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Fidelity Diluted: Client Confidentiality Gives Way to the First Amendment & Social Media in *Virginia State Bar, ex rel. Third District Committee v. Horace Frazier Hunter*

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"Nothing is more noble, nothing more venerable than fidelity. Faithfulness and truth are the most sacred excellences and endowments of the human mind."[2] Marcus Tullius Cicero

Although Cicero shared his timeless wisdom in ancient Rome long before the Internet and the digital age became a part of the practice of law, fidelity remains the hallmark of the attorney-client relationship. Fidelity aside, the Internet has changed the manner in which attorneys and clients connect. Today, social media is "permanently altering the way that potential clients . . . evaluate their need for legal services and identify and select the lawyer best-suited to serve those needs."[3] Arguably, attorneys are remiss if they are not entering cyberspace to attract new clients.

In fact, the 2012 American Bar Association (ABA) Legal Technology Survey Report indicates that fifty-five percent of law firms surveyed have a presence on Facebook, and thirty-eight percent of attorneys have their own Facebook page.[4] Some of the other major social networking

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2. TRYON EDWARDS, A DICTIONARY OF THOUGHTS: BEING A CYCLOPEDIA OF LACONIC QUOTATIONS FROM THE BEST AUTHORS IN THE WORLD, BOTH ANCIENT AND MODERN 176 (F. B. Dickerson, Co. 1908).

3. Niki Black & Carolyn Elefant, *Social Media: What It Is and Why It Matters*, ABA LAW PRACTICE TODAY (Jan. 2010), http://apps.americanbar.org/lpm/lpt/articles/ftr01102.shtml ("Social media gives lawyers the tools to provide potential clients with the kind of in-depth information that they've come to expect online prior to making any kind of decision requiring a significant commitment of resources.").

4. Robert Ambrogi, *ABA Survey Shows Growth in Lawyers' Social Media Use*, LAWSITES (Aug. 16, 2012), http://www.lawsitesblog.com/2012/08/aba-survey-shows-

options for attorneys include Twitter,[5] LinkedIn,[6] and blog websites.[7] Twitter use among attorneys and law firms has nearly doubled in one year.[8] LinkedIn use is prevalent among firms and individual attorneys with eighty-eight percent of firms and ninety-five percent of individual attorneys retaining accounts.[9] Finally, the survey "not surprisingly" shows that the number of attorneys writing blogs has also grown.[10] Among law firms and individual attorneys, twenty-two percent and nine percent, respectively, maintain professional blogs.[11] Nearly 40 percent of attorneys stated that their blogs generated new business for them.[12]

Given the lower percentage of attorneys writing blogs relative to those attorneys posting on Facebook and LinkedIn, blogging may be the newest marketing frontier for attorneys and the one where an attorney or firm may currently have the least competition. Many bloggers link their blogs to other social media websites and to their firm websites, thereby further enhancing their Internet marketing presence.[13]

Horace Hunter is one such attorney who not only writes a blog, but also links the blog to his firm website.[14] The blog is titled "This Week in Richmond Criminal Defense," and it chronicles cases and issues arising

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growth-in-lawyers-social-media-use.html. The ABA sent questionnaires to 12,500 ABA-member lawyers in private practice and 823 of the lawyers completed the questionnaires. *Id.*

5. TWITTER, https://twitter.com/ (last visited Oct. 27, 2013).

6. LINKEDIN, http://www.linkedin.com/ (last visited Oct. 27, 2013).

7. *E.g.*, TYPEPAD, http://www.typepad.com/ (last visited Oct. 27, 2013).

8. Ambrogi, *supra* note 4.

9. *Id.*

10. *Id.*

11. *Id.* This is up from fifteen percent of firms with blogs in 2011 and fourteen percent in 2010. *Id.* The amount of individual attorneys with blogs is up from five percent in both 2011 and 2010. *Id.*

12. *Id.*

13. *See* William R. Peterson & Clark E. Smith, *Law Firm Websites: An Ethical Minefield*, THE BENCHER, (Jan./Feb. 2013), http://home.innsofcourt.org/for-members/current-members/the-bencher/recent-bencher-articles/januaryfebruary-2013/law-firm-websites-an-ethical-minefield.aspx. In fact:

> In today's world, law firms are expected to have websites. Even more than the office, the website is the public face of the law firm, providing information and an introduction to clients, colleagues, and even new employees. Easy to modify and with nearly endless reach, websites are a powerful and effective tool for lawyers.

Id.

14. *See This Week in Richmond Criminal Defense*, HUNTER & LIPTON PC, http://hunterlipton.com/news.php (last visited Oct. 27, 2013).

in the criminal justice system.[15] Hunter primarily writes about his own clients and cases, although he has indicated that his goal in writing the blog is to expose issues of public importance.[16] Hunter conceded that the blog also serves a commercial purpose.[17]

Hunter's blog became the subject of national attention this year, but not because of the issues that he writes about. Rather, the blog became another test case that demonstrates the challenges that arise in applying the traditional legal ethics rules on confidentiality and advertising to the Internet in the new digital age practice of law. The Virginia State Bar found Hunter's blog to be problematic in two ways: as a form of misleading advertising and as a violation of client confidentiality.[18] Why? The short answer is that many of the blog articles were written about Hunter's own clients, some containing the clients' actual names, without their consent and without a required attorney advertising disclaimer warning the reader that the case results being profiled were not necessarily results that the reader could expect in his own case.[19]

As the case wound its way through the Virginia state courts and ultimately into a petition for writ of certiorari to the United States Supreme Court, which was recently denied,[20] many First Amendment and legal ethics lawyers debated the Virginia Bar's position.[21] The Supreme Court of Virginia held that Hunter must add a disclaimer to his blog articles, which remains the subject of some debate.[22] However, perhaps the more controversial position is the Supreme Court of Virginia's holding that to deny Hunter the ability to speak about his clients' cases, after the case concludes and based upon what is found in the public record, is to deny Hunter his First Amendment right of free speech.[23]

This Article will focus on the First Amendment confidentiality issue, as this part of the decision arguably undermines the long-standing legal ethics rule of confidentiality and strikes at the heart of the attorney-

15. *Id.*

16. Hunter v. Va. State Bar *ex rel.* Third Dist. Comm., 744 S.E.2d 611, 614 (Va. 2013), *cert. denied*, 133 S. Ct. 2871 (2013).

17. *Id.*

18. *Id.*

19. Brief for Appellee at 2, *Hunter*, 744 S.E.2d 611 (No. 121472).

20. Petition for Writ of Certiorari, *Hunter*, 744 S.E.2d 611, *cert. denied*, 133 S. Ct. 2871 (June 24, 2013) (No. 12-1379).

21. *See, e.g.*, Brief for VA. Assoc. of Broad. as Amici Curiae Supporting Appellant, *Hunter*, 744 S.E.2d 611.

22. *Hunter*, 744 S.E.2d at 620–21.

23. *Id.* at 620.

client relationship as it has been defined and has evolved since the late nineteenth century. Ultimately, the central issue for the legal profession is whether an attorney's relationship with a client, and the simultaneous duty of confidentiality owed to the client, survives the completion of the case, notwithstanding what may appear in a public record and regardless of First Amendment considerations.

In an attempt to provide necessary context for the discussion, this Article will explore the various aspects of the definition of attorney-client relationship and review the history, evolution, and moral underpinnings of the ethical rule of client confidentiality. Next, this Article will look at these contextual puzzle pieces in conjunction with Virginia's Rule 1.6[24] and the *Hunter* case[25] in an effort to determine whether the Supreme Court of Virginia has attempted to add a piece to the confidentiality puzzle, or instead, has designed its own new confidentiality rubric. Finally, this Article will discuss the juxtaposition of the rule of confidentiality with the First Amendment and offer a perspective on the potential impact of the Supreme Court of Virginia's decision on the legal profession and the public.

I. DEFINING THE ATTORNEY-CLIENT RELATIONSHIP

The attorney-client relationship has been defined throughout the years in terms of agency, fiduciary, contract, and tort law.[26] Regardless of which definition is applied, confidentiality is a critical element of the relationship.

For example, when described in terms of an agency relationship, the attorney is defined as the agent and the client as the principal.[27] The attorney is given the power to act on behalf of the client and is to do so in accordance with the accompanying duties of loyalty and confidentiality.[28] In fact, the attorney's duty to maintain client confidences has been identified as such a fundamental aspect of the agency relationship that it attaches to a preliminary consultation, even if no ongoing attorney-client relationship is established, and continues

24. VA. RULES OF PROF'L CONDUCT R. 1.6 (2004), *available at* http://www.vsb.org/docs/2009-10-pg-rpc.pdf.

25. *See Hunter*, 744 S.E.2d 611.

26. *See infra* notes 27, 32, 37, and 39 and accompanying text.

27. John M. Burman, *A Lawyer's Fiduciary Duties*, WYO. LAWYER, Oct. 2004, at 42, 42.

28. *Id.*

even after the relationship is terminated.[29] Naturally, an attorney functions somewhat differently than a traditional agent in that the client does not control all of the actions of the attorney, but the client does provide the authority for the attorney to act on the client's behalf.[30] More importantly, attorney-client agency is often distinguished from the typical agency relationship by the fact that the duty of confidentiality survives the termination of the agency relationship.[31]

The duty of confidentiality is also central to the definition of the attorney-client relationship when the attorney serves in a fiduciary role for the client. The fiduciary definition highlights the distinctive nature of the attorney as an agent who is authorized, but not controlled by, the principal.[32] In other words, a fiduciary may be "a person to whom another person's affairs are entrusted in circumstances that often make it difficult or undesirable for that other person to supervise closely the performance of the fiduciary."[33] Thus, under this definition, the attorney becomes a fiduciary simultaneously with the formation of the attorney-client privilege[34] and is immediately "in a relationship of trust and confidence to a client."[35] In fact, "[t]he relationship between an attorney and client is a fiduciary relationship of the very highest character. All

29. Douglas R. Richmond, *The Attorney-Client Privilege and Associated Confidentiality Concerns in the Post-Enron Era*, 110 PENN ST. L. REV. 381, 395 (2005). "Lawyers' duty to maintain client confidences is a fundamental agency law principle." *Id.* at 394. "[This] duty of confidentiality attaches to initial consultations and preliminary communications, even if no attorney-client relationship ultimately results, and continues after representation concludes." *Id.* at 395. The duty of confidentiality is quite broad, and any exceptions that apply are typically very narrow. *Id.* at 395.

30. Grace M. Giesel, *Client Responsibility for Lawyer Conduct: Examining the Agency Nature of the Lawyer-Client Relationship*, 86 NEB. L. REV. 346, 350–51 (2007). *See also* RESTATEMENT (SECOND) OF AGENCY § 14N cmt. a (1958) ("[A]ttorneys . . . are independent contractors . . . since they are contractors but, although employed to perform services, are not subject to the control or right to control of the principal with respect to their physical conduct in the performance of the services. However, they fall within the category of agents."). Attorneys are also seen to be "special agents" because they are not engaged in continuing services; rather, they are authorized to perform one transaction or a series of transactions. *See* Giesel, at 353.

31. Burman, *supra* note 27, at 42 ("After the termination of the agency, the obligation of confidentiality imposed by the law of agency is modified, though the ethical obligation remains nearly the same, as does the fiduciary obligation.").

32. *See id.* at 43.

33. *Id.* (quoting RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 16 cmt. b (2000)).

34. Alvin O. Boucher, *North Dakota Legal Malpractice: A Summary of the Law*, 70 N.D. L. REV. 615, 620 (1994).

35. Kaseberg v. Davis Wright Tremaine, LLP, 265 P.3d 777, 782 (Or. 2011).

dealings between an attorney and his client that are beneficial to the attorney will be closely scrutinized with the utmost strictness for any unfairness."[36]

The attorney-client relationship is also expressed as a relationship evidenced by an express or implied contract.[37] Generally, the attorney and client each sign a retainer letter that expresses the essential terms of their agreement.[38] However, an attorney-client relationship may arise as a result of an implied contract, evidenced by the parties' conduct and intent to establish the relationship.[39] In the absence of an express agreement, the attorney-client relationship has also been defined based upon a tort theory when it is found to be reasonably foreseeable that an individual who seeks and receives legal advice will rely on that advice.[40]

Thus, whether the emphasis is placed upon the agency, fiduciary, contract, or tort theory of law, an attorney-client relationship is one in which loyalty, trust, and the inherent duty of confidentiality are vitally important and well-recognized in the law of lawyering and legal ethics.

II. THE ETHICAL DUTY OF CLIENT CONFIDENTIALITY IN THE ATTORNEY-CLIENT RELATIONSHIP

The historical roots of the ethical duty of confidentiality are found in the Alabama Bar Association's 1887 Code of Ethics from which the

36. Lee v. State Bar of Cal., 472 P.2d 449, 457 (Cal. 1970). *See also In re* Cooperman, 633 N.E.2d 1069, 1071, (N.Y. 1994) ("The duty to deal fairly, honestly and with undivided loyalty superimposes onto the attorney-client relationship a set of special and unique duties, including maintaining confidentiality, avoiding conflicts of interest, operating competently, safeguarding client property and honoring the clients' interests over the lawyer's.").

37. Ingrid A. Minott, Note, *The Attorney-Client Relationship: Exploring the Unintended Consequences of Inadvertent Formation*, 86 U. DET. MERCY L. REV. 269, 276–78 (2009).

38. *Id.* at 275.

39. *Id.* at 274–75 (describing that an attorney-client relationship is contractual in nature, may be express or implied, and whether an employment relationship actually exists in any given case will depend upon the application of the rules of contract law). *See also* Kiger v. Balestri, 376 S.W.3d 287, 290–91 (Tex. App. 2012) ("The attorney-client relationship is a contractual relationship that arises from a lawyer's agreement to render professional services to a client."); Koo v. Rubio's Rests, Inc., 109 Cal. App. 4th 719, 729 (Cal. Ct. App. 2003) ("An attorney-client relationship is not created by the unilateral declaration of one party to the relationship. . . . Rather, the relationship can only be created by contract, express or implied.").

40. *See* Boucher, *supra* note 34, at 619; s*ee also* Togstad v. Vesely, Otto, Miller & Keefe, 291 N.W.2d 686, 693 (Minn. 1980).

ABA initial Canon of Professional Ethics (1908 Canons) was drafted and adopted in 1908.[41] Canon 37, adopted in 1928, provided:

> It is the duty of a lawyer to preserve his client's confidences. This duty outlasts the lawyer's employment, and extends as well to his employees; and neither of them should accept employment which involves or may involve the disclosure or use of these confidences, either for the private advantage of the lawyer or his employees or to the disadvantage of the client, without his knowledge and consent, and even though there are other available sources of such information.[42]

Thus, the 1908 Canons embodied the legal concepts of agency, fiduciary, and contract by concluding that client consent was required to reveal client confidences and specified that disclosure was impermissible, "even though there are other available sources of such information."[43] The 1908 Canons were replaced in 1969 when the ABA adopted the Model Code of Professional Responsibility (Model Code).[44] Along with the Model Code came a new disciplinary rule governing client confidentiality. Disciplinary Rule 4-101 provides, in relevant part:

> Preservation of Confidences and Secrets of a Client
>
> (A) -"Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.
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> (B) -Except when permitted under DR 4-101(C), a lawyer shall not knowingly:

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41. David F. Chavkin, *Why Doesn't Anyone Care About Confidentiality? (And, What Message Does This Send to New Lawyers?)*, 25 GEO. J. LEGAL ETHICS 239, 242–43 (2012).

42. ABA CANONS OF PROFESSIONAL ETHICS Canon 37 (1937). The remainder of Canon 37 provided:

> A lawyer should not continue employment when he discovers that this obligation prevents the performance of his full duty to his former or to his new client.
>
> If a lawyer is accused by his client, he is not precluded from disclosing the truth in respect to the accusation. The announced intention of a client to commit a crime is not included within the confidences which he is bound to respect. He may properly make such disclosures as may be necessary to prevent the act or protect those against whom it is threatened.

Id.

43. *Id.* There were exceptions to Canon 37's rule of confidentiality, as indicated in footnote 42, but those exceptions are not relevant to the facts of *Hunter*.

44. *Model Rules of Professional Conduct*, AM. BAR ASS'N, http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct.html (last visited Oct. 28, 2013).

(1) -Reveal a confidence or secret of his client.

(2) -Use a confidence or secret of his client to the disadvantage of the client.

(3) -Use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure.[45]

Once again, client confidentiality is sacrosanct. Although the language of the rule changes Canon 37 and specifically adds the word "secret" to further define confidential information, the rule makes disclosure impermissible absent consent of the client or if disclosure would be embarrassing or detrimental.[46] Most states have adopted some version of the Model Code, including Virginia.[47]

The Model Code Disciplinary Rule 4-101 draws a distinction between "confidences," covered by the attorney-client privilege, and client "secrets."[48] Attorney-client privilege is a concept from the law of evidence.[49] The client, acting through his attorney, may claim the

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45. MODEL CODE OF PROF'L RESPONSIBILITY DR 4-101 (1980). The remainder of the rule provides the following exceptions, although they are not directly relevant to this discussion:

(C) -A lawyer may reveal:

(1) -Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them.

(2) -Confidences or secrets when permitted under Disciplinary Rules or required by law or court order.

(3) -The intention of his client to commit a crime and the information necessary to prevent the crime.

(4) -Confidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct.

(D) -A lawyer shall exercise reasonable care to prevent his employees, associates, and others whose services are utilized by him from disclosing or using confidences or secrets of a client, except that a lawyer may reveal the information allowed by DR 4-101(C) through an employee.

Id.

46. *Id.*

47. *State Adoption of the ABA Model Rules of Professional Conduct*, AM. BAR ASS'N CTR. FOR PROF'L RESPONSIBILITY, http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules.html (last visited Oct. 28, 2013).

48. MODEL CODE OF PROF'L RESPONSIBILITY DR 4-101.

49. Sue Michmerhuizen, *Confidentiality, Privilege: A Basic Value in Two Different Applications*, AM. BAR ASS'N CTR. FOR PROF'L RESPONSIBILITY, (May 2007), http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/confidentiality_or_attorney.authcheckdam.pdf.

privilege to prevent disclosure of communications that have actually occurred between the client and his attorney. However, the privilege only protects information shared for the purpose of legal representation.[50] On the other hand, client "secrets" can be any information that would be embarrassing or detrimental to the client if disclosed by the attorney, regardless of the source or purpose for the communication.[51]

Client confidentiality was again revisited when the Model Rules of Professional Conduct replaced the Model Code in 1983.[52] When the 1983 Model Rule for confidentiality, Rule 1.6, was adopted, the relevant portion provided: "A lawyer shall not reveal information relating to the representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b)."[53]

The 1983 model rule removes the reference to confidences and secrets, and broadens the rule to include any "information relating to representation of a client."[54] The definition simultaneously reinforces the historical and legal foundation for client confidentiality and is the most broadly encompassing definition to date. An attorney is prohibited from disclosing *any* information relating to the representation of a client

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50. *Id.*

51. MODEL CODE OF PROF'L RESPONSIBILITY DR 4-101.

52. *Model Rules of Professional Conduct*, AM. BAR ASS'N, http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct.html (last visited Oct. 28, 2013).

53. AM. BAR ASS'N CTR. FOR PROF'L RESPONSIBILITY, THE LEGISLATIVE HISTORY OF THE MODEL RULES OF PROFESSIONAL CONDUCT: THEIR DEVELOPMENT IN THE ABA HOUSE OF DELEGATES 51 (1987). The remainder of the rule contained the following exceptions:

> 1.6(b): A lawyer may reveal such information to the extent that the lawyer reasonably believes necessary:
>
> > (1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or
> >
> > (2) 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 involving the lawyer's representation of the client.

Id.

54. *See id.* Although Rule 1.6 was again amended in 2002 and 2003, the amendments do not pertain to the definition of confidential information. *See* Chavkin, *supra* note 41, at 254.

without client consent, absent an exception noted in the rule.[55] There is no exception provided in the rule for public record information. Forty-nine states have adopted the ABA Model Rules, however, various states have made their own modifications to the rules.[56] Notably, Virginia has retained the language of confidences and secrets in its confidentiality rule, as will be more fully discussed below.[57]

III. THE PHILOSOPHICAL JUSTIFICATIONS FOR CLIENT CONFIDENTIALITY

There has been much scholarly writing and debate about the appropriate breadth of confidentiality that attaches to the attorney-client relationship. The discussion often focuses on whether an additional exception to the rule should be created, such as an exception to release historical information,[58] to protect others against environmental hazards,[59] or to release information that would prevent an innocent individual from being prosecuted and convicted.[60] Inevitably, the debaters examine the underlying policies at play in protecting a client's confidentiality.

For example, in 2003, Susan R. Martyn, defending confidentiality as defined in the newly released Restatement (Third) of the Law Governing Lawyers and in the ABA Ethics 2000 Commission revisions to the Model Rules, describes "two distinct but complimentary" moral justifications for confidentiality.[61] She explains that the "true believers" of utilitarian philosophy, who evaluate conduct by considering the greatest good for the greatest number, support confidentiality because it in turn supports the functioning of the legal system and an attorney's ability to function in that system.[62] The legal system is a beneficial societal alternative to

55. *See* AM. BAR ASS'N CTR. FOR PROF'L RESPONSIBILITY, *The Legislative History*, *supra* note 53, at 51.

56. AM. BAR ASS'N CTR. FOR PROF'L RESPONSIBILITY, State Adoption, *supra* note 47.

57. *See* VA. RULES OF PROF'L CONDUCT R. 1.6 (2004).

58. Patrick Shilling, Note, *Attorney Papers, History and Confidentiality: A Proposed Amendment to Model Rule 1.6*, 69 FORDHAM L. REV. 2741, 2751, 2767 (2001).

59. Irma S. Russell, *Cries and Whispers: Environmental Hazards, Model Rule 1.6, and the Attorney's Conflicting Duites to Clients and Others*, 72 WASH. L. REV. 409, 411–15 (1997).

60. Shilling, *supra* note 58, at 2749 n.75.

61. Susan R. Martyn, *In Defense of Client-Lawyer Confidentiality . . . And its Exceptions . . .*, 81 NEB. L. REV. 1320, 1322–23 (2003).

62. *Id.* at 1323–24.

disparate results and chaos; therefore, confidentiality benefits the greater good.[63]

On the other hand, the deontological justifications focus upon an analysis of the "motive of the actor, rather than by the consequences the actor produces."[64] Deontologists seek universal rules that reflect respect for individual rights.[65] Martyn suggests that a deontological approach may begin with a focus on law as the protector of individual rights.[66] When an attorney agrees to represent a client and sets out to protect his individual rights, the client is afforded respect by the tacit understanding that his privacy will be protected through the implicit or explicit promise of confidentiality.[67] She suggests that this protection of client autonomy and privacy serves as the primary basis for the fiduciary duty ascribed to the attorney-client relationship in both agency law and the legal ethics codes.[68]

The importance of confidentiality has also been analyzed in terms of the attorney's specific role in society. In an article arguing for a narrow exception to confidentiality for environmental hazards, Irma S. Russell explores the definitions of "lawyer as champion" and "lawyer as officer of the court."[69] She explains that the lawyer as champion role considers confidentiality to be intrinsic to the attorney-client relationship and to be an absolute, critical value:

> This view is premised on the belief that the duty of confidentiality is a nonnegotiable element of our judicial system that must not be overridden except in cases so dramatic that reporting should occur in spite of any rule. It assumes that releasing the attorney's pledge of silence endangers the protections of the advocacy system of justice. . . .
>
> The view of the attorney as champion has long historical precedent. Courts, scholars, and boards of professional responsibility speak of the lawyer's duty of "single allegiance," "absolute loyalty," and "undivided fidelity" to the client.[70]

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63. *Id.* at 1322–24. Martyn also notes that utilitarian naysayers, such as Jeremey Benthem, have used utilitarian reasoning to argue against confidentiality as protecting the guilty, hiding information, and therefore, going against the public good. *Id.* at 1324.

64. *Id.* at 1328.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* at 1329.

69. Russell, *supra* note 59, at 448–52.

70. *Id.* at 448–49 (citing Moritz v. Med. Protective Co., 428 F. Supp. 865, 872 (W.D. Wis. 1977); Parsons v. Cont'l Nat'l Am. Grp., 550 P.2d 94 (Ariz. 1976); Am. Emp'rs Ins. Co. v. Goble Aircraft Specialties, Inc., 131 N.Y.S.2d 393, 401 (N.Y. App. Div. 1954); ABA

The lawyer as officer of the court and as protector of the rule of law fits more into the utilitarian definition of a lawyer as someone who benefits the societal good, as well as the overall legal system.[71] Russell notes that the lawyer as officer of the court both incorporates and qualifies the role of the lawyer as champion.[72] The lawyer still plays a role as champion for the individual, but not at all costs to the legal system.[73] In other words:

> The focus of this model is the obligation of the attorney to the system as a whole: the champion must play by the rules. While recognizing the attorney has a duty of loyalty to the client, this model sets limits on the duty, reminding us that the attorney's duty has never been to win at all costs. The attorney has no duty to keep the client's secrets, for example, if to keep quiet would perpetrate fraud on the court.[74]

Thus, the lawyer as officer of the court provides support for exceptions to the rule of confidentiality to uphold candor to the tribunal and to prevent bodily harm to another. It takes into consideration the deontological concerns for rights of the individual, but at the same time paves the way for the utilitarian notions of benefiting the legal system and society as a whole.

Other scholars, such as David F. Chavkin, who argue on behalf of confidentiality and suggest modifications to the current Model Rule 1.6 to enhance compliance, have integrated these ideas to speak more generally about confidentiality's role in enhancing the legal system.[75] Chavkin discusses the value of confidentiality as a vehicle for establishing trust by encouraging open communication between an attorney and his client.[76] This allows the attorney not only to provide better representation to the client, but also gives the attorney an opportunity to dissuade a client from committing a crime who shares such an intention.[77]

CANONS OF PROFESSIONAL ETHICS Canon 6 (1908); Steven H. Goldberg, *The Former Client's Disqualification Gambit: A Bad Move in Pursuit of an Ethical Anomaly*, 72 MINN. L. REV. 227, 235 (1987)).

71. Russell, *supra* note 59, at 451–52.

72. *Id.*

73. *Id.* at 452.

74. *Id.* (citing CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 6.7.3 at 301 (West 1986); Michael K. McChrystal, *Lawyers and Loyalty*, 33 WM. & MARY L. REV. 367 (1992)).

75. Chavkin, *supra* note 41, at 255–57.

76. *Id.* at 256.

77. *Id.*

Chavkin notes that some scholars doubt the utilitarian aspect of this justification.[78] However, he also explains that others believe that an attorney, as a private agent, owes no obligation to the public good to reveal client confidences.[79] Further, because an attorney is essential to guard an individual's rights in the legal system, confidentiality is fundamental to the protection of individual autonomy, thus defaulting to the deontological values of the motive of the actor and individual rights.[80]

Regardless of whether confidentiality is defined by general philosophical principles of morality, by the specific labels society attaches to an attorney's role, or by focusing on the general importance that confidentiality plays in legal ethics, confidentiality is clearly fundamental to the attorney-client relationship. Any exceptions that permit a breach of fidelity should be narrow and should be governed by a critical need to protect the greater good.

IV. VIRGINIA'S RULE OF CLIENT CONFIDENTIALITY

As mentioned above, Virginia did not adopt all of the language contained in Model Rule 1.6, however, it retained the language of confidences and secrets.[81] The notes to Virginia's rule indicate that the ABA's language that incorporates "all information relating to the representation" was rejected as being too broad.[82] However, comment 3 to the rule, reprinted below, distinguishes the attorney-client privilege and explains that confidentiality, within the context of the embarrassing or detrimental limitation, includes information gained in the professional relationship, "whatever its source."[83]

The sections that are directly relevant to the discussion of the *Hunter* case read as follows:

> Confidentiality of Information
>
> (a) A lawyer shall not reveal information protected by the attorney-client privilege under applicable law or other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client unless the client consents after consultation,

78. *Id.*
79. *Id.*
80. *Id.*
81. VA. RULES OF PROF'L CONDUCT R. 1.6 (2004).
82. *Id.* Virginia Code Comparison.
83. *Id.* cmt 3.

except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b) and (c).[84]

Comment

[1] The lawyer is part of a judicial system charged with upholding the law. One of the lawyer's functions is to advise clients so that they avoid any violation of the law in the proper exercise of their rights.

[2] The common law recognizes that the client's confidences must be protected from disclosure. The observance of the ethical obligation of a lawyer to hold inviolate confidential information of the client not only facilitates the full development of facts essential to proper representation of the client but also encourages people to seek early legal assistance.

[2a] Almost without exception, clients come to lawyers in order to determine what their rights are and what is, in the maze of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that clients usually follow the advice given, and the law is upheld.

[2b] A fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation. The client is thereby encouraged to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter.

[3] The principle of confidentiality is given effect in two related bodies of law, the attorney-client privilege (which includes the work product doctrine) in the law of evidence and the rule of confidentiality established in professional ethics. The attorney-client privilege applies in judicial and other proceedings in which a lawyer may be called as a witness or otherwise required to produce evidence concerning a client. The rule of client-lawyer confidentiality applies in situations other than those where evidence is sought from the lawyer through compulsion of law. The confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information protected by the attorney-client privilege under applicable law or other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law.

. . .

84. VA. RULES OF PROF'L CONDUCT R. 1.6.

> Disclosure Adverse to Client
>
> [6b] The confidentiality rule is subject to limited exceptions. However, to the extent a lawyer is required or permitted to disclose a client's confidences, the client will be inhibited from revealing facts which would enable the lawyer to counsel against a wrongful course of action. The public is better protected if full and open communication by the client is encouraged than if it is inhibited.
>
> . . .
>
> Former Client
>
> [18] The duty of confidentiality continues after the client-lawyer relationship has terminated.[85]

Thus, Virginia's rule of confidentiality and the interpretive comments clearly reference the importance of confidentiality both from a utilitarian perspective and from a deontological perspective. Comment 1 identifies the attorney as a central figure in our judicial system whose advice assists in maintaining the rule of law and encouraging individuals to be law-abiding members of society.[86] Comment 2a also acknowledges that attorneys' advice is usually followed and thus contributes to the law being upheld.[87] Comment 6b further supports the utilitarian view, noting that confidentiality encourages "full and open communication by the client," which better protects the public.[88]

The comments to Virginia's Rule 1.6 also reflect the deontological aspect of confidentiality as it contributes to the preservation of individual rights. Comment 2 acknowledges that the right to confidential communication stems from the common law and is essential for proper representation, and comment 2a reflects the fact that individuals need lawyers to understand and protect individual rights.[89] Comment 6b reinforces the need for confidentiality so that a client will communicate fully in an effort to gain appropriate representation.[90]

As mentioned above, comment 3 distinguishes the attorney-client privilege from confidentiality and explains:

> The confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information protected by the attorney-client privilege under applicable law or other information

85. *Id.* cmts. 1, 2, 2a, 2b, 3, 6b, 18.
86. *Id.* cmt. 1.
87. *Id.* cmt. 2a.
88. *Id.* cmt. 6.
89. *Id.* cmts. 2, 2a.
90. *Id.* cmt. 6b.

> gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client, *whatever its source*.[91]

Finally, comment 18 secures a client's right to confidentiality after the attorney-client relationship is terminated.[92] The language of the rule combined with comment 3 and comment 18 begs the question of how an attorney is allowed to write a blog that reveals little known information from a public record, in a criminal matter, after the termination of a case, when that information without a doubt would be embarrassing or likely would be detrimental to the client? The Supreme Court of Virginia answered that question by invoking the First Amendment—a result that probes further consideration.

V. THE HUNTER BLOG

"This Week in Richmond Criminal Defense" is the blog at the center of this controversy.[93] A reader may directly access the blog on the Internet or through a link on Hunter's firm's website, www.hunterlipton.com.[94] Prior to the Supreme Court of Virginia's decision, the news on the blog primarily consisted of detailed summaries of Hunter's clients' cases.[95] Hunter revealed his clients' first and last names in most of the blog posts, although occasionally he posted only a last name or a last name and a first initial.[96] In a few of the posts, Hunter's clients' names were omitted, however, even in those posts, adequate detail was provided from which the public would have been able to discern the clients' identities.[97]

Many of Hunter's blog posts described dismissals, dropped charges, and not guilty verdicts, yet the information provided still could have been potentially embarrassing or detrimental to his clients. For

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91. *Id.* cmt. 3 (emphasis added).

92. *Id.* cmt. 18.

93. *See This Week in Richmond Criminal Defense*, HUNTER & LIPTON PC, http://hunterlipton.com/news.php (last visited Oct. 29, 2013).

94. *Id.*

95. Brief for Appellee, *supra* note 19, at 2. At the October 18, 2011 hearing, the Virginia State Board "entered all of the blog posts Hunter had posted on his blog to date. . . . Of these thirty unique posts, only five discussed legal, policy issues. The remaining twenty-five discussed cases. Hunter represented the defendant in twenty-two of these cases and identified that fact in the posts." Hunter v. Va. State Bar *ex rel.* Third Dist. Comm., 744 S.E.2d 611, 614 (Va. 2013), *cert. denied*, 133 S. Ct. 2871 (2013).

96. *See* Complaint, Exhibit 2, *Hunter*, 744 S.E.2d 611 (No. 121472).

97. Brief for Appellee, *supra* note 19, at 6–12.

example, when discussing one client, Hunter wrote, "[t]o be sure, there is no doubt that she was shop lifting."[98] Regarding another blog post, Hunter wrote that his client, who was later found not guilty, "tested positive for cocaine."[99] One of Hunter's clients was a schoolteacher who was arrested for assaulting another teacher, but the charges were ultimately dismissed.[100] The blog included the client's first initial and last name, the date of the incident, the alleged victim's name, and the name of the school where they both worked.[101] These types of blog posts formed the basis of the Virginia State Bar's disciplinary proceeding against Hunter.

A. The Hunter Case

On March 24, 2011, the Third District Committee of the Virginia State Bar notified Virginia attorney Horace Frazier Hunter that it scheduled a disciplinary hearing because Hunter's blog posts lacked the requisite advertising disclaimer and because he impermissibly revealed his clients' confidential information.[102] What followed the October 18, 2011 disciplinary hearing was a finding that Hunter violated the Virginia Rules of Professional Conduct regarding attorney advertising and confidentiality, which Hunter appealed to a three-judge circuit court.[103] The Virginia circuit court, in an unpublished decision, agreed that Hunter's blog required a disclaimer, but reversed and dismissed the confidentiality violation as an impermissible restriction of Hunter's First Amendment right to free speech.[104]

The parties appealed to the Supreme Court of Virginia, and it issued its opinion on February 28, 2013.[105] Upon review, the Supreme Court Virginia affirmed the circuit court's determination that an advertising disclaimer was required on the blog, which it deemed to be commercial speech, and affirmed the circuit court's dismissal of the breach of client

98. Complaint, Exhibit 2, *supra* note 96, at 68.

99. Brief for Appellee, *supra* note 19, at 10.

100. *Id.* at 7–8.

101. Complaint, Exhibit 2, *supra* note 96, at 66.

102. Letter from Renu Mago Brennan, Asst. Bar Counsel, Virginia State Bar, to Horace Frazier Hunter, Esq. (Mar. 24, 2011) (on file with author). *See also* Hunter v. Va. State Bar *ex rel.* Third Dist. Comm., 744 S.E.2d 611, 614 (Va. 2013), *cert. denied*, 133 S. Ct. 2871 (2013).

103. *In re* Hunter, No. 11-032-084907 (Va. 3d Dist. Comm. of Va. State Bar (Nov. 8, 2011)) (on file with author).

104. Va. State Bar *ex rel.* Third Dist. Comm. v. Hunter, Case No. CL12-335-7 (Va. Cir. Ct. June 29, 2012) (on file with author).

105. *Hunter*, 744 S.E.2d 611.

confidentiality claim based on the First Amendment.[106] The court devoted approximately three and one-half pages of its twenty-three-page opinion to the Virginia State Bar's contention that its Rule 1.6 on confidentiality prevents attorneys, such as Hunter, from revealing information about a client that may be embarrassing or detrimental, notwithstanding the fact that the information may have been revealed in a public forum or record, and despite the First Amendment.[107] Hunter filed a petition for writ of certiorari to the U.S. Supreme Court on the advertising disclaimer issue, and the Virginia State Bar filed a conditional cross-petition.[108] The Supreme Court declined to hear the case in June 2013.[109]

B. The Hunter Opinion

One of the central themes of First Amendment jurisprudence is preventing state regulations that will have a chilling effect on free speech.[110] Ironically, however, the Supreme Court of Virginia's application of First Amendment jurisprudence may have actually chilled the flow of free speech from client to attorney. The Virginia State Bar urged the court to focus its inquiry on the speaker—an attorney—and the way the speaker gained access to the disclosed information—through the attorney-client relationship.[111] Instead, the Supreme Court of Virginia appears to have focused on the nature of the information and when the information was disclosed—purportedly public record information disclosed after the conclusion of the case.[112] The court framed the issue before it in the following manner: "Thus, we are called upon to answer whether the state may prohibit an attorney from discussing information about a client or former client that is not protected by attorney-client privilege without express consent from that client. We agree with Hunter that it may not."[113]

106. *Id.* at 621.

107. *Id.* at 619–20.

108. Petition for Writ of Certiorari, *supra* note 20; Conditional Cross Petition, *Hunter*, 744 S.E.2d 611.

109. *Id.*

110. *See* Lamont v. Postmaster General of United States, 381 U.S. 301, 307 (1965); Wieman v. Updegraff, 344 U.S. 183, 194 (1952) (Black, J., concurring).

111. Brief for Appellee, *supra* note 19, at 8–9, 30–31.

112. Hunter v. Va. State Bar *ex rel.* Third Dist. Comm., 744 S.E.2d 611, 619–20 (Va. 2013), *cert. denied*, 133 S. Ct. 2871 (2013).

113. *Id.* at 619.

The court seemed to conflate Rule 1.6 on confidentiality and the entire doctrine of agency and doctrine of fiduciary law into the narrow definition of attorney-client privilege.[114] In reaching its determination on this issue, the court failed to consider the issue of confidentiality and the language of Virginia's Rule 1.6, which prohibits the disclosure of embarrassing or detrimental information, and it did not even acknowledge the delineated exceptions to the rule.[115] Peter Joy points out,

> In effect, the Virginia Supreme Court has created a public records or public knowledge exception to client confidentiality, which erodes the duty of loyalty lawyers owe current and former clients . . . . Now, lawyers can embarrass and humiliate former clients with impunity as long as they use confidential information that is in the public records. The court's ruling is in direct contradiction with the rules of professional conduct.[116]

As Richard Zitrin suggested, "[t]he worst part of the *Hunter* court's decision was not the court's analysis of Hunter's blog, but its misinterpretation of its own rule on confidentiality."[117]

Certainly, if an individual is arrested on drug charges but avoids conviction because of a successful motion to suppress the evidence, then those facts may be in the public record. But, unless that individual is a high profile member of the community, few people are aware of the arrest or aware of the suppression motion. Are all of the facts subject to the attorney-client privilege? No. If this individual and these facts are discussed in a blog, might it cause embarrassment or detriment when, for example, a future employer conducts a Google search of this individual? Of course.

Essentially, the Supreme Court of Virginia held that it is irrelevant whether an attorney's blog post is embarrassing or detrimental to his client, as long as the information in the blog is part of the public record.[118] The definition of "public record" is unclear, however, it appears to apply to matters that are discussed in open court, even if the

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114. *See id.*

115. *See id.* at 619–20.

116. Peter A. Joy, *quoted in* David L. Hudson, Jr., *Commercial Ahead: Virginia Supreme Court Holds that Advertising Rules May be Applied to a Lawyer's Blog*, A.B.A. J., Nov. 2013, at 20, 21, *available at* http://www.abajournal.com/magazine/article/virginia_supreme_court_holds_that_advertising_rules_may_be_applied_to_a_law/.

117. Richard Zitrin, *Viewpoint: Guard Your Clients' Public Secrets*, THE RECORDER (June 7, 2013), *available* at http://www.uchastings.edu/news/articles/2013/06/zitrin-client-secrets.php.

118. *Hunter*, 744 S.E.2d at 619–20.

information is not recorded in an official court document.[119] Regardless, information in any form of public record can be embarrassing or detrimental for a client.[120] The Virginia State Bar provided the court with numerous examples of Hunter's blog posts, yet, perhaps more compelling than the blog posts were the references to the testimony in the disciplinary hearing record from some of Hunter's clients.[121] One of Hunter's clients who was acquitted on charges of aggravated malicious wounding and use of a firearm in the commission of a felony testified that he was upset and angry about Hunter's blog because he found it to be "embarrassing, dangerous, and harmful."[122] Hunter used this client's full name on his blog.[123] Additionally, the teacher, mentioned above, whose assault charges were dropped testified that the blog posts were embarrassing and potentially detrimental to his career.[124]

In considering the possible consequences of these blog posts, query the likelihood of a third party accessing the information about Hunter's clients if it was not posted on the Internet. Webpages are archived and can exist indefinitely.[125] Hunter's client, whose blood tested positive for cocaine but was found not guilty at trial, may still find herself condemned as a cocaine-user in cyberspace.[126] The *Hunter* court's opinion does not consider the potential repercussions of such blog posts.

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119. *See* Jeff Day, *Panel Admonishes Criminal Defense Attorney For Blog Naming Clients, Omitting Disclaimer*, BLOOMBERG BNA (Nov. 23, 2011), http://www.bna.com/panel-admonishes-criminal-n12884904453/. Jeff Day reports about Virginia Bar Counsel Jim McCauley:

> McCauley disputed Hunter's contention that client names are necessarily revealed to the public in open court and in court records. The state's general district courts are not courts of record . . . .
>
> McCauley maintained that rapid-fire criminal trials in district court are not open trials. The short form on which judges record decisions have no details on the cases and thus do not constitute a public record of a trial . . . . Unless the case is detailed in an easily accessible public record, Hunter's claim has no basis . . . .

Id.

120. Hunter maintained information on his blog explaining the reasons for plea bargains, dismissals, and dropped charges. *See* Complaint, Exhibit 2, *supra* note 96, at 3, 9, 27, 29.

121. Brief for Appellee, *supra* note 19, at 6–12.

122. *Id.* at 9.

123. *Id.*

124. *Id.* at 8.

125. *See* INTERNET ARCHIVE, http://archive.org/about/ (last visited Oct. 30, 2013).

126. *See* Brief for Appellee, *supra* note 19, at 10–11.

Instead of analyzing the blog posts under confidentiality Rule 1.6 and providing an appropriate weighing of the significance of the attorney-client relationship and confidentiality, the Supreme Court of Virginia focused on the public nature of the information and the right of public access.[127] For example, it likened the blog entries to information disclosed by the press.[128] The court stated:

> The VSB argues that it can prohibit an attorney from repeating truthful information made in a public judicial proceeding even though others can disseminate this information because an attorney repeating it could inhibit clients from freely communicating with their attorneys or because it would undermine public confidence in the legal profession. Such concerns, however, are unsupported by the evidence. To the extent that the information is aired in a public forum, privacy considerations must yield to First Amendment protections. In that respect, a lawyer is no more prohibited than any other citizen from reporting what transpired in the courtroom.[129]

Thus, the Supreme Court of Virginia emphasized the overarching societal value of transparency in our criminal justice system rather than focusing more specifically on an attorney's role in the legal system.[130] As Zitrin further posited, "The core of where the Virginia court went wrong was its conclusion that 'a lawyer is no more prohibited than any other citizen' from talking about an old case. Not so. A lawyer remains at all times a lawyer."[131]

Numerous cases have recognized that the unique role of an attorney subjects him or her to greater restrictions on his or her speech than those imposed upon the average citizen.[132] An attorney's position is one

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127. Hunter v. Va. State Bar *ex rel.* Third Dist. Comm., 744 S.E.2d 611, 619–20 (Va. 2013), *cert. denied*, 133 S. Ct. 2871 (2013).

128. *Id.*

129. *Id.* at 620.

130. For example, the Virginia Supreme Court cited to free-press cases that have nothing to do with attorney speech. *See id.*; *see also* Zitrin, *supra* note 117 (noting the *Hunter* opinion's reference to *Richmond Newspapers v. Virginia*, 448 U.S. 555 (1980) and *Seattle Times v. Rhinehart*, 467 U.S. 20 (1984)).

131. Zitrin, *supra* note 117 (quoting *Hunter*, 744 S.E.2d at 620).

132. *See* Gentile v. State Bar of Nevada, 501 U.S. 1030, 1076 (1991); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 455–56 (1978); Bates v. State Bar of Arizona, 433 U.S. 350, 383–84 (1977); *In re* Sawyer, 360 U.S. 622, 646–47 (1959) (Stewart, J., concurring); Douglas v. DynMcDermott Petroleum Operations Co., 144 F.3d 364, 370 (5th Cir. 1998); *In re* Palmisano, 70 F.3d 483, 487 (7th Cir. 1995); U.S. Dist. Ct. For E.D. Wash. v. Sandlin, 12 F.3d 861, 866–67 (9th Cir. 1993); The Florida Bar v. Conway, 996 So. 2d 213 (Fla. Oct. 29, 2008) (adopting the uncontested Report of Referee, *available at* http://www.floridasupremecourt.org/clerk/briefs/2008/201-400/08-326_ROR.pdf); *In re*

of trust and fidelity to his clients.[133] A client believes that he can share information with an attorney and that the information will be held in the strictest of confidences. Even as it pertains to public record information, it is unlikely that a criminal client expects to be the feature of his attorney's blog post upon the conclusion of his case without his consent. The testimony from Hunter's clients who indicated that the blog posts were detrimental reinforces this presumption.[134] Furthermore, the damage to the client who finds himself the subject of his attorney's blog post may be compounded by the fact that "lawyers' statements are likely to be received as especially authoritative" and "'knowledgeable, reliable and true' because of attorneys' unique access to information."[135]

The Virginia State Bar asserted that permitting attorneys to freely blog about their clients, based upon public record, will impede the free-flow of information between clients and their attorneys and undermine the public's confidence in the legal profession, an argument that was dismissed by the Supreme Court of Virginia as "unsupported by the evidence," without much analysis of the utilitarian and deontological issues at play.[136] Under both the utilitarian and deontological philosophies, the inhibition of attorney-client communication has negative consequences.[137] As discussed above, from the utilitarian view, the greatest good for the greatest number is served by having a successfully functioning legal system.[138] When an attorney cannot effectively advocate for his client because the client has withheld information, it results in inequities in the justice system. Inequities in the justice system will also undermine public confidence in the legal profession. Indeed, as the Preamble to Virginia's rules recognizes, "a lawyer can be sure that preserving client confidences ordinarily serves

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Skinner, 740 S.E.2d 171, 172–73 (Ga. 2013); *In re* Comfort, 159 P.3d 1011, 1025 (Kan. 2007); *In re* Landrith, 124 P.3d 467, 479–81 (Kan. 2005); Matter of Westfall, 808 S.W.2d 829, 833–37 (Mo. 1991); Disciplinary Counsel v. Gardner, 793 N.E.2d 425, 428–31 (Ohio 2003); Am. Motor Corp. v. Huffstutler, 575 N.E.2d 116, 120–21 (Ohio 1991); *In re* Peshek, 798 N.W.2d 879, 880 (Wis. 2011); *In re* Denison, No. 6192441 (Ill. Atty. Reg. & Disc. Comm'n Jan. 8, 2013), *available at* https://www.iardc.org/13PR0001CM.html; *In re* Peshek, No. 6201779 (Ill. Atty. Reg. & Disc. Comm'n Aug. 25, 2009), *available at* https://www.iardc.org/09CH0089CM.html; Erwin Chemerinsky, *Silence is Not Golden: Protecting Lawyer Speech Under the First Amendment*, 47 EMORY L.J. 859 (1998).

133. *See supra* notes 32–36 and accompanying text.

134. *See* Brief for Appellee, *supra* note 19, at 6–12.

135. Gentile v. State Bar of Nevada, 501 U.S. 1030, 1074 (1991) (quoting *In re* Hinds, 449 A.2d 483, 496 (N.J. 1982)).

136. *Hunter*, 744 S.E.2d at 620.

137. *See supra* notes 61–68 and accompanying text.

138. *See supra* notes 61–63 and accompanying text.

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."[139]

The deontological approach highlights the concept of fidelity, and under this approach, the potential chilling effect of *Hunter* may be even more compelling.[140] It becomes difficult to define an attorney as a champion of individual rights if he uses client information to the client's detriment or disadvantage, regardless of whether the information is part of a public record. Furthermore, as discussed above, an attorney's agreement to represent a client should include the implicit promise to respect the client's privacy through confidentiality. An attorney's individual right to engage in commercial speech should not take priority over the protection of a client's individual right to confidentiality. An attorney should maintain "absolute loyalty"[141] and "undivided fidelity"[142] to the client.

The individual harms caused by attorneys blogging about their clients not only may result in the client's distrust of his lawyer, but also may damage the public's confidence in the legal profession and the justice system. "[T]he integrity of the judicial system would be sullied if courts tolerated [the disclosure of client confidences] by those who profess and owe undivided loyalty to their clients."[143] The duties of confidentiality and loyalty "instill a faith in the system necessary for the public to trust our legal system in the resolution of its disputes."[144] Furthermore, "the free-speech interests of lawyers is [sic] impinged by a broad rule of confidentiality. Nonetheless, despite those costs, the confidentiality rule reflects a considered judgment that high net social value justifies it."[145]

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139. VA. RULES OF PROF'L CONDUCT pmbl. (2004).

140. *See supra* notes 64–68 and accompanying text.

141. Russell, *supra* note 59, at 449 (citing Steven H. Goldberg, *The Former Client's Disqualification Gambit: A Bad Move in Pursuit of an Ethical Anomaly*, 72 MINN. L. REV. 227, 235 (1987)).

142. *Id.* (citing CANONS OF PROFESSIONAL ETHICS Canon 6 (1908)).

143. Duncan v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 646 F.2d 1020, 1027 (5th Cir. 1981), overruled on other grounds by Gibbs v. Paluk, 742 F.2d 181 (5th Cir. 1984).

144. Douglas v. DynMcDermott Petroleum Operations Co., 144 F.3d 364, 375 (5th Cir. 1998).

145. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 60 cmt. b (2000).

VI. THE FIRST AMENDMENT AND THE RULE OF CONFIDENTIALITY JUXTAPOSED

Whether Hunter's First Amendment rights trump the legal ethics rule of confidentiality regarding discussion of a client's case without client consent and based upon facts found in a public record is a question that *one* court answered in the affirmative for attorneys in its state. However, whether the First Amendment *should* override a client's right to confidentiality in these circumstances is an issue that continues to be the subject of debate not only in Virginia, but also in legal communities across the country that are not bound by the Virginia decision.[146]

The tension between the First Amendment and the legal rules of professional conduct is not a new phenomenon. As previously noted, there have been a myriad of situations in which the issue of whether the self-regulating nature of the legal profession and the unique role of the attorney in society give rise to justifiable limits on an attorney's constitutional right of free speech.[147] A 1979 case decided by the United States Court of Appeals for the Fourth Circuit, which upheld a Supreme Court of Virginia decision restricting attorneys' speech during pending criminal litigation, provides a perspective that is a common thread running throughout this area of law.[148] The Fourth Circuit stated:

> Lawyers have First Amendment rights of free speech. They are not second class citizens. They are first class citizens with many privileges

146. *See* Andrew Perlman, *More on the Confidentiality Implications of Hunter v. Virginia State Bar*, LEGAL ETHICS FORUM (June 9, 2013, 8:20 PM), http://www.legalethicsforum.com/blog/2013/06/hunter_case.html#comments; Zitrin, *supra* note 117.

147. *See* Gentile v. State Bar of Nevada, 501 U.S. 1030, 1076 (1991); Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 455–56 (1978); Bates v. State Bar of Arizona, 433 U.S. 350, 401–02 (1977); *In re* Sawyer, 360 U.S. 622, 646–47 (1959) (Stewart, J., concurring); Douglas v. DynMcDermott Petroleum Operations Co., 144 F.3d 364, 370 (5th Cir. 1998); *In re* Palmisano, 70 F.3d 483, 487 (7th Cir. 1995); U.S. Dist. Ct. For E.D. Wash. Sandlin, 12 F.3d 861, 866–67 (9th Cir. 1993); The Florida Bar v. Conway, 996 So. 2d 213 (Fla. Oct. 29, 2008) (adopting the uncontested Report of Referee, *available at* http://www.floridasupremecourt.org/clerk/briefs/2008/201-400/08-326_ROR.pdf); *In re* Skinner, 740 S.E.2d 171, 172–73 (Ga. 2013); *In re* Comfort, 159 P.3d 1011, 1025 (Kan. 2007); *In re* Landrith, 124 P.3d 467, 479–81 (Kan. 2005); *In re* Westfall, 808 S.W.2d 829, 833–37 (Mo. 1991); Disciplinary Counsel v. Gardner, 793 N.E.2d 425, 428–31 (Ohio 2003); Am. Motor Corp. v. Huffstutler, 575 N.E.2d 116, 120–21 (Ohio 1991); *In re* Peshek, 798 N.W.2d 879, 880 (Wis. 2011); *In re* Denison, No. 6192441 (Ill. Atty. Reg. & Disc. Comm. Jan. 8, 2013), *available at* https://www.iardc.org/13PR0001CM.html; *In re* Peshek, No. 6201779 (Ill. Atty. Reg. & Disc. Comm. Aug. 25, 2009), *available at* https://www.iardc.org/09CH0089CM.html; Chemerinsky, *supra* note 132.

148. *See* Hirschkop v. Snead, 594 F.2d 356 (4th Cir. 1979).

> not enjoyed by other citizens. With privilege, however, goes responsibility, and codes of professional responsibility have traditionally recognized that a lawyer is subject to special disciplinary sanctions when he neglects his responsibility to his clients and to the public.[149]

The Fourth Circuit's observation echoes the often quoted Justice Cardozo declaration that membership in the legal profession is a "privilege burdened with conditions."[150] The Supreme Court has concluded that one of the burdens "requires members of the bar to conduct themselves in a manner compatible with the role of courts in the administration of justice."[151]

The idea of "the privilege and the burden" has not only been reviewed and debated in the areas of pre-trial publicity and gag orders, but also as it pertains to an attorney's right to criticize the judiciary, to advertise, to provide advice, and to create exceptions to the confidentiality rule, such as preventing fraud upon the court and preventing substantial harm to others.[152]

What is novel about the *Hunter* decision is that the court applied First Amendment theory to carve what some contend is an unnecessary and unwarranted exception to the rule of client confidentiality—public record information when a case has concluded.[153] In fact, other state courts have expressly held that the rule of confidentiality is not nullified simply because the information has become part of the public record.[154] Although the *Hunter* case is one of first impression in Virginia because it involves Internet blogging, other states have issued ethics opinions in which attorneys' First Amendment rights have been restricted on social media in accordance with the legal ethics rules.[155]

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149. *Id.* at 366.

150. *In re* Snyder, 472 U.S. 634, 644 (1985) (quoting People *ex rel.* Karlin v. Culkin, 162 N.E. 487, 489 (1928)).

151. *Id.* at 644–45.

152. See *Bates*, 433 U.S. at 379–82; *Conway*, 996 So. 2d 213; Margaret Tarkington, *A First Amendment Theory for Protecting Attorney Speech*, 45 U.C. DAVIS L. REV. 27, 74 (2011); Martyn, *supra* note 61, at 1330–46; Chemerinsky, *supra* note 132.

153. *See* Hunter v. Va. State Bar *ex rel.* Third Dist. Comm., 744 S.E.2d 611, 619–20 (Va. 2013), *cert. denied*, 133 S. Ct. 2871 (2013).

154. *In re* Anonymous, 654 N.E.2d 1128, 1129 (Ind. 1995); *In re* Bryan, 61 P.3d 641, 656–57 (Kan. 2003); Akron Bar Ass'n v. Holder, 810 N.E.2d 426, 434–35 (Ohio 2004); Lawyer Disciplinary Bd. v. McGraw, 461 S.E.2d 850, 860–63 (W. Va. 1995); *In re* Harman, 628 N.W.2d 351, 361 (Wis. 2001).

155. *Conway*, 996 So. 2d 213 (upholding public reprimand for comments attorney made about a judge on a blog, including referring to her as an "EVIL UNFAIR WITCH"); *In re* Skinner, 740 S.E.2d 171, 172–73 (Ga. 2013) (finding violation of Rule 1.6 resulting from an attorney posting confidential information about a client on the Internet in

Professor Margaret Tarkington, although a frequent critic of the restriction of attorneys' free speech rights, has expressed disagreement with the *Hunter* decision.[156] Tarkington's access-to-justice approach for evaluating the protection of attorney speech provides that "the core protection for attorney speech must consist of attorney speech that is key to the proper and constitutional functioning of the United States justice system."[157] The *Hunter* court's protection of Hunter's blog posts that breach client confidentiality fails Tarkington's test as she explains in her comments on the Legal Ethics Forum:

> I think the [Hunter] opinion is absolutely wrong . . . . I think the state constitutionally can forbid attorneys from violating the traditional (and even quite broad) duty of confidentiality. This is the whole point to my access-to-justice approach to the First Amendment[]. Traditional First Amendment doctrines fail to illuminate what attorney speech must be protected (such as speech essential to providing legal advice to clients or to invoke the law on behalf of clients, and overarchingly, speech necessary to invoke or avoid government power in the protection of client life, liberty, and property), and, conversely, the traditional doctrines do not illuminate what attorney speech constitutionally can and should be prohibited.
>
> As you know, my view is that the First Amendment as applied to attorney speech must be keyed to the attorney's role in the system of justice in protecting client life, liberty, and property (or depriving others of life, liberty, or property—for example, a prosecutor). Thus restrictions on speech essential to that role are constitutional under my theory—and confidentiality would be a prime example. Attorneys have access to client information solely because of the delegation of state power to them to practice law, to discover the most embarrassing and terrible information possible about people. That information is provided

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response to negative reviews the client had posted about the attorney on consumer websites); *In re* Peshek, 798 N.W.2d 879, 880–81 (Wis. 2011) (suspending attorney's license for 60 days after she posted information about her clients on her blog). *See also* Complaint, ¶ 12, *In re* Denison, No. 6192441 (Ill. Atty. Reg. & Disc. Comm., Jan. 8, 2013), *available at* https://www.iardc.org/13PR0001CM.html (accusing attorney of committing misconduct in violation of Rule 8.2 based on blog posts alleging corruption in the Illinois probate system); Complaint, ¶ 13, *In Re* Peshek, No. 6201779 (Ill. Atty. Reg. & Disc. Comm., Aug. 25, 2009), *available at* https://www.iardc.org/09CH0089CM.html.

156. *See* Tarkington, *supra* note 152, at 33 (noting that "it was never satisfactory to treat attorneys as having relinquished their First Amendment rights as a condition of membership in the bar. . . . There are scenarios . . . where the judiciary has demonstrated a failure to protect speech that clearly should enjoy constitutional protection"). *Id. See also infra* note 157 and accompanying text.

157. Tarkington, *supra* note 152, at 61.

> to the attorney for the express purpose that the attorney will be able to use the information to invoke and/or avoid government power on behalf of that person. As an essential component of the role of the lawyer, Virginia and other states can constitutionally prohibit attorneys from disclosing information about their clients outside of what is necessary for this role, unless the client consents.
>
> As a matter of First Amendment theory, these ideas are reflected in the work of Alexander Meiklejohn and Wittgenstein. Wittgenstein argues generally that speech protection must be keyed to the "form of life" in which it exists. Thus, as applied to the system of justice, speech regulation and protection must preserve that form of life—and here, our system of justice as a "form of life" requires confidentiality. Alexander Meiklejohn uses the town meeting as an example. Although political speech is absolutely protected in town meetings, yet it is and must be abridged (for example, through rules and regulations about who speaks when, and order by the chair, etc.). The abridgment is necessary to accomplish the governmental purpose—that is, the purpose of holding the town meeting. While manipulation of the process cannot be allowed through abridging just one side of an issue, for example, abridgment through creating rules of the game is essential to preserve the process itself.
>
> In like manner, there are many restrictions on attorney speech that are essential to the proper functioning of the attorney's role in the system of justice and as an advocate for her client. These regulations are constitutional precisely because they make it possible for the speech essential to our system of justice to take place. Without confidentiality, clients don't talk, a lawyer's knowledge in pursuing legal remedies becomes limited, and, more importantly, state powers and processes to discover information through the justice system can be used by attorneys (who are licensed with state power to discover such information for these very purposes) to instead embarrass and undermine clients—and perhaps even harm their reputation and property. As you know, there are plenty of regulations on attorney speech that I think are unconstitutional under the First Amendment and that I have written about. But confidentiality is not unconstitutional; instead, it is an essential aspect of the attorney's role in our system of justice.[158]

158. Margaret Tarkington, Comment to John Steele, *Lawyer Blogs, Public Facts, and Confidentiality (or, that Blogging Criminal Defense Lawyer From Virginia Won on First Amendment Grounds)*, LEGAL ETHICS FORUM (Feb. 28, 2013, 3:37 PM), Comment posted Feb. 28, 2013, 10:46 PM, http://www.legalethicsforum.com/blog/2013/02/lawyer-blogs-public-facts-and-confidentiality-or-that-blogging-criminal-defense-lawyer-won-on-first-.html.

Hunter's position on the First Amendment does not dispute that there is some need for client confidentiality, but rather, he discards the value or necessity of it after the case becomes part of a public record.[159] The argument is strident not only in its defense of First Amendment freedoms, but also in discounting any obligation to the client, regardless of how embarrassing and detrimental to the client the information may be.[160] Although the *Hunter* briefs contain significant argument about whether Hunter's blog is political or commercial speech, and therefore which level of scrutiny should apply regarding the attorney advertising regulations, the fundamental underlying concerns about the value of confidentiality should not significantly change whether the breach of client confidentiality is attacked based upon a strict scrutiny political speech standard or a substantial state interest commercial speech analysis.[161]

Why does the character of the speech not matter? Because if the legal profession accepts that the attorney is bound to maintain confidentiality based upon the ethics rules and principles of agency, fiduciary, and contract law, then is not the logical extension of that idiom an obligation not to breach confidentiality except through an established exception? In other words, conceding the value of political and commercial speech, has an attorney not agreed in the context of his relationship with a client to refrain from exercising free speech that may be embarrassing or detrimental to the client? The legal profession has not disavowed general free speech rights, but rather, in an effort to provide better advocacy, the profession has concluded that client confidentiality is indispensable to support both the client and the legal system.

As a self-regulating profession, has the legal profession therefore cornered itself with no way out of this First Amendment "dilemma" other than through the assistance of the courts? The answer is of course not, because there is always the option of obtaining client consent. If Hunter had obtained client consent, this entire discussion would be unnecessary. He conceded that there was a commercial aspect to his blog, but he primarily relied on a political speech argument in which he

159. Reply Brief for Appellant at 1–11, Hunter v. Va. State Bar *ex rel.* Third Dist. Comm., 744 S.E.2d 611 (Va. 2013) (No. 121472).

160. *Id.*

161. *See generally* Opening Brief for Appellant, *Hunter*, 744 S.E.2d 611 (No. 121472); Brief for Appellee, *Hunter*, 744 S.E.2d 611 (No. 121472); Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 340 (2010) (explaining the test for political speech); Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 564 (1980) (explaining the test for commercial speech).

asserted that he was blogging about his clients' cases to expose flaws in the criminal justice system and to bring about change.[162] Does a client not have a say in whether he wants to be a part of a campaign to effect change? Is it the attorney's case or the client's case? Even conceding Hunter's claim that his blog is political speech (a difficult argument upon which to prevail for any attorney who is marketing himself on social media),[163] is there not a compelling state interest in upholding the sanctity of client confidentiality? Client confidentiality is the bedrock of the attorney-client relationship, and in turn, a lynchpin in the structure of our legal system. Is not the rule of confidentiality narrowly tailored, as it is replete with compelling exceptions, including client consent?[164]

Moreover, if an attorney would rather not seek client consent or cannot obtain client consent, but believes that there is value in sharing the story of the client's case, then the attorney may discuss the case in a hypothetical manner.[165] Hunter could write about his clients' real-life cases and still accomplish his commercial speech goals, as well as purported political speech goals, without including client names or detailed personal information. He could discuss the ramifications of having a client who has allegedly tested positive for cocaine and the various strategies for challenging the test and defending the case. In

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162. Compare *In re* Denison, No. 6192441 (Ill. Atty. Reg. & Disc. Comm'n, Jan. 8, 2013), *available at* https://www.iardc.org/13PR0001CM.html (accusing attorney of committing misconduct in violation of Rule 8.2 based on blog posts alleging corruption in the Illinois probate system), and The Florida Bar v. Conway, 996 So. 2d 213 (Fla. Oct. 29, 2008) (adopting the uncontested Report of Referee, *available at* http://www.floridasupremecourt.org/clerk/briefs/2008/201-400/08-326_ROR.pdf) (upholding public reprimand for comments attorney made about a judge on a blog, including referring to her as an "EVIL UNFAIR WITCH"), with *In re* Skinner, 740 S.E.2d 171, 172–73 (Ga. 2013) (finding violation of Rule 1.6 resulting from an attorney posting confidential information about a client on the Internet in response to negative reviews the client had posted about the attorney on consumer websites), and *In re* Peshek, 798 N.W.2d 879, 880–81 (Wis. 2011) (suspending attorney's license for 60 days after she posted information about her clients on her blog).

163. In fact, a new ethics opinion was just released by the New York State Bar Association in which it defined blogs as advertising unless the blog does not discuss legal topics and its primary purpose is not the retention of the lawyer. N.Y. State Bar Ass'n Comm. on Prof'l Ethics, Op. 967 (2013), *available at* http://www.nysba.org/CustomTemplates/Content.aspx?id=28100.

164. A constitutional analysis of the doctrines of political and commercial speech and the various circumstances under which attorney speech may be restricted based upon confidentiality is beyond the scope of this Article, which seeks to explore the ethical issues regarding Hunter's blog posts and the potential impact of the Supreme Court of Virgina's opinion.

165. *See* MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 4 (1980).

fact, comment 4 to Model Rule 1.6 contemplates such a situation: an attorney's use of a hypothetical modeled from a real case is allowed "so long as there is no reasonable likelihood that the listener will be able to ascertain the identity of the client or situation the situation involved."[166]

Unfortunately, it appears that the Supreme Court of Virginia neither analyzed the alternatives of client consent or the use of hypotheticals, nor addressed the intrinsic value of maintaining client confidentiality as the sacrosanct characteristic of the attorney-client relationship.[167] These issues remain critical to the ongoing discussion of client confidentiality and the role of the attorney in the digital age. The Internet affords tremendous opportunity to provide the public with access to legal information and to promote reform, but it also may be a vehicle to inflict unwarranted harm upon an individual client. Fidelity has been referred to as "the sister of justice,"[168] so it follows that when information that is embarrassing or detrimental to a client is posted on the Internet, thereby diluting the fidelity of the attorney-client relationship, our system of justice likewise suffers.

CONCLUSION

Becoming an attorney is a voluntary act. Entering into an attorney-client relationship generally is also a voluntary act.[169] The moment that the attorney-client relationship commences, an attorney is bound to maintain a client's confidences based upon agency, fiduciary, contract law, and the code of professional responsibility. Does this obligation of confidentiality, which reflects the loyalty, trust, and fidelity that are the underpinnings of the relationship, magically expire upon the completion of the case? Certainly, Virginia's comment 18 to Rule 1.6 states otherwise,[170] as does Rule 1.9 governing conflicts with former clients.[171] If an attorney is prohibited from using the information learned in a representation to the detriment of a former client, should he be able to

166. *Id.*

167. *See* Hunter v. Va. State Bar *ex rel.* Third Dist. Comm., 744 S.E.2d 611 (Va. 2013), *cert. denied*, 133 S. Ct. 2871 (2013).

168. HORACE, THE ODES: BOOK I:XXIV A LAMENT FOR QUINTILIUS (A.S. Kline trans., 2003), *available at* http://www.poetryintranslation.com/PITBR/Latin/HoraceOdesBkI.htm.

169. That is, with the understanding that there are exceptions, such as court appointed obligations.

170. VA. RULES OF PROF'L CONDUCT R. 1.6 cmt. 18 (2004).

171. VA. RULES OF PROF'L CONDUCT R. 1.9.

use it to the current client's public detriment?[172] Again, there is no stated exception to the confidentiality rule for material that appears in a public record.[173]

The *Hunter* opinion dilutes the fidelity that is intrinsic in the attorney-client relationship and challenges the public trust. Members of the public are better served by the assurance that whatever occurs in their individual legal cases will not become the subject of a blog or otherwise be posted on the Internet by their attorney with whom they entered into a fiduciary relationship.

Virginia is only one state and Horace Hunter is only one lawyer in that state, but imagine lawyers all over the country freely blogging, updating Facebook statuses, and tweeting the details of their clients' cases just because the facts may be found in a public record after the matter is completed.[174] While the Supreme Court has not opined on an

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172. *Id.* Rule 1.9 states, in relevant part:

> (c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
>
> > (1) use information relating to or gained in the course of the representation to the disadvantage of the former client except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client, or when the information has become generally known; or
> >
> > (2) reveal information relating to the representation except as Rule 1.6 or Rule 3.3 would permit or require with respect to a client.

Id. Of course, Rule 1.9 refers back to Rule 1.6, so arguably, if an attorney may publish confidential information to the client's detriment under Rule 1.6, then perhaps it also dilutes a client's protection under Rule 1.9. *See id.*

173. While the *Hunter* opinion did not focus on the distinction between information that is generally available and information that is generally known, it is interesting to note that The Restatement (Third) of the Law Governing Lawyers is in accord with the idea that information that is known by others is not a reason for an attorney to breach confidentiality. *See* RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS § 59 cmt. b (2000). However, the Restatement does distinguish information that becomes "generally known" and provides permission for an attorney to speak about a client's case based upon generally known information. *Id.* § 59 cmt. d. Whether "generally available" is the same as "generally known" is a subject of debate. While high profile cases that are televised and discussed frequently in all forms of media may fit the description of generally known, most individuals, like Horace Hunter's clients, live lives under the proverbial radar. Their private affairs, including a criminal matter, are usually not generally known or generally available and, therefore, if disclosed, are easily a subject of embarrassment and detriment in their lives. *See* Chavkin, *supra* note 41, 257–60; Zitrin, *supra* note 117.

174. The *Hunter* opinion has not only raised concerns about its impact on other states' legal ethics rules, but also about the potential long range effect on other professions as well as an individual's general right to privacy. *See* Perlman, *supra* note 146 (suggesting

attorney's free speech rights regarding client confidentiality in the context of Internet blogging, the Court's guidance, offered in 1959, seems to have stood the test of time and technology:

> A lawyer belongs to a profession with inherited standards of propriety and honor, which experience has shown necessary in a calling dedicated to the accomplishment of justice. He who would follow that calling must conform to those standards.
>
> Obedience to ethical precepts may require abstention from what in other circumstances might be constitutionally protected speech.[175]

Confidentiality is one of the ethical precepts that sometimes demand abstention in order to maintain dedication to the legal profession's "inherited standards" of fidelity, propriety, and honor, which are the cornerstones of the attorney-client relationship. "We count on the space of trust that confidentiality provides. When someone breaches that trust, we are all worse off for it."[176]

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that doctors are also in a position of trust with their clients, and under the *Hunter* court's reasoning, the laws protecting patient privacy arguably violate doctors' First Amendment rights). Note also that the Supreme Court has recognized limited First Amendment rights for other professions, such as government employees. *See* Connick v. Myers, 461 U.S. 138 (1983) (restricting government employee speech that hampers the public function).

175. *In re* Sawyer, 360 U.S. 622, 646–47 (1959) (Stewart, J., concurring).

176. Hillary Rodham Clinton, U.S. Sec'y of State, Remarks to the Press on Release of Purportedly Confidential Documents by Wikileaks, (Nov. 29, 2010), *available at* http://www.state.gov/secretary/rm/2010/11/152078.htm.