003), and WASH. RULES OF PROF’L CONDUCT R. 3.3(c), (d) (1985), and WASH. RULES OF PROF’L CONDUCT R. 3.3(c), (d) (2006).

necessary, withdrawing from representation.²⁰¹ The 2003 Model Rules, however, extend that mandate to remedy false material produced by the lawyer's client and any witnesses called by the lawyer.²⁰² Thus, 2003 Model Rule 3.3(a)(3) covers the situation where, if the lawyer comes to know of false evidence offered by the lawyer's client, or a witness called by the lawyer, then the lawyer has an affirmative duty to take remedial action.²⁰³

The 2006 Washington Rule 3.3(c) parts ways with the 2003 Model Rule 3.3(a)(3) in that when a Washington lawyer discovers past materially fraudulent evidence that has been offered, the lawyer must inform the court unless that information is protected by Rule 1.6.²⁰⁴ Also, the 2006 RPC 3.3(a)(4) reads, "[A lawyer shall not knowingly] offer evidence that the lawyer knows to be false."²⁰⁵ The provision does not include a duty to remedy the situation if the "lawyer's client, or a witness called by the lawyer, has offered the evidence and the lawyer comes to know of its falsity."²⁰⁶ Thus, it appears that the omission of those words by the Washington Supreme Court endorses the view that a lawyer is not under a duty to remedy the situation when a witnesses has lied, or when the client has lied and disclosure would not be "necessary to avoid assisting a criminal or fraudulent act."²⁰⁷

Perhaps the most striking difference among the rules is a new paragraph added to the 2003 Model Rules which reads: "A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging, or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal."²⁰⁸ Because few states have yet to adopt this provision,²⁰⁹ and no courts have interpreted

201. Compare MODEL RULES OF PROF'L CONDUCT R. 3.3 cmt. 11 (1983), with MODEL RULES OF PROF'L CONDUCT R. 3.3 cmts. 10–11 (2003), and WASH. RULES PROF'L CONDUCT R. 3.3(c), (d) (1985), and WASH. RULES OF PROF'L CONDUCT R. 3.3(d) (2006).

202. MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(3) (2003) ("If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.").

203. *Id.*

204. WASH. RULES OF PROF'L CONDUCT R. 3.3(c) (2006).

205. *Id.* at R. 3.3(a)(4).

206. See *id.*; MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(3) (2003).

207. See *supra* notes 202–06 and accompanying text.

208. Compare MODEL RULES OF PROF'L CONDUCT R. 3.3(b) (2003), with MODEL RULES OF PROF'L CONDUCT R. 3.3 (1983).

209. Progress on the adoption is available at http://www.abanet.org/cpr/mrpc/alpha_states.html (last visited August 11, 2006). Note that the chart only indicates where the states are in the process of review; it does not note whether the states chose to adopt the ABA Model Rule language. The four most recent states other than Washington to adopt the Model Rules are Ohio in August of 2006,

its application,²¹⁰ it is difficult to tell how this new paragraph will affect the lawyer's duty of candor to the tribunal in states that adopt the Model Rules. In considering whether to adopt the ABA 2003 Model Rules, the Washington Supreme Court made a wise decision to wholly delete the ABA's version²¹¹ of the new, untried 3.3(b) provision.

One possible explanation for the disparity among these rules is that the legal community still struggles to find the right balance between courts and clients. The next section explores the struggle and the tensions placed on a lawyer by Rules 1.6 and 3.3 and recommends allowing lawyers discretion as to when to reveal client confidences to the court.

IV. FINDING THE BALANCE FOR RULES 3.3 AND 1.6

Legitimate and pressing concerns have triggered the legal community's renewed focus on client fraud and lawyer cover-ups.²¹² Lawyers helping their clients defraud investors and the public is unacceptable, and the concerns of protecting societal interests, and maintaining positive public perceptions and the integrity of the legal system, render turning a blind eye to lawyer fraud unthinkable. That said, the new versions of Rule 3.3 and Rule 1.6 do not provide attorneys with adequate discretion to handle the wide variety of ethical dilemmas they will inevitably face. First, this section explores the tension created when a lawyer is expected to conform to Washington's adopted rule. Second, this section argues that neither Washington's unique rule nor the Model Rule allows lawyers enough discretion to employ a solution to an individual ethical dilemma.

Nebraska in June of 2005, Iowa in March of 2005, and Oregon in January of 2005. *Id.* Nebraska adopted Rule 3.3 verbatim. NEB. RULES OF PROF'L CONDUCT R. 3.3 (2005). Ohio also adopted Rule 3.3 and Rule 1.6 verbatim, and the new rules take effect February 2007. OHIO RULES OF PROF'L CONDUCT R. 1.6, 3.3 (2007), available at http://www.supremecourtsohio.gov/Atty-Svcs/ProfConduct/rules/default.asp#Rule1_6. Iowa adopted Model Rule 3.3 verbatim, IOWA RULES OF PROF'L CONDUCT R. 32:3.3 (2005), but, Oregon chose to continue protecting Rule 1.6 confidences. OR. RULES OF PROF'L CONDUCT R. 3.3 (2005), available at <http://www.abanet.org/cpr/links.html>.

210. As far as research shows, there are no published cases addressing the 2003 Model Rule version of Rule 3.3(b) as of July 2006.

211. The Supreme Court did not follow the recommendation of the Subcommittee, which endorsed the new provision. See WSBA REPORT, *supra* note 4, at 179 (2004), available at <http://www.wsba.org/lawyers/groups/ethics2003/reportpart3.doc> (asserting that proposed Rule 3.3 restructures existing RPC 3.3 and, in some cases, substantively alters the duties established in the existing version of the RPC).

212. See Sung Hui Kim, *The Banality of Fraud: Re-Situating the Inside Counsel as Gatekeeper*, 74 FORDHAM L. REV. 983, 984-88 (2005) (discussing the recent Enron scandal, the broader implications of in-house counsel facilitating illegal transactions, and Congress' decision to make lawyers the public's gatekeepers of our national securities market by enacting the Sarbanes-Oxley Act of 2002).

A. Ethical Principles Create Tension

Washington's new rules, as do all ethical rules, create a lot of tension for an attorney because the attorney must balance competing duties to zealously advocate on behalf of a client and to be an officer of the court. These two competing duties are both essential cornerstones of the American legal system. First, the adversary system requires attorneys to be devoted advocates for their clients,²¹³ and the attorney-client privilege is the lynchpin of that requirement.²¹⁴ Second, the legal system and the public's perception of its integrity depend on attorney trustworthiness.²¹⁵ The eternal struggle is in how to efficiently maximize both tenets and keep true to the ideals of each.²¹⁶ This Comment does not propose to solve the struggle to balance these duties.²¹⁷ However, this Comment does argue that the recently adopted Washington RPC do not provide the attorney with the discretion to make the difficult and complicated choice between loyalty to clients and loyalty to courts.

1. Loyalty to Clients

America's adversarial system is the product of the deeply-held presumption of innocence and our constitutional rights under the Fifth

213. See Deborah L. Rhode, *Ethics by the Pervasive Method*, in *THE LEGAL PROFESSION: RESPONSIBILITY AND REGULATION* 196–200, (Geoffrey C. Hazard, Jr. & Deborah L. Rhode eds., 3d ed. 1994) (finding that there are two common justifications for zealous representation: one, advocating on behalf of those who are factually guilty is necessary to protect those who are factually innocent, and two, protection of rights).

214. Crotty Guttilla, *supra* note 24, at 709. Guttilla points out that the duty of a lawyer to preserve a client confidence is one of the most important obligations imposed on an attorney. She lists three reasons why the attorney-client relationship is so important. First, to maintain the adversary system, parties must utilize attorneys and attorneys must have sufficient information to effectively represent their client. Second, lawyers must know all relevant facts to advocate effectively. Third, clients will not confide in lawyers unless the client knows that what she said will remain confidential. *Id.*

215. Cynthia L. Fountaine, *In the Shadow of Atticus Finch: Constructing a Heroic Lawyer*, 13 *WIDENER L.J.* 123, 144–46 (2003) (outlining the public's negative perception of lawyers and pointing out that this lack of credibility undermines a lawyer's ability to effectively represent clients because of judicial recognition of lawyer honesty).

216. This article does not go into alternate forms of legal systems. This article assumes that we are working in the American adversary legal system. Many authors have proposed revising the American legal system, or adopting a Continental-style legal system. For an in-depth look at this issue, see generally John Leubsdorf, *Three Models of Professional Reform*, 67 *CORNELL L. REV.* 1021 (1982).

217. Simon, *supra* note 20, at 1133. According to Simon:

[T]he lawyer has been both an advocate and an 'officer of the court' with responsibilities to third parties, the public, and the law. There has never been a consensus about where to draw the line between these two aspects of the lawyer's role, and the two have always been in tension within the professional culture.

Id.

Amendment.²¹⁸ The theory behind the adversarial system is to protect against the possibility of an innocent person's unjust conviction and thus to preserve the integrity of society itself.²¹⁹ The insistence on a committed advocate "marks society's determination to keep unsoiled and beyond suspicion the procedures by which men are condemned for a violation of its laws."²²⁰ Indeed, this determination that all persons deserve zealous advocacy, even those who are factually guilty, has been, by and large, successfully defended by legal scholars.²²¹ Professor Deborah L. Rhode believes there are two main reasons why zealous representation of clients is essential.²²² The first is that defense of clients whom an attorney believes to be factually guilty is necessary to "protect those who are factually, or legally innocent."²²³ The American system proceeds on the assumption that guilt is best determined "not in the privacy of one lawyer's office but in open court under due process."²²⁴ And without the probability of a zealous defense, prosecutors and police have little incentive to thoroughly investigate the facts, corroborate a complainant's story, or follow up on other leads.²²⁵

The second justification for zealous representation involves the protection of rights. Professor Rhodes suggests that "[w]here individuals' lives, liberty, and reputation are so directly at risk, they deserve one ad-

218. See Rhode, *supra* note 213, at 196–200; see also Lon L. Fuller, *The Adversary System Law*, in *THE LEGAL PROFESSION: RESPONSIBILITY AND REGULATION* 180–81 (Geoffrey C. Hazard, Jr. & Deborah L. Rhode eds., 3d ed. 1994); see also Deborah L. Rhode, *The Future of the Legal Profession: Institutionalizing Ethics*, 44 CASE W. RES. L. REV. 665, 668 (1993) (finding that our legal model rests on two assumptions, one of which is that partisan advocacy provides the most effective protection for individual constitutional rights).

219. Fuller, *supra* note 218, at 180–81.

220. *Id.* at 181.

221. See *infra* notes 222–25 and accompanying text.

222. Rhode, *supra* note 213, at 196–200.

223. *Id.* at 197.

224. Deborah L. Rhode, *An Adversarial Exchange on Adversarial Ethics: Text, Subtext, and Context*, 41 J. LEGAL EDUC. 29, 32 (1991); see also John B. Mitchell, *Reasonable Doubts Are Where You Find Them: A Response to Professor Subin's Position on the Criminal Lawyer's "Different Mission,"* 1 GEO J. LEGAL ETHICS 339, 345 (1987) (arguing that in a trial there are no such things as facts, "there is only information, lack of information, and chains of inferences therefrom").

225. Rhode, *supra* note 213, at 197; see also John B. Mitchell, *The Ethics of the Criminal Defense Lawyer: New Answers to Old Questions*, 32 STAN. L. REV. 293 (1980). Professor Mitchell describes a defense attorney's function as "making the screens work." *Id.* at 298. The screening process happens at every level of society and is a method of sorting out those who have deviated from society's laws from those who have not. *Id.* at 300. The lawyer's job is make sure that the screen is correctly applied at every level. *Id.* at 303. The defense attorney who insists on advocating for her client plays an integral role in checking that the built-in screens work. *Id.* For example, the police will be careful to follow the built-in screens society has placed (such as being required to have a reasonable suspicion before stopping a pedestrian) because if they do not the defense attorney will bring that fact out at trial. *Id.* at 303–07.

vocate without competing loyalties to the state.”²²⁶ Moreover, Rhodes claims that penalizing clients for making disclosures to their lawyers suggesting guilt would “effectively force an impermissible choice between Fifth and Sixth Amendment guarantees.”²²⁷ The conditions of confinement in America’s prisons, coupled with the potential for governmental repression, creates the need for both the Sixth Amendment right to effective assistance of counsel and the Fifth Amendment right against self-incrimination.²²⁸ Forcing lawyers to reveal client confidences would violate the defendant’s right to both.²²⁹

2. Loyalty to Courts

The reliance of the judicial system upon the trustworthiness of attorneys competes with the need for zealous advocacy. As members of a self-governing profession, lawyers impose a high ethical standard on themselves.²³⁰ Lawyers often view themselves as public servants and moral activists, with a sense of fulfilling a civic obligation to promote justice.²³¹ For example, Justice Louis Brandeis believed that attorneys should take advantage of the opportunity the law provides to promote justice through reform activity and client counseling.²³² Additionally, because most lawyers can readily tell the difference between “making good-faith efforts to comply with a plausible interpretation of the pur-

226. Rhode, *supra* note 213, at 198.

227. *Id.* at 199.

228. *Id.* at 199.

229. *United States v. Midgett*, 342 F.3d 321, 327 (4th Cir. 2003). In *Midgett*, a criminal defendant wished to take the stand on his own behalf and testify that someone else had committed the crimes. *Id.* at 322–23. The defendant was told to “waive either his right to counsel or his right to testify because neither his counsel nor the court was satisfied that his testimony would be truthful.” *Id.* at 327. The appellate court found that “[i]n doing so, the [trial] court leveled an ultimatum upon Midgett which, of necessity, deprived him of his constitutional right to testify on his own behalf.” *Id.* In essence, the trial court was forcing upon the defendant a “Hobson’s” choice because a criminal defendant is entitled to all of his guaranteed rights and cannot be forced to barter one for another. *Id.* (citing *United States v. Johnson*, 555 F.2d 115, 120–21 (3d Cir. 1977)). See also Stephanie J. Frye, *Disclosure of Incriminating Physical Evidence Received from a Client: The Defense Attorney’s Dilemma*, 52 U. COLO. L. REV. 419, 442–43 (1981) (discussing the interaction between the Fifth and Sixth Amendments); Robert P. Mosteller, *Admissibility of Fruits of Breached Evidentiary Privileges: The Importance of Adversarial Fairness, Party Culpability, and Fear of Immunity*, 81 WASH. U. L.Q. 961, 989–1007 (2003) (describing in detail the evidentiary privileges created by the Fifth and Sixth Amendments).

230. WASH. RULES OF PROF’L CONDUCT pmb. cmt. 10 (2006); Zacharias & Green, *supra* note 57, at 4 n.13 (citing Gerald J. Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L. REV. 63, 73–83 (1980)) (arguing for “a broader scope for engaged moral judgment in day-to-day professional activities while encouraging a keener sense of personal responsibility for the consequences of these activities.”).

231. HAZARD & RHODE, *supra* note 39, at 137.

232. LOUIS D. BRANDEIS, *THE OPPORTUNITY IN THE LAW, IN BUSINESS: A PROFESSION* 329 (Hale, Cushman & Flint 1933) (1914).

poses of a legal regime,” they should not use “every ingenuity of his or her trade to resist or evade compliance.”²³³ After all, it seems wrong to conceive of the law and the state wholly as adversaries because we are, after all, members of a common political community, with agreed-upon procedures for establishing and changing its common frameworks.²³⁴

B. The Clash of Loyalties

Ideally, the Rules of Professional Conduct should strike a manageable balance between the ethical imperatives mandating the promotion of justice and zealous advocacy. Furthermore, it is absolutely imperative that lawyers, who may potentially lose their license to practice if not compliant with the rules,²³⁵ receive guidelines that relieve as much of that pressure as possible. For the most part, Washington’s adopted rules strike a good balance by allowing attorneys to choose when to reveal client confidences in the most dire of circumstances under Rule 1.6, and protecting those confidences in all other situations.²³⁶ However, Washington should align Rules 1.6 and 3.3 more closely, and allow discretionary disclosure of Rule 1.6 confidences to the court in circumstances of client fraud and criminal conduct.

The pressure the 2006 Washington rule creates can be seen by looking at a hypothetical situation based on the facts of *Nix v. Whiteside*, where the U.S. Supreme Court held that a criminal defendant does not have a constitutional right to perjure himself.²³⁷ There, the defendant and two companions went to the victim’s house seeking marijuana.²³⁸ The victim was in bed when the defendant arrived, and the two began to argue.²³⁹ The victim directed his girlfriend to get his gun, and at one point, the victim got up and then returned to his bed.²⁴⁰ The defendant testified that he saw the victim reach under his pillow; thinking the victim was reaching for a gun, the defendant consequently stabbed him.²⁴¹ The defendant told his attorney that although he did not see a gun, he was convinced that the victim had been reaching for one.²⁴²

Now suppose the attorney, not having any reason to suspect a falsehood, prepares the case based on that version of events. At trial, the de-

233. Gordon, *supra* note 21, at 48 (Deborah L. Rhode ed., 2000).

234. *See id.* at 42, 47–48.

235. WASH. RULES OF PROF’L CONDUCT pmb. cmt. 19 (2006).

236. *See id.* at R. 1.6.

237. 475 U.S. 157 (1986).

238. *Id.* at 160.

239. *Id.*

240. *Id.*

241. *Id.*

242. *Id.*

fendant takes the stand and tells a slightly different version of events: that he had seen something “metallic” in the victim’s hand.²⁴³ The attorney is now faced with a difficult problem: under adopted Rule 3.3, if the attorney knows that the client has engaged in perjury, then he has a duty to remedy the situation.²⁴⁴ Since the attorney is already at the trial stage of the case, it is unlikely that the judge would allow withdrawal.²⁴⁵ If the attorney decides that the only true remedy is disclosure to the court, the attorney had better be completely sure that his client truly has engaged in perjury, because disclosure by the attorney of his belief that his client has committed perjury would expose his client to a range of negative consequences, whether the client is factually guilty or not.²⁴⁶ Also, the attorney must be confident that any disclosure is not prohibited by Rule 1.6. If disclosure is prohibited by Rule 1.6,²⁴⁷ the only option is for the attorney to seek to withdraw or plead with the client to rectify the situation.²⁴⁸

The ultimate tension between the two conflicting duties will be placed squarely on criminal defense lawyers, as the above example shows, because criminal defendants have a constitutional right to testify.²⁴⁹ The Court in *Nix v. Whiteside* decided that even though a criminal

243. *Id.* at 161. The actual facts of *Nix v. Whiteside* are slightly different. In *Nix*, the defendant changed his story about a week before trial and said he saw something metallic in the victim’s hand. *Id.* Defense counsel informed the defendant that if he testified falsely it would be perjury, and he would have to withdraw from representation and advise the Court of the perjury. *Id.* The defendant eventually testified that he had not seen the gun. *Id.* The Court concluded that defense counsel’s insistence on truth did not violate the defendant’s Sixth Amendment rights to assistance of counsel: “Whatever the scope of a constitutional right to testify, it is elementary that such a right does not extend to testifying falsely.” *Id.* at 173.

244. WASH. RULES OF PROF’L CONDUCT R. 3.3(a)(2) (2006). A lawyer may not fail to disclose a material fact when disclosure is necessary to avoid assisting in criminal or fraudulent conduct, unless disclosure is prohibited by Rule 1.6. *Id.* Arguably, in this situation a lawyer would be assisting in perjury if he did not disclose this material fact to the tribunal. *See id.* at R. 1.2(d) (“A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent”).

245. *E.g.*, *State v. McDowell*, 272 Wis. 2d 488, 496–97 (2004) (the judge refused to let the attorney withdraw because trial was already underway).

246. WASH. RULES OF PROF’L CONDUCT R. 3.3 cmt. 11 (2006).

247. Disclosure in this instance *would* most likely be prohibited by Rule 1.6. Under this factual scenario, none of the 1.6 exemptions seem to apply. *See id.* at R. 1.6. For example, revelation of confidential information in this situation would not “prevent the client from committing a crime” because the client has already committed the crime. *Id.* at R. 1.6(b)(2). Also, there is no substantial financial property interest at stake. *Id.* at R. 1.6(b)(3).

248. *Id.* at 3.3(d).

249. *Nix v. Whiteside*, 475 U.S. 157, 164 (1986) (finding that “[a]lthough this Court has never explicitly held that a criminal defendant has a due process right to testify in his own behalf, cases in several Circuits have held so, and the right has long been assumed”); *see also* *State v. Robinson*, 138 Wash. 2d 753, 758, 982 P.2d 590, 594 (1999) (holding that a criminal defendant has both a state and a constitutional right to testify on his or her own behalf). However, the 2006 Washington RPC do not explicitly protect the criminal defendant’s right to testify. *See supra* notes 193–99 and accompanying text.

defendant has the right to testify, that same defendant does not have the right to lie.²⁵⁰ The Court acknowledged the tension that exists in placing a criminal defendant on the stand while knowing or having reasonable certainty that the defendant is going to falsely testify, but did not recommend what an attorney must or should do in that situation.²⁵¹ Thus, a defense attorney must put his or her client on the stand when the client insists on testifying, even if the attorney knows the client will commit perjury. Then, as soon as the client is done testifying, the attorney may turn to the judge and say, "Excuse me, your honor, but I need to withdraw."

This turn of events would be an unacceptable situation in which to place both the attorney and client.²⁵² Overall, the tension placed on lawyers by Washington's new rule is too great—rules of conduct should help guide lawyers in making ethically correct decisions rather than force lawyers to choose between violating their professional code and violating their clients' trust.

That is not to say that Washington should mandate Rule 1.6 disclosures as recommended by the Ethics 2003 Committee.²⁵³ At least one state that experimented with a strict candor rule has recently retreated from its extreme position because lawyers found that the rule destroyed whatever confidentiality existed between lawyer and client.²⁵⁴ New Jersey adopted a radical candor rule which required that a lawyer not "fail to disclose to the tribunal a material fact with knowledge that the tribunal may tend to be misled by such failure."²⁵⁵ This rule effectively made an attorney responsible for a misapprehension on the part of the tribunal that the attorney could have prevented.²⁵⁶ However, the Supreme Court of New Jersey rarely enforced the extreme rule,²⁵⁷ and in 2003 that court

250. *Whiteside*, 475 U.S. at 173 ("Whatever the scope of a constitutional right to testify, it is elementary that such a right does not extend to testifying *falsely*.").

251. *See id.* at 176–77.

252. The attorney may inform the client, and indeed should inform the client, that the attorney is obligated to remedy the situation if the client lies while on the stand. This may induce the client to testify truthfully. Or, it may induce the client to be untruthful with the lawyer from the beginning because the client knows the lawyer will not risk professional sanctions should the client change his testimony; a truly unfortunate outcome, considering the importance of truthful communication between a lawyer and client. *See discussion infra* notes 261–67. Of course, an effective system should provide plaintiffs, defendants, and witnesses with incentives to present truthful evidence. However, an effective system should not punish the lawyer if the individual client chooses not to present truthful evidence. Instead, the lawyer should be encouraged and supported in taking steps to prevent and remedy untruthfulness to the court, rather than sanctioned for the conscious and sometimes uncontrollable choice of another. A criminal defense lawyer has no choice but to let his client testify.

253. *See* WSBA REPORT, *supra* note 4, app. D, at 7–9.

254. Walfish, *supra* note 64, at 642.

255. *Id.* at 638.

256. *Id.* at 639.

257. *Id.* at 644 (in over twenty years the rule has only been mentioned in thirty-five published decisions).

adopted a weaker rule in response to public criticism and dissatisfaction.²⁵⁸ Critics of both the old and the new rule argue that either version places tension on the attorney-client relationship.²⁵⁹ The New Jersey Bar Association recommended deleting the rule altogether, stating, "[T]he rule strains the attorney-client relationship by placing a duty on a lawyer to disclose information that may be adverse to the client's interest."²⁶⁰

Another reason why a mandatory disclosure rule may be problematic is because it erodes the attorney-client relationship and attorney-client privilege. Although little empirical evidence exists on this subject,²⁶¹ it is a general premise that the attorney-client privilege encourages full communication between clients and attorneys.²⁶² Indeed, the Court in *Upjohn Co. v. United States*²⁶³ declared that clients "must be able to predict with some degree of certainty whether particular discussions will be protected."²⁶⁴ As former Chief Justice Rehnquist wrote, "[a]n uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all."²⁶⁵

Under a mandatory disclosure version of Rule 3.3, clients will be afraid of revealing, and lawyers will be afraid of hearing, factual guilt. The most concerning situation would be where the client, having been

258. *Id.* at 639 (although a lawyer's duty is still triggered if the omission is reasonably certain to mislead, the rule does not require disclosure if that disclosure would violate a privilege or other law).

259. *Id.* at 643.

260. *Id.* For another article discussing New Jersey's rule and describing the negative consequences of expanding the duty of candor, see Richard Silverman, Note, *Is New Jersey's Heightened Duty of Candor Too Much of a Good Thing?*, 19 GEO. J. LEGAL ETHICS 951, 959-61 (2006).

261. See generally Note, *Attorney-Client and Work Product Protection in a Utilitarian World: An Argument for Recomparison*, 108 HARV. L. REV. 1697, 1700 n.32 (1995). There are at least four published studies exploring the relationship between the typical layperson's, client's, and business executive's expectations of confidentiality and willingness to disclose secrets to the attorney. *Id.* Most interestingly, in every survey the majority of those interviewed indicated, in some way, that they would withhold information from their lawyer if the lawyer could not guarantee confidentiality but would generally keep information secret. *Id.* For another discussion of three of the surveys and conclusions drawn from those surveys see Edward J. Imwinkelried, *Questioning the Behavioral Assumption Underlying Wigmorean Absolutism in the Law of Evidentiary Privileges*, 65 U. PITT L. REV. 145, 157 (2004).

262. This article does not explore the validity of this assumption. However, some commentators have attacked the premise that a confidentiality privilege will encourage client truthfulness. See generally Imwinkelried, *supra* note 261. Washington seems to officially embrace the assumption. See WASH. RULES OF PROF'L CONDUCT R. 1.6 cmt. 2 (2006) ("This [principle of non-disclosure] contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter.").

263. 449 U.S. 383 (1981).

264. *Id.* at 393.

265. *Id.* at 392.

assured by the attorney that most communications are kept confidential, relays information with the expectation that the information will be protected. Moreover, if the client confidence must be revealed because a testifying witness commits perjury, the sense of betrayal that client probably would feel would likely be devastating to the attorney-client relationship.²⁶⁶ The comments to the proposed RPC do recognize the potential for this situation, but hold that “the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement.”²⁶⁷

But the assumption that an attorney will subvert the truth-finding process which the adversary system is designed to implement is questionable. The adversary system as a truth-finding process is not a straight shot to the truth; rather, it is a process in which opposing sides vigorously compete to convince a neutral fact-finder that their version is correct.²⁶⁸ When attorneys reveal client confidences, they are undermining the adversarial system by becoming fact finders themselves.²⁶⁹ If the rule obliging the lawyer to reveal client confidences continues to expand, the

266. WASH. RULES OF PROF'L CONDUCT R. 3.3 cmt. 11 (2006).

267. *Id.* The disclosure of a client's false testimony can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement. *See* Rule 1.2(d). Furthermore, unless it is clearly understood that the lawyer will act upon the duty to disclose the existence of false evidence, the client can simply reject the lawyer's advice to reveal the false evidence and insist that the lawyer keep silent. Thus the client could in effect coerce the lawyer into being a party to fraud on the court. *Id.*

268. Peter J. Henning, *Lawyers, Truth, and Honesty in Representing Clients*, 20 NOTRE DAME J.L. ETHICS & PUB. POL'Y 209, 212–15 (2006). The author notes that it is difficult to say that a trial “accurately reflects the truth about what occurred . . . [because] a trial is not [like] a quiz show with the right answer waiting in a sealed envelope.” *Id.* at 212. Thus, references to “truth” tend to obfuscate rather than clarify an attorney's role. *Id.* The core of the attorney-client relationship is trust, which is protected by the attorney-client privilege that mostly prevents the attorney from being compelled to disclose client secrets. *Id.* And, that privilege frustrates the search for “truth” because the lawyer “ordinarily may not reveal what has been learned during the representation of the client.” *Id.* Ultimately, then, dedication to the truth cannot be a lawyer's paramount goal when every lawyer is equally compelled to keep the truth hidden. *Id.* “Finding the truth is the object of the judicial system, but it is not the governing principal for the lawyer.” *Id.* at 214.

269. Rhode, *supra* note 213, at 197 (“Our system proceeds on the assumption that guilt is best determined ‘not in the privacy of one lawyer's office but in open court under due process’.”). If one party uses deception the fact finder may indeed be frustrated in its ability to award a just remedy. When and if discovered, the party who commits perjury should naturally be subjected to appropriate legal sanctions. But, client or witness perjury should not necessarily lead to *attorney sanctions* should the attorney not authorize or encourage the perjury. A bright line should be drawn between attorneys who help their clients commit fraud or perjury and attorneys who do their best to prevent materially false evidence from being presented to the court. Ultimately, we should not sanction attorneys who make every effort to prevent false evidence from being presented, but their client or witness nevertheless testifies falsely, and the attorney is unwilling to reveal client confidences to remedy the situation.

system will no longer follow the spirit of the adversary system, and instead it will begin to resemble a system where counsels' job is not to zealously advocate on behalf of their client, but to gather facts impartially and present those to the court.²⁷⁰ This rule removes attorneys from the role of trusted advisor and advocate, and replaces them with a courtroom investigator.²⁷¹ As Justice Frankfurter explained, "[o]urs is the accusatorial as opposed to the inquisitorial system. . . . Under our system, society carries the burden of proving its charge against the accused not out of his own mouth."²⁷² A basic premise of the adversarial system is that the truth will emerge after full and vigorous representation.²⁷³ If that basic premise is taken as true, lawyers who do not deem it best to reveal client confidences, after balancing the interests of society with the interests of their client, are not subverting truth, but are merely serving as zealous advocates because it is society's burden to prove factual guilt, not the lawyer's.²⁷⁴

Overall, a mandatory disclosure rule, such as Model Rule 3.3, would be more harmful than helpful. As proof, when New Jersey's strict candor rule was in place, it was ineffective because New Jersey courts would not enforce it and attorneys felt it harmed the attorney-client relationship.²⁷⁵ Hence, a better rule for all interested parties would be a balanced rule that allowed an attorney the discretion to reveal client confidences when the attorney felt absolutely compelled that in the particular situation justice required such action.

V. A PUSH FOR CHANGE—A DIFFERENT TAKE ON THE DUTY OF CANDOR

The purpose of this Part is to propose a slightly different rule to govern candor to the tribunal ("alternative rule"). Similar to adopted Rule 3.3, this alternative rule forbids the lawyer from lying to the court,

270. This would resemble a European inquisitorial or Napoleonic system. For a discussion of the inquisitorial system, see Martin Killias et al., *Crime and Punishment in Switzerland, 1985-1999*, 33 CRIME & JUSTICE 213, 216-17 (2005). For a discussion of the "Napoleonic" system see Edward A. Tomlinson, *Nonadversarial Justice: The French Experience*, 42 MD. L. REV. 131, 134-135 (1983).

271. For an argument that attorneys and courts are wrong to think of our legal system as purely adversarial see generally Amalia D. Kessler, *Our Inquisitorial Tradition: Equity Procedure, Due Process, and the Search for an Alternative to the Adversarial*, 90 CORNELL L. REV. 1181, 1184 (2005), who argues that our legal system only became fully adversarial in the last half century. Kessler urges that we uncover our forgotten, quasi-inquisitorial equity tradition in order to facilitate an inquisitorial procedural reform. *Id.* at 1185.

272. *Watts v. Indiana*, 338 U.S. 49, 54 (1949).

273. FREEDMAN, *supra* note 98, at 9.

274. *See supra* note 268.

275. *See supra* note 254-60 and accompanying text.

presenting material evidence known by the lawyer to be false, or encouraging a client to commit perjury. The alternative rule is just as strict as adopted Rule 3.3 on attorney perjury and misrepresentations, but allows the attorney more discretion in deciding when to reveal client confidences to remedy a client's fraud or crime. The alternative rule, with major changes noted, is as follows:

(a) A lawyer shall not knowingly:

(1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting in a criminal or fraudulent act by the client, unless such disclosure is prohibited by Rule 1.6, in which case the lawyer may make the disclosure if the lawyer deems that the interests of justice so demand;

(3) offer evidence that the lawyer knows to be false;

(b) The duties stated in paragraph (a) continue to the conclusion of the proceeding.

(c) If the lawyer has offered material evidence and comes to know of its falsity, the lawyer shall promptly disclose this fact to the tribunal unless such disclosure is prohibited by Rule 1.6, in which case the lawyer may make the disclosure if the lawyer deems that the interests of justice so demand.

(d) If the lawyer has offered material evidence and comes to know of its falsity, and disclosure of this fact is prohibited by Rule 1.6, the lawyer shall promptly make reasonable efforts to convince the client to consent to disclosure. If the client refuses to consent to disclosure, the lawyer may seek to withdraw from representation in accordance with Rule 1.16 or may make the disclosure if, after weighing the interests of the client with the interests of the tribunal, the lawyer determines that disclosure is the proper remedy.

(e) A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(f) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

The alternative rule closely tracks Washington's 2006 Rule 3.3. Like Washington's 2006 Rule 3.3 and 2003 Model Rule 3.3, the alternative rule would discourage attorneys from conduct that is evasive (that is, conduct that betrays a willingness to consume court resources when the information is not even subject to the protection of Rule 1.6).²⁷⁶ The alternative rule would subject attorneys to professional sanctions for misleading the court and opposing counsel by concealing critical but discoverable information. In essence, the alternative rule would function just as well as the adopted rule in this regard.

However, the alternative rule, unlike Washington's 2006 Rule, neither prohibits nor forces attorneys to reveal client confidences. Instead, attorneys are encouraged to take any and all remedial actions that are necessary. This includes encouraging the client to be truthful, threatening to withdraw if the client insists on perjury, or refusing to aid the client in any way in perjuring himself. If the attorney feels that under the particular facts disclosure is necessary to promote justice, then under the alternative rule the attorney may reveal client information and would be supported in doing so. Additionally, opposing counsel would still have the opportunity to impeach the client and bring criminal perjury charges even if the client's attorney chose not to reveal confidences.

The alternative rule adopts the Model Rule's version of constitutional protection²⁷⁷ for criminal defendants. Washington 2006 RPC Rule 3.3 does not appear to offer adequate protection for criminal defense attorneys.²⁷⁸ Nothing is said in Washington's adopted rule about a criminal defendant's special rights; only the comments mention how the rule deals with a defendant's constitutional rights, and even then somewhat vaguely.²⁷⁹ The alternative rule solves this by using language from

276. For example, when a lawyer fails to reveal to the court that his client has died, the lawyer will be disciplined. The information is plainly discoverable, but would materially affect the disposition of the case. Another example is where the lawyer fails to inform opposing counsel and the court that his client is bankrupt. See *Kernan v. One Wash. Park Urban Renewal Ass'n*, 713 A.2d 411 (N.J. Sup. Ct. 1998).

277. See *supra* notes 193–94 and accompanying text.

278. See *supra* notes 193–99 and accompanying text.

279. WASH. RULES OF PROF'L CONDUCT R. 3.3 cmt. 7 (2006) ("The duties stated in paragraph (a) apply to all lawyers, including defense counsel in criminal cases. In some jurisdictions other than Washington, however, courts have required counsel to present the accused as a witness or to give a narrative statement if the accused so desires, even if counsel knows that the testimony or statement will be false. The obligation of the advocate under the Rules of Professional Conduct is subordinate to such requirements. See *State v. Berrysmith*, 87 Wash. App. 268, 944 P.2d 397 (1997), *review denied*, 134 Wash. 2d 1008, 954 P.2d 277 (1998).").

Model Rule 3.3(a)(3) to clarify that criminal defendants have the right to testify and that a lawyer must not inhibit that right.

Overall, the alternative rule takes the middle track. It allows the attorney to reveal client confidences in extreme circumstances, as Model Rule 3.3 contemplates, and in all other situations it encourages lawyers to protect client confidences, as Washington 2006 Rule 3.3 contemplates. In essence, the rule allows the attorney the discretion to decide the best course of action after balancing the client's interest in having an advocate with whom the client can openly communicate and the court's interests in maintaining integrity and truthfulness in proceedings.

VI. CONCLUSION

In formulating a different rule, one must be careful not to go too far in requiring the attorney to take on the role of both an advocate and a guardian of opposing counsel's case. Frankel argued the following:

The object of a lawsuit is to get at the truth and arrive at the right result. That is the sole objective of the judge, and counsel should never lose sight of that objective in thinking that the end purpose is to win for his side. Counsel exclusively bent on winning may find that he and the umpire are not in the same game.²⁸⁰

But, in keeping with the analogy, a coach, watching his ballplayer running for home base, would never turn to the umpire and say, "by the way, you called that wrong, he was out, not safe." It is the umpire's duty, as the fact finder or the neutral mediator, to call the strikes and balls as he sees them. Likewise, it is the coach's duty to keep his ballplayers in line by explaining the rules and giving them advice on the best strategy for making it to home plate. The game would no longer be baseball if the coach was required to turn his players in every time they were really out and the umpire called them safe. And it would no longer be baseball if the coach was forced to turn a blind eye to his player's behavior and did not have the power to keep them in line by putting a player on the bench.

Unfortunately, generations of legal scholars have struggled to find the perfect balance between a lawyer's duty as a private advocate and a public servant. In most respects, Washington's rules find the right balance in protecting the attorney-client privilege and protecting the integrity of the court. However, Washington's adopted Rules 3.3 and 1.6, and the ABA Model Rules 3.3 and 1.6, miss the mark. The Model Rules go beyond what is necessary to preserve court integrity and provides little support to practicing attorneys. Washington's adopted rules do not pro-

280. Frankel, *supra* note 76, at 1035.

vide enough discretion to attorneys who wish to uphold the integrity of the court. Thus, an alternative rule that makes disclosures discretionary but still encourages and protects lawyers who take remedial actions would be a preferable rule.