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## Lawyers' Papers: Confidentiality Versus The Claims Of History

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# NOTES

## LAWYERS' PAPERS: CONFIDENTIALITY VERSUS THE CLAIMS OF HISTORY

Demand for all types of legal papers is on the rise as researchers and historians increasingly become aware of the value of legal papers in areas above and beyond legal history.<sup>1</sup> Documents such as judicial opinions, court records, briefs and associated papers are easily accessible to researchers studying landmark cases that have had dramatic impacts on society.<sup>2</sup> Archivists, historians and other researchers recognize, however, that the role that law plays in society is not limited to what takes place in the courtroom or the judge's chambers.<sup>3</sup> The relationship between law and society unfolds in the lawyer's office, behind closed doors and hidden from the eye of public scrutiny.<sup>4</sup> The private papers of lawyers tell the story of the impact of the legal profession on the relationship between law and society.<sup>5</sup> How-

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1. See A. Morse, *Considerations in the Appraisal of Twentieth Century Papers of Legal Institutions 1* (1992) (unpublished manuscript, available in University of New Mexico Law Library) (discussing uses of legal papers). Morse states that legal papers are used to study the social conditions of the times, not just the history of legal doctrine. *Id.* Morse asserts that legal papers tell us a part of our past. *Id.* at 28; see also M. Cohen, *Proposal for a Feasibility Study: Collecting Lawyers' Professional Papers 2* (Feb. 1, 1984) (unpublished manuscript, on file at Yale Law Library) (discussing significance of legal documentation).

2. See Cohen, *supra* note 1, at 2 (asserting that litigation and judicial decision making are visible processes, relatively open to scholarly inquiry); Morse, *supra* note 1, at 1 (stating that several recent studies have relied on civil and criminal court records, including studies on adoption and custody, housing patterns and effects of probation).

3. See Cohen, *supra* note 1, at 2 (stating that most of what lawyers do has nothing to do with courts and judicial decisions).

4. See *id.* (noting that various lawyers' activities do not become matters for public notice or record). Cohen notes the importance of lower visibility legal activities such as counselling, negotiation, drafting, dispute resolution and business advising that take place outside of the public forum. *Id.*; see also Morse, *supra* note 1, at 3 (noting importance of lawyer's role as both counsellor and litigator in assessing research value of legal papers).

5. See Morse, *supra* note 1 at 1 (asserting that legal papers tell story of law in relation to family or community); see also R. McReynolds, *The Archivist and Lawyers' Records 9* (Presentation to Society of American Archivists, Oct. 2, 1988) (available from author, at National Archive and Records Administration) (stating that records of lawyers and firms document numerous and critical aspects of American legal, social, political, and economic life); Trimble, *Archives and Manuscripts: New Collecting Areas for Law Libraries*, 83 L. LIBR. J. 429, 442 (1991) (discussing historical interest in lawyers' papers). Trimble states that historians are interested in lawyers' papers because of the predominant role lawyers play in society. *Id.* Trimble asserts that future generations of historians will want to know what lawyers did and how they did it. *Id.*; Cohen, *supra* note 1, at 2 (discussing significance of lawyers' papers). Cohen asserts that what the legal profession does in low visibility ways has a more profound and frequent impact upon the structuring of private and public institutions than major case litigation does. *Id.* Cohen cites, for example, the United States financial system as the product

ever, access to lawyers' papers is extremely limited, and this is largely attributable to the confidential nature of the documents contained in a lawyer's private files.<sup>6</sup> The documents that represent a valuable resource to historians<sup>7</sup> present an ethical dilemma for lawyers as lawyers struggle to reconcile the public's demand for historical data with the time-honored principle of lawyer-client confidentiality.<sup>8</sup>

Take, for example, the case recently considered by the District of Columbia Bar Committee on Legal Ethics involving a former, high-level government employee who is now a lawyer representing private clients.<sup>9</sup> After participating in the shaping of United States domestic and foreign policy, the lawyer now wishes to donate papers from his private practice to

of numerous private decisions and inventions guided or designed by lawyers. *Id.* Cohen asserts that lawyers' nonlitigative activities are of great importance to legal scholarship, in that lawyers' decisions about the meaning of law have an impact on social, moral and economic ordering. *Id.* at 2-3. These activities are also important to scholarship in the social sciences as the activities relate to the origins of institutions and modes of institutional and professional activity. *Id.* at 3.

See also Schaeffer, *The Osgoode Society Survey of Private Legal Records in Ontario*, 24 ARCHIVARIA 181, 183 (1987) (discussing value of private legal records). Schaeffer asserts that lawyers' activities touch on every aspect of community life, whether social, economic or political. *Id.* Schaeffer notes that the administrative records of law firms and lawyers' files containing documentation on corporate, commercial and municipal matters contain useful information. *Id.*; Guth, *Retention and Disposition of Client Files: Guidelines for Lawyers*, 46 ADVOCATE 229, 231 (1988) (discussing archival value of client files). Guth asserts that collections of files may contain documentation for policies and practices which helped to shape the legal profession as well as information about individuals or groups which may have significance for the national heritage. *Id.*

6. See Trimble, *supra* note 5, at 441 (asserting that for some repositories lawyer-client confidentiality is major stumbling block to collecting lawyers' papers); Cohen, *supra* note 1, at 5 (asserting that main obstacle to collecting lawyers' papers has been reluctance of lawyers to open files to researchers or to deposit papers in libraries because of concern with confidentiality); Schaeffer, *supra* note 5, at 181 (asserting that ethical rule of confidentiality is serious constraint on depositing lawyers' papers in archives); Morse, *supra* note 1, at 3 (citing issues of confidentiality and legal ethics as factor contributing to difficulty in acquiring law firm papers).

7. See Kaplan, *A Matter of Truth or Confidences: Does Attorney-Client Privilege Outweigh Demands of History?*, NAT'L L.J., July 4, 1988 (stating that as lawyers increasingly are recognized as major historical players, manuscript departments and libraries are eagerly pursuing lawyers' papers); Cohen, *supra* note 1, at 1-2 (discussing varied and substantial need for papers of legal profession, and asserting that it is time for scholars to pay serious attention to solving problem of access to papers); Trimble, *supra* note 5, at 442 (discussing reasons why historians are interested in having access to lawyers' papers).

8. See Kaplan, *supra* note 7, at 1 (discussing clash of legal ethics and history). Kaplan poses a hypothetical in which a summer associate at a law firm discovers notes taken by John Wilkes Booth's attorney during a conversation in which Booth describes the shooting of Abraham Lincoln and mentions all of the co-conspirators in the crime. *Id.* Kaplan posed the question whether the senior partner of the law firm may release the file to two prominent legal scholars. *Id.* The first scholar answered that the Booth papers could not be released due to the requirement of confidentiality. *Id.* The second answered that confidentiality must have a limit, calling the notion that the file could not be released "absurd." *Id.*

9. See *infra* notes 63-74 and accompanying text (discussing Committee on Legal Ethics of District of Columbia Bar Opinion No. 128).

a university archive.<sup>10</sup> In the lawyer's endeavors to affect government policy on behalf of some of his clients, the lawyer has already disclosed some of the papers arising from his practice, such as letters to government officials, comments concerning proposed regulations and statutory changes, and other similar documents to third parties outside the lawyer-client relationship.<sup>11</sup> The lawyer, however, has not disclosed other papers to anyone outside that relationship.<sup>12</sup> What rules or principles of confidentiality must the lawyer consider in making any decision to donate papers? What are the limitations and restrictions, if any, imposed by those rules or by ethical considerations? To what kinds of liability will donation of the papers expose the lawyer, and is there any way the lawyer can give the papers to the university without incurring that liability?

Courts and the doctrines of confidentiality have given little guidance to the lawyer confronted with this issue.<sup>13</sup> An examination of the background of the concept of confidentiality is helpful in analyzing current thinking on the issue and on the limits and restrictions placed on confidentiality by courts and state bar ethics committees.<sup>14</sup> The interests of archivists and historians are difficult to reconcile with the lawyer's ethical duty in light of the legal framework surrounding confidentiality.<sup>15</sup> An amendment to the state codes of ethics, incorporating the interests of both lawyers and archivists, may provide a workable solution to the lawyer's dilemma.<sup>16</sup>

The confidentiality rules adopted by most states closely parallel or adopt in their entirety the American Bar Association Model Code of Professional Responsibility confidentiality provisions and the more recent Model Rules of Professional Conduct.<sup>17</sup> Canon 4 of the Model Code states that "A

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10. See *infra* notes 63-74 and accompanying text (discussing Committee on Legal Ethics of District of Columbia Bar Opinion No. 128).

11. See *infra* notes 63-74 and accompanying text (discussing Committee on Legal Ethics of District of Columbia Bar Opinion No. 128).

12. See *infra* notes 63-74 and accompanying text (discussing Committee on Legal Ethics of District of Columbia Bar Opinion No. 128).

13. See *infra* note 45 and accompanying text (noting that American Bar Association never considered historical exception when drafting ethics code); see also *infra* notes 52-74 and accompanying text (discussing opinions relating to donation of private papers and failure by ethics committees to provide guidance on issue to lawyers).

14. See *infra* notes 17-43 and accompanying text (discussing ethical duty of confidentiality and exceptions and limitations on duty).

15. See *infra* notes 82-86 and accompanying text (discussing difficulty of balancing ethical duty of confidentiality and interests of archivists in historically significant material found in legal papers).

16. See *infra* notes 155-169 and accompanying text (discussing proposed amendment to ethics codes providing for donation of historically significant legal papers).

17. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY CANON 4, DR 4-101, EC 4-1, 4-6 (1969) [hereinafter MODEL CODE]; MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1983) [hereinafter MODEL RULES]. The Canons found in the Model Code express in general terms the standards of professional conduct expected of lawyers, and embody the general concepts from which the Disciplinary Rules and Ethical Considerations are derived. MODEL CODE, *supra*, Preliminary Statement. The Disciplinary Rules are mandatory in nature, and state the

lawyer should preserve the confidences and secrets of his client."<sup>18</sup> Disciplinary Rule 4-101 (DR 4-101) states in relevant part:

- (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.
- (B) Except when permitted under DR 4-101(C), a lawyer shall not knowingly:
  - (1) Reveal a confidence or secret of his client.
  - . . .
- (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.<sup>19</sup>

The inclusion of both "confidences" and "secrets" is an important aspect of confidentiality under the Model Code.<sup>20</sup> The inclusion of "secrets" in

minimum level of conduct below which no lawyer can fall without being subject to disciplinary action. *Id.* The Ethical Considerations are aspirational in character, represent the objectives toward which lawyers should strive, and provide guidance to lawyers in specific situations. *Id.* The Model Rules are mandatory, and failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process. MODEL RULES, *supra*, Scope.

Fewer than fifteen states retain the Model Code, and many of those states are considering adoption of the Model Rules. S. GILLERS & R. SIMON, JR., REGULATION OF LAWYERS: STATUTES AND STANDARDS 301 (1992). As of fall 1991, more than thirty-five states and the District of Columbia had adopted all or significant portions of the Model Rules in some form. *Id.* at xiii-xiv. Several states, including New York, Vermont and Massachusetts, have rejected the Model Rules as a whole. *Id.* at xiv. However, some states, including California and New York, have amended their ethics codes to incorporate some Model Rules provisions. *Id.*

Significant variations exist among the state codes in provisions dealing with confidentiality. *Id.* at vii. For example, California's Rules of Professional Conduct do not expressly cover confidentiality. *Id.* at 54. The ethical duty of confidentiality is covered instead under the California Business and Professions Code §6068(e), which states that "It is the duty of an attorney to . . . maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client." *Id.* at 644. *See also* 1-4 Nat'l Rep. Legal Ethics (UPA) (1991) (containing ethics codes adopted by all fifty states).

18. MODEL CODE, *supra* note 17, Canon 4.

19. MODEL CODE, *supra* note 17, DR 4-101. The parts of DR 4-101 not relevant to this discussion include (B)(2) and (3), which state that a lawyer may not use a confidence or secret of his client to the disadvantage of the client or for the advantage of the lawyer or of a third person without the client's consent. *Id.* Section (C)(3) permits the lawyer to reveal the intention of a client to commit a crime and the information necessary to prevent the crime and (4) permits the lawyer to reveal confidences or secrets necessary to establish or collect the lawyer's fee or to defend the lawyer against an accusation of wrongful conduct. *Id.* Section (D) requires a lawyer to use reasonable care to prevent employees, associates, etc. from disclosing client confidences or secrets. *Id.*

20. *See* Myrick, *Confidential Communications and the ABA Code of Professional*

DR 4-101 extends the protection of confidentiality beyond privileged material to any information that the lawyer obtains in her professional capacity, shielding all information given by a client to the lawyer whether or not the information is strictly confidential in nature.<sup>21</sup> The sole requirement under Canon 4 is that the lawyer receive the communication in her professional capacity.<sup>22</sup>

Rule 1.6 of the Model Rules of Professional Conduct states in relevant part:

(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).<sup>23</sup>

These professional codes of responsibility impose an ethical duty of confidentiality upon lawyers.<sup>24</sup> Additionally, the courts have reinforced this duty by manifesting a general disapproval of extrajudicial disclosure by lawyers of information gained through confidential communications between the lawyers and their clients.<sup>25</sup> The policies behind the duty of confidentiality are based on concern for the uninterrupted free flow of communication between client and lawyer, but the ethical duty extends beyond this concern to embrace a moral obligation and sense of loyalty and responsibility that have traditionally constituted an integral part of the lawyer-client relationship.<sup>26</sup> This obligation prompted the formulation of rules requiring confi-

*Responsibility*, 1 J. LEGAL PROF. 79, 84-87 (1976) (discussing confidential communications under Model Code Canon 4, and meaning and requirements of "secret" as contained therein).

21. See *Doe v. A Corp.*, 330 F. Supp. 1352, 1356 (1971) (stating that Canon 4 looks beyond technical considerations of secrecy in evidentiary sense and shields all information given by client to lawyer whether or not strictly confidential in nature, and that sole requirement under Canon 4 is that lawyer receive communication in lawyer's professional capacity).

22. *Id.*

23. MODEL RULES, *supra* note 17, Rule 1.6. Section (b) of Rule 1.6, not relevant to this discussion, contains exceptions similar to those found in Model Code DR 4-101. *Id.* Section (b)(1) states that a lawyer may reveal information to prevent the client from committing a serious crime, and (b)(2) allows disclosure of information in situations where the lawyer must defend herself, establish a claim or respond to allegations in proceedings involving a client. *Id.*

24. See MODEL CODE, *supra* note 17, Canon 4, DR 4-101 (setting forth ethical duty of confidentiality); MODEL RULES, *supra* note 13, Rule 1.6; ABA Comm. on Professional Ethics and Grievances, Formal Op. 155 (1936) (stating that "It is the duty of an attorney to maintain confidence and preserve inviolate secrets of his client"); Myrick, *supra* note 20, at 87-91 (discussing explicit ethical obligation imposed on lawyer by DR 4-101(B)).

25. See *Lakoff v. Lionel Corp.*, 207 Misc. 319, 137 N.Y.S.2d 806 (1955) (expressing disapproval of lawyer revealing secret information given to lawyer by client in patent suit); *E.F. Hutton & Co. v. Brown*, 305 F. Supp. 371 (S.D. Tex. 1969) (recognizing and enforcing Model Code and Model Rules as proper standards for professional conduct); *Herman v. Acheson*, 108 F. Supp. 723 (D.D.C. 1952) (same); see also *Cox, Extrajudicial Disclosures of Confidential Communications — A Continuing Dilemma for the Lawyer*, 1 J. LEGAL PROF. 93 (1976) (discussing views of courts on attorney disclosure of confidential information outside courtroom).

26. See MODEL CODE, *supra* note 17, EC 4-1 (stating that client must feel free to discuss

dentiality that national and state bar associations have incorporated into codes of ethics governing the conduct of lawyers.<sup>27</sup>

A lawyer's duty of confidentiality applies at all times, and not just when a court compels a lawyer to testify about the lawyer's professional relationship with a client in some type of formal proceeding.<sup>28</sup> The scope of the duty is wide, encompassing all information that a lawyer possesses about a client, including the underlying facts surrounding the case, information received from third parties and anything else the lawyer may know about either the client or the case from whatever source.<sup>29</sup>

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whatever client wishes with lawyer, and lawyer must feel free to obtain information beyond that volunteered by client). EC 4-6 states that the observance of the ethical duty of confidentiality facilitates the full development of facts essential to proper representation and encourages laymen to seek early legal assistance. *Id.*; MODEL RULES, *supra* note 17, Rule 1.6 comment (stating that lawyer-client confidentiality encourages client to communicate fully and frankly with lawyer even as to embarrassing or legally damaging subject matter); ABA Comm. on Professional Ethics and Grievances, Formal Op. 250 (1943) (stating that permitting attorney to reveal client confidences to others would be gross violation of "sacred trust," and would destroy usefulness and benefits of professional assistance (quoting 2 MECHEM ON AGENCY §2297 (2d ed. 1914)); 1 G. HAZARD & W. HODES, THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT 89 (Supp. 1989) (stating that beyond pragmatic concern regarding client's reliance on confidentiality, lawyers demonstrate moral values of trust and loyalty when they keep confidences of clients); Myrick, *supra* note 20, at 79 (discussing grounds on which courts base ethical obligation of confidentiality). Myrick asserts that the ethical obligation is based on the concept of a "service ideal" or the notion that the legal profession exists to serve the community, and that maintaining the confidences of clients is essential to this service concept and the status of the profession as a whole. *Id.* at 82. The service ideal imposes a professional obligation directly on the individual lawyer. *Id.*; Pizzimenti, *The Lawyer's Duty to Warn Clients About Limits on Confidentiality*, 39 CATH. U.L. REV. 441, 443-51 (1990) (discussing deontological and utilitarian justifications that scholars offer for maintaining client confidences). The deontological justification is based upon notions of a client's right to autonomy and inherent right to privacy regarding the client's innermost thoughts, as well as the notion that the lawyer has made an explicit or implicit promise to keep client secrets. *Id.* at 445-46. The utilitarian justification is based on the premise that clients must be able to fully unburden themselves in order to receive competent legal representation, and that full disclosure by clients to the lawyer may prevent harm to third parties. *Id.* at 447; Crystal, *Confidentiality Under the Model Rules of Professional Conduct*, 30 U. KAN. L. REV. 215, 218-19 (1982) (stating justifications for imposing general duty of confidentiality on lawyers). Crystal discusses four justifications for the duty of confidentiality: 1) lawyers have a legal duty to maintain confidentiality, 2) in some situations disclosure of confidential information serves no legitimate social purpose, such as disclosure used for the financial advantage of the lawyer, 3) the duty of confidentiality supports social roles of lawyer as advocate and counselor by helping to remove a barrier to functioning of those roles, and 4) the profession itself is deeply committed to the value of confidentiality. *Id.*

27. See *supra* note 26 (discussing lawyer's moral obligation as incorporated into ethics codes).

28. MODEL CODE, *supra* note 17, EC 4-2 (describing situations outside litigation context to which ethical duty of confidentiality extends); MODEL RULES, *supra* note 17, Rule 1.6 comment (stating that ethical rule of confidentiality applies in situations other than those where evidence is sought from lawyer through compulsion of law); G. HAZARD & W. HODES, *supra* note 26, at 90.5 (stating that duty of confidentiality binds lawyer at all times and does not spring into being merely in cases where lawyer faces inquiry from others).

29. MODEL CODE, *supra* note 17, EC 4-4 (stating that ethical precept of confidentiality

Commentators disagree upon whether limitations on the duty and exceptions to the rule exist.<sup>30</sup> Those commentators who advocate an absolute duty of confidentiality reason that only if the duty is absolute can the lawyer assure the client that the lawyer will hold the information revealed by the client in strict confidence.<sup>31</sup> The client's resulting willingness to communicate will in turn assure the lawyer that the client will communicate all the necessary information surrounding the case, thus allowing the lawyer to serve the client more effectively.<sup>32</sup> Critics of absolute confidentiality assert that permitting disclosure of confidential information in certain limited circumstances would not seriously threaten the openness of lawyer-client communication.<sup>33</sup> Ethics codes generally reject the notion of absolute con-

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exists without regard to nature or source of information or fact that others share knowledge); MODEL RULES, *supra* note 17, Rule 1.6 comment (stating that confidentiality rule applies not merely to matters communicated in confidence by client but also to all information relating to representation, whatever its source); G. HAZARD & W. HODES, *supra* note 26, at 90.5 (stating that confidentiality applies to all information about client, not simply to communications from client).

30. See Pizzimenti, *supra* note 26, at 449-50 and accompanying notes (discussing disagreement among commentators regarding extent of exceptions to duty of confidentiality); M. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* 27-41 (1975) (advocating strict duty of confidentiality); Abramovsky, *A Case for Increased Confidentiality*, 13 FORDHAM URB. L.J. 11, 15 (1984-85) (arguing that in order to promote trust between lawyers and clients, lawyer should be permitted to guard client's secrets in all circumstances and that duty of confidentiality should remain paramount); Subin, *The Lawyer as Superego: Disclosure of Client Confidences to Prevent Harm*, 70 IOWA L. REV. 1091, 1114-19 (1985) (arguing that crime or fraud exception to attorney-client confidentiality is justified because purposes of attorney-client privilege plainly are not at stake); Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 351, 358-61 (1989) (discussing justifications for strict confidentiality).

31. See FREEDMAN, *supra* note 30, at 1-8 (discussing absolute nature of lawyer's obligation of confidentiality and rationale behind lawyer's maintenance of strict confidentiality). Freedman asserts that the client cannot be expected to reveal all essential information unless the client is assured that the lawyer will keep the information in "strictest confidence." *Id.* at 4-5. Thus, strict confidentiality is required to maintain the free and open communication between client and lawyer which is "essential to the administration of justice." *Id.* (quoting ABA Comm. on Professional Ethics and Grievances, Formal Op. 91 (1933)). See also Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966) (arguing that obligation of confidentiality allows lawyer to continue to represent defendant who intended to take stand and commit perjury and that lawyer should not reveal client's perjury to authorities); Abramovsky, *supra* note 30, at 15 (arguing that to promote trust between lawyers and clients, lawyer should be permitted to guard client's secrets in all circumstances and that duty of confidentiality should remain paramount).

32. See M. FREEDMAN, *supra* note 30, at 4-5 (asserting that lawyer can perform effectively as advocate only if lawyer has all information that is potentially relevant).

33. See Crystal, *supra* note 26, at 220-27 (arguing that advocates of strict confidentiality cannot justify that position on bases of clients' rights, historical justifications, or policy considerations). One of the policy considerations that Crystal discusses is the facilitation of communication between client and lawyer. *Id.* at 223-24. Crystal asserts that proponents of strict confidentiality that rely on such a policy consideration neglect the fact that numerous barriers already exist to open communication between clients and lawyers. *Id.* at 224. Crystal asserts that the first barrier consists of a client's unwillingness in some situations, out of concern for their own welfare, to reveal complete and truthful information. *Id.* Secondly,



fidentiality, providing some exceptions to confidentiality between lawyer and client.<sup>34</sup> The most common exceptions include disclosure with the consent of the client, or disclosure when permitted under the rules or when required by court order or other law.<sup>35</sup> Specifically, the rules allow disclosure when the client reveals his intention to commit a crime, and when a lawyer is required to disclose confidences to collect the lawyer's fee or to defend against an accusation of wrongful conduct.<sup>36</sup>

Both state and national ethics codes fail to address the issue of a time limit on the duty of confidentiality.<sup>37</sup> Proponents of limited exceptions to

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racial and social barriers may exist. *Id.* Finally, rules of strict confidentiality are inadequate to provide the complete security to a client that is the result of an extended lawyer-client relationship, and even the rules provide for qualified disclosure. *Id.* See also Pizzimenti, *supra* note 26, at 447-48 (discussing criticisms of deontological and utilitarian arguments supporting absolute prohibition of disclosure of confidences). Pizzimenti cites studies indicating that many clients still would confide in a lawyer without assurances of absolute confidentiality. *Id.* at 447.

34. See *supra* note 23 (summarizing exceptions to confidentiality found in Model Rule 1.6(b)); *supra* note 19 (summarizing exceptions to confidentiality found in Model Code DR 4-101(C)). See also Pizzimenti, *supra* note 26, at 449 (stating that codes of ethics recognize that absolute confidentiality is wrong and unworkable as indicated by established exceptions to confidentiality rules).

35. See MODEL CODE, *supra* note 17, DR 4-101(C)(1)-4-101(C)(2) (stating that lawyer may reveal confidences or secrets with consent of client and when permitted by Disciplinary Rules or required by court order); MODEL CODE, *supra* note 17, EC 4-2 (stating that obligation to protect confidences and secrets does not preclude lawyer from revealing information when client consents after full disclosure, when necessary to perform professional employment, when permitted by Disciplinary Rule or when required by law); MODEL RULES, *supra* note 17, Rule 1.6(a) (stating that lawyer shall not reveal information relating to client unless client consents after consultation); MODEL RULES, *supra* note 17, Rule 1.6 comment (stating that lawyer may not disclose information except as authorized or required by Model Rules or other law); see also MODEL RULES, *supra* note 17, Rules 2.2, 2.3, 3.3, 4.1 (permitting or requiring lawyer to disclose information relating to representation in various circumstances); Crystal, *supra* note 26, at 219 (asserting that disclosure when required by law is justified by reasons of practicality and fairness).

36. See MODEL CODE, *supra* note 17, DR 4-101(C)(3)-4-101(C)(4) (stating that lawyer may reveal client's intention to commit crime and information necessary to prevent crime, and confidences or secrets necessary to establish or collect lawyer's fee or to defend against accusation of wrongful conduct); MODEL RULES, *supra* note 17, Rule 1.6(b)(1)-1.6(b)(2) (stating that lawyer may reveal information to prevent client from committing criminal act and to establish claim or defense in proceedings involving lawyer-client relationship). Significant variation exists among state ethics codes, however, regarding the exception to confidentiality when the client reveals the client's intention to commit a crime, although all states contain some exception to one degree or another for disclosure of such information. S. GILLERS & R. SIMON, JR., *supra* note 17, at 54-56 (citing various state ethics codes and exceptions contained therein regarding criminal acts or intentions of client).

37. See Kaplan, *supra* note 7, at 37 (asserting that no time limit under confidentiality principle exists); McReynolds, *supra* note 5, at 1 (stating that American Bar Association ethics code requires lawyers to protect client confidentiality forever); e.g., MODEL CODE, *supra* note 17, Canon 4, DR 4-101 (containing no provision for time limit on duty of confidentiality); MODEL RULES, *supra* note 17, Rule 1.6 (containing no provision for time limit on duty of confidentiality); NEW YORK CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101 (1987) (containing

the duty have refrained from proposing a blanket exception describing the time at which confidentiality is no longer required, choosing instead to confine the exceptions to very specific situations.<sup>38</sup> Ethics committees have never directly addressed the issue of a time limit on the duty.<sup>39</sup> One ethics committee, however, emphasized that "the mere passage of time" does not affect the ongoing duty of confidentiality,<sup>40</sup> and ethics codes indicate that the duty extends beyond the termination of the lawyer's employment or practice.<sup>41</sup> Additionally, ethics committees have held that the death of the client does not terminate the duty.<sup>42</sup> These facts lend support to advocates of an absolute duty of confidentiality, leading them to assert that ethics codes should not complicate the duty with exceptions, and should consider the duty of confidentiality never-ending.<sup>43</sup>

Ethics codes generally dictate a strict principle of confidentiality that attaches to all information relating to a client under any circumstances.<sup>44</sup> The drafters of the Model Rules, the most recent and widely recognized set of rules governing lawyer conduct, never considered an historical exception

no provision for time limit on duty of confidentiality); ALABAMA RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1991) (containing no provision for time limit on duty of confidentiality); MASSACHUSETTS CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101 (1972) (containing no provision for time limit on duty of confidentiality).

38. See *supra* notes 31-32 and accompanying text (citing advocates of limited exceptions to duty of confidentiality); see also *supra* notes 34-36 and accompanying text (discussing exceptions contained in Model Code and Model Rules).

39. See *infra* notes 40-42 and accompanying text (discussing ethics committee opinions relating to duration of duty of confidentiality).

40. Virginia State Bar Ethics Comm., Op. 812 (1986).

41. See MODEL RULES, *supra* note 17, Rule 1.6 comment (stating that duty of confidentiality continues after lawyer-client relationship has terminated); MODEL CODE, *supra* note 17, EC 4-6 (stating that lawyer's obligation of confidentiality continues after termination of lawyer's employment).

42. See, e.g., Disciplinary Commission of the Alabama State Bar, Ethics Op. RO-87-126 (1987) (holding that lawyer's obligation to safeguard client confidences does not terminate upon client's death); Washington State Bar Code of Professional Responsibility Comm., Formal Op. 175 (1982) (concluding that lawyer's statutory and ethical duties survive death of client); Mississippi State Bar, Op. 119 (1986) (finding that lawyer owes same duty of confidentiality to deceased client as to living client); Mississippi State Bar, Op. 123 (1986) (finding that lawyer owes duty of confidentiality to deceased client and must respect client's desire for strict confidentiality); Los Angeles County Bar Association Ethics Comm., Formal Op. 414 (1983) (holding that lawyer has ethical obligation not to reveal client's confidential communications after client's death); Wisconsin Professional Ethics Comm., Formal Op. E-82-14 (1982) (stating that lawyer's duty to preserve client secrets and confidences does not end with client's death, but continues indefinitely unless client consents to or court orders disclosure or client waives attorney-client privilege).

43. See *supra* notes 31-32 and accompanying text (discussing argument for absolute confidentiality).

44. See *supra* note 29 and accompanying text (discussing broad scope of duty of confidentiality); MODEL CODE, *supra* note 17, EC 4-4 (stating that ethical obligation exists without regard to nature or source of information or fact that others share knowledge); MODEL RULES, *supra* note 17, Rule 1.6 comment (stating that ethical rule applies to all information relating to representation, whatever source).

to the duty of confidentiality when formulating the rules.<sup>45</sup> Moreover, donation of private papers does not fit within any of the traditionally accepted exceptions to the rules of ethics.<sup>46</sup> Consequently, lawyers must consider the provisions of the ethical code in their jurisdiction that appear to relate to this issue and extract from those provisions a set of guidelines to aid in solving a problem never contemplated.<sup>47</sup>

Lawyers also may look to the various ethics opinions issued by state bar committees relating to the handling of confidential documents and to the donation of historically valuable documents when seeking to resolve this difficult issue.<sup>48</sup> The Professional Ethics Committee of the Florida Bar applied the provision for protection of "confidences and secrets" in DR 4-101 to information which might be contained in client files and records.<sup>49</sup> Responding to an inquiry regarding the ethical guidelines for retention and destruction of client files, the committee cited Ethical Consideration 4-6, which states in part:

A lawyer should also provide for the protection of the confidences and secrets of his client following the termination of the practice of the lawyer, whether termination is due to death, disability or retirement. For example, a lawyer might provide for the personal papers of the client to be returned to him and for the papers of the lawyer to be delivered to another lawyer or to be destroyed.<sup>50</sup>

The committee stated that the interests of the client should be the dominant consideration in the disposition of the client files and that the lawyer should make every effort to contact the client prior to disposing of any client papers.<sup>51</sup>

In addressing the issue of confidentiality with regard to a lawyer's desire to donate private legal papers, two state bar committees have emphasized the importance of client interests.<sup>52</sup> A lawyer who was about to close his

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45. See Kaplan, *supra* note 7, at 37 (quoting Prof. Geoffrey C. Hazard, Jr.) (stating that drafters never mentioned notion of historical exception when formulating Model Rules).

46. See *supra* notes 34-36 and accompanying text (discussing exceptions contained in ethics codes to duty of confidentiality); MODEL CODE, *supra* note 17, DR 4-101(C) (setting out situations where lawyer may reveal client confidences); MODEL RULES, *supra* note 17, Rule 1.6(b) (listing exceptions to rule prohibiting disclosure of client information).

47. See *supra* note 17 and accompanying text (citing examples of ethics rules relating to lawyer's duty of confidentiality and indicating which states have adopted versions of rules).

48. See *infra* notes 49-74 and accompanying text (citing ethics committee decisions relating to ethical duty of confidentiality and lawyers' papers).

49. Florida Bar, Staff Op. TEO83018 (1982). The opinion states that Canon 4 of the Code of Professional Responsibility establishes guidelines for preserving the confidences and secrets of a client, and states that these guidelines are applicable to information which might be contained in client records and files. *Id.* at 2.

50. *Id.* at 1-2 (citing Model Code EC 4-6).

51. *Id.* at 2.

52. See Oklahoma Bar, Legal Ethics Op. 301 (1983) (holding that files of lawyer containing matters of historical significance may not be turned over to historical or educational

practice and desired to give some of his files to an educational institution asked the Oregon State Bar Committee on Legal Ethics whether the lawyer properly could donate files to an institution for historical purposes without the clients' consent.<sup>53</sup> The committee observed that the majority of a lawyer's files contain material relating to confidential communications.<sup>54</sup> The committee concluded that the lawyer, by giving the files to the institution, would be violating the Oregon State Bar Rules of Professional Conduct, which require that a lawyer maintain and preserve the confidences and secrets of clients.<sup>55</sup>

In a subsequent opinion, the Oklahoma State Bar cited the Oregon State Bar opinion in considering whether a lawyer could donate files containing matters of historical significance to an historical or educational institution.<sup>56</sup> The Oklahoma State Bar concluded that if the files contained information that DR 4-101 defined as "confidences or secrets," the lawyer must obtain the express permission of the individual client whose files were in question.<sup>57</sup> Moreover, the bar committee warned the lawyer of the "great danger" of exposing confidences and secrets by turning over files to any other entity for any purpose, historical, educational or otherwise.<sup>58</sup> The committee noted that the Oklahoma Code of Professional Responsibility required consent even if a client no longer is the lawyer's client or is dead.<sup>59</sup>

The decision by the Oklahoma State Bar is ambiguous because the decision fails to specify from whom the lawyer may obtain permission to donate client files if a client is no longer alive.<sup>60</sup> The opinion also fails to address whether unavailability of consent from another source after the death of a client mandates the permanent closure of the files and prohibits the lawyer from giving the files to any outside entity for any purpose.<sup>61</sup>

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institution). The Oklahoma Bar committee asserted that the files probably contained confidences and secrets of clients protected under the Oklahoma Code of Professional Responsibility. *Id.* at 1. The committee concluded, therefore, that the lawyer could not give the files to the institution unless the lawyer obtained consent from the client or the file contained no information that could be properly classified as confidences or secrets as defined in DR 4-101. *Id.*; see also Comm. on Legal Ethics of the Oregon State Bar, Op. 105 (1962) (holding that lawyer about to close practice could not donate files to educational institution for historical purposes without express permission from client, because doing so might expose confidences and secrets of client).

53. Comm. on Legal Ethics of the Oregon State Bar, Op. 105 (1962).

54. *Id.*

55. *Id.*

56. Oklahoma Bar, Legal Ethics Op. 301 (1983).

57. *Id.* at 2.

58. *Id.*

59. *Id.* at 3.

60. *Id.*; but see Disciplinary Commission of the Alabama State Bar, Ethics Op. RO-87-126 (1987) (holding that lawyer may not reveal client confidences in book about deceased clients unless deceased clients executed consents of release of such information prior to their deaths, or lawyer obtains consents from deceased clients' estates).

61. Oklahoma Bar, Legal Ethics Op. 301, at 3 (1983).

The opinion, therefore, fails to provide guidance on these important issues to a lawyer wishing to donate historically significant papers.<sup>62</sup>

The Committee on Legal Ethics of the District of Columbia Bar recently addressed the issue of donating papers with regard to the case of the lawyer mentioned above, who is currently in private practice and wishes to donate legal papers to a university archive.<sup>63</sup> The lawyer's specific question was whether he could turn over papers from his private practice reflecting his work and advice without the consent of affected clients, when obtaining such consent probably would be extremely difficult.<sup>64</sup> The committee noted that Canon 4 of the Code of Professional Responsibility governed disclosure, stating that the drafters designed this provision to promote candor and to require a lawyer to preserve the "confidences" and "secrets" of a client.<sup>65</sup> Moreover, the committee asserted that papers containing any "confidences" or "secrets" as defined by DR 4-101(A) ethically might be donated to the archive only under the conditions described in the remaining part of the rule, which required the consent of the affected client.<sup>66</sup> The committee concluded that the lawyer could donate the questionable portions of the papers only with the informed consent of the client.<sup>67</sup> Accordingly, the committee determined that in the absence of client consent, the lawyer only could donate the papers after making any deletions necessary to protect his client's confidences and secrets.<sup>68</sup>

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62. See *supra* notes 60-61 and accompanying text (discussing issues on which Oklahoma Bar opinion fails to provide guidance).

63. Comm. on Legal Ethics of the District of Columbia Bar, Op. 128 (1983). The committee observed that the university created the archive to house documents of certain individuals who have participated in the shaping of United States domestic and foreign policy. *Id.* at 1. The committee also stated that the archive served as a research facility for historians seeking access to raw materials concerning the development of government policies that would otherwise be unavailable. *Id.* at 1-2. The committee noted that the lawyer wishing to donate the files had endeavored, in the course of representing private clients, to affect government policy on behalf of those clients by writing letters to government officials, filing comments concerning proposed regulations and statutory changes, and by taking other similar actions. *Id.* at 2.

64. *Id.* at 3. The lawyer asserted that obtaining the consent of the affected clients would probably be "too time consuming and onerous." *Id.* The lawyer also asked the committee whether there were any ethical considerations regarding donation of papers written or received while the lawyer was in government service. *Id.* at 3. The committee did address this question; however, the considerations surrounding government papers are different than those surrounding private papers, and are not discussed in this note. *Id.* at 6-10.

65. *Id.* at 3-4 (citing Model Code Canon 4).

66. *Id.* at 5.

67. *Id.* at 5. The committee first discussed the scope of the consent requirement. *Id.* The committee asserted that the client's consent would be effective only after the lawyer had apprised the client fully of the potential consequences of disclosure. *Id.* The committee also stated that the consent restriction applies to both former and present clients and continues to apply as long as the client continues to hold the subject information confidential, the client has made a continuing request for non-disclosure, or disclosure continues to be potentially detrimental or embarrassing to the client (i.e., contains client "secrets"). *Id.*

68. *Id.* at 5.

The District of Columbia Bar opinion forcefully dictated the first step a lawyer seeking to donate private papers must take: the lawyer must attempt to obtain the express consent of the affected client no matter how "time consuming" or "onerous" that task may be.<sup>69</sup> If a living client fails to give consent, a lawyer has the responsibility to ensure that whatever documents the lawyer decides to donate do not disclose any information that will breach the ethical duty of confidentiality.<sup>70</sup> The speculative nature of any decision about what material might be embarrassing or detrimental to a client, and thus constitute a "secret" as defined in DR 4-101(A), most likely will deter the thoughtful lawyer from donating any papers at all when the client has not given consent.<sup>71</sup> The lawyer may not wish to assume the risk of making a determination that will leave the lawyer open to bar-imposed sanctions should a party with some interest in the papers wish to challenge the lawyer's determination.<sup>72</sup>

The District of Columbia Bar opinion makes clear that if the client is still alive and refuses to consent to donation of the lawyer's papers relating to the client's case, the lawyer may not donate the papers.<sup>73</sup> The opinion left open, however, the question of the effect of changed circumstances, such as the death of the client, on any potential detriment or embarrassment to the client resulting from disclosure.<sup>74</sup> The District of Columbia Bar opinion committed this issue to the lawyer's discretion, urging that any doubts be resolved in favor of nondisclosure.<sup>75</sup> The opinion, therefore,

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69. *Id.* See also cases cited *supra* note 52 (holding that client consent is required before turning files over to institutions).

70. Comm. on Legal Ethics of the District of Columbia Bar, Op. 128, at 5 (1983). The committee also noted that the attorney must make whatever deletions are necessary to protect his client's confidences and secrets. *Id.*

71. See *infra* note 72 (discussing possible consequences of lawyer's breach of ethical duty of confidentiality).

72. See Myrick, *supra* note 20, at 90-91 (discussing consequences resulting from lawyer's breach of ethical obligation). Professional discipline in the form of disbarment, suspension or reprimand is the most probable consequence of a breach of the ethical duty. *Id.* at 90. Among the other possible consequences is a reversal of a favorable judgment where a lawyer has breached the duty of confidentiality and disqualification from any future action arising out of the same facts. *Id.* at 90-91. See also Pizzimenti, *supra* note 26, at 463-69 (discussing possible ramifications of violating ethical duty of confidentiality). Pizzimenti cites various civil causes of action that clients can maintain against a lawyer who violates the ethical duty of confidentiality. *Id.* at 463. Among these are breach of an express or implied promise to maintain confidentiality, breach of statutory duty, invasion of privacy, malpractice and breach of fiduciary duty. *Id.*

73. Comm. on Legal Ethics of the District of Columbia Bar, Op. 128 (1983). See *supra* notes 66-70 and accompanying text (discussing consent requirement).

74. *Id.* at 5, n.1. The District of Columbia Bar Committee on Legal Ethics also included disclosure by the client to third parties under "changed circumstances." *Id.* Additionally, the committee left the question of whether information remains confidential for attorney-client privilege purposes after changed circumstances for the governing jurisdiction to decide as a matter of law. *Id.*

75. *Id.*

allowed some room for flexibility, refraining from strictly prohibiting the donation of papers under "changed circumstances."

The facts underlying the District of Columbia Bar opinion limit the opinion's application to situations where the lawyer is living and still is in actual possession of the documents.<sup>76</sup> An entirely different set of considerations arises if the lawyer no longer is alive and papers are in the possession of the lawyer's heirs or if the documents are in the possession of partners in a law firm.<sup>77</sup> After all, many requests for client documents for historical, educational or research purposes are likely to be for papers concerning past clients or cases that have proven to be historically significant over the intervening years.<sup>78</sup> In many instances the particular lawyer who was in charge of the case has moved on to another firm or position or has died.<sup>79</sup> The status of a client as an entity such as a corporation poses yet another set of problems in attempting to identify who has the right to consent to disclosure of client confidences and secrets if the entity is no longer in existence.<sup>80</sup> Courts and ethics committees have provided little direction to

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76. See *supra* notes 63-75, *infra* notes 77-79 and accompanying text (discussing Committee on Legal Ethics of the District of Columbia Bar opinion). Cf. Oklahoma Bar, Legal Ethics Op. 301 (1984) (addressing lawyer's question as to whether files of lawyer, deceased or not, may be turned over to historical or educational institution). Though the lawyer's inquiry encompassed a deceased lawyer's files, the bar committee did not specifically address any issues involved in turning over a deceased lawyer's files. *Id.* Rather, the bar committee extended the holding to cover a dead *client's* files. *Id.* at 3.

77. See *infra* notes 193-98 and accompanying text (discussing Mississippi State Bar opinion regarding disposition of client files after lawyer's death).

78. See *infra* note 108 and accompanying text (discussing confidential presidential papers and methods used by archivists to protect documents in collections).

79. See *infra* notes 193-98 and accompanying text (discussing Mississippi State Bar opinion concerning disposition of client papers after lawyer's death); see also MODEL CODE, *supra* note 17, EC 4-6 (stressing importance of lawyer providing for disposition of client papers after termination of practice, whether due to death, disability or retirement, and suggesting possible means of disposition).

80. See C. WOLFRAM, MODERN LEGAL ETHICS §6.5, at 283-91 (1986) (discussing application of attorney-client privilege to corporate and other entity clients). Examining the area of attorney-client privilege, a concept closely related to the ethical duty of confidentiality, with regard to entity clients, may provide some guidance for the lawyer faced with this issue; see also *infra* notes 170, 172, 176-77 and accompanying text (discussing attorney-client privilege).

Courts have held that the power to assert or waive the attorney-client privilege for a corporation in bankruptcy proceedings belongs to the trustee. *Commodity Futures Trading Comm'n v. Weintraub*, 471 U.S. 343, 358 (1985) (holding that trustee of corporation in bankruptcy has power to waive corporation's attorney-client privilege with respect to pre-bankruptcy communications); *Citibank, N.A. v. Andros*, 666 F.2d 1192, 1195-96 (8th Cir. 1981) (holding that officers of bankrupt corporation may not assert or waive corporation's attorney-client privilege because that power vests exclusively in bankruptcy trustee upon bankruptcy adjudication). When a corporation has ceased to exist due to acquisition, the acquiring entity controls exercise of the attorney-client privilege. *Dickerson v. Superior Court, Santa Clara County*, 135 Cal.App.3d 93, 98, 185 Cal.Rptr. 97, 99 (1982) (holding that attorney-client privilege, originally held by corporation, is now held by corporation's successor in interest after merger).

assist lawyers in reconciling these difficulties.<sup>81</sup> Accordingly, a lawyer wishing to donate his papers will face many unresolved issues.

The goal of historians in gleaning valuable information from lawyers' papers and the interest of lawyers in protecting client confidentiality pose a conflict between the two groups that seems insurmountable.<sup>82</sup> However, the repositories in which a lawyer may place private papers and the archivists who maintain the collections may form a link between historians and lawyers in their attempts to address the interests of both groups.<sup>83</sup> Archivists who seek lawyers' papers have devised their own methods to address issues of confidentiality that arise in the donation of sensitive client documents.<sup>84</sup> Archivists recognize a lawyer's personal papers as documentation of a private and personal relationship, and acknowledge that disclosure of the confidential information contained in those papers is a very sensitive issue and that institutions must handle the issue carefully.<sup>85</sup> In the view of the archivist, however, the potential value of the papers outweighs the difficulties encountered in acquisition, and archival institutions are making efforts to accommodate the need for client confidentiality while at the same time making the documents available for historical research.<sup>86</sup>

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81. See *supra* notes 48-74 and accompanying text (discussing bar opinions and holdings relating to duty of confidentiality and consent requirement for lawyer disclosure of confidential client information).

82. See Hay, *Archival Research in the History of the Law: A User's Perspective*, 24 ARCHIVARIA 36, 44 (1987) (discussing problem posed by different intellectual commitments of lawyers and historians). Hay asserts that the concerns of lawyers and historians lie at different poles with regard to their public duty in respect to the truth. *Id.*; see also Trimble, *supra* note 5, at 440 (asserting that archivists and historians must wrestle with conflict between protection of confidences and eventual historical research value of legal papers).

83. See Trimble, *supra* note 5, at 441 (asserting that archivist or librarian is caught between desire to promote and assist historical research and concern about rigid restrictions imposed by ABA rules).

84. See *infra* notes 85-123 and accompanying text (discussing archivists' methods for dealing with confidential material in collections).

85. See Chalou, *Reference*, in A MANUAL OF ARCHIVAL TECHNIQUES 52 (R. Baumann ed. 1982) (discussing confidential materials that archive may receive and techniques for dealing with such materials).

86. See generally McReynolds, *supra* note 5 (discussing problems associated with and solutions to accessioning lawyers' papers); Whyte, *The Acquisition of Lawyers' Private Papers*, 18 ARCHIVARIA 142 (discussing problems in acquiring lawyers' papers and presenting solutions used by institutions in Canada and the Netherlands in obtaining lawyers' private papers); Schaeffer, *supra* note 5 (discussing program launched by Osgoode Society, Ontario, Canada's legal history society, to obtain private legal records in Ontario).

Courts also have recognized the benefits of preservation, cataloging and storage of historical documents, and the importance to the archival donor of the freedom to place restrictions on disclosure of certain information. *Wilkinson v. F.B.I.*, 111 F.R.D. 432, 443 (C.D.Cal. 1986) (rejecting argument for archival privilege of donors not to reveal documents placed in archive under restricted access agreement). One court emphasized the importance to our nation of efforts to shed new light on and analyze historical events, and declared that it is not the role of the courts to place restraints on commentators and historians as they seek to preserve the nation's heritage. *Street v. National Broadcasting Co.*, 645 F.2d 1227, 1236 (6th Cir. 1981) (discussing considerations underlying public figure doctrine).



Archives in possession of lawyers' papers might choose not to address the issue of restrictions if the donor indicates that confidentiality is not a problem, or the archives might impose only those restrictions dictated by the donor.<sup>87</sup> In dealing with sensitive documents such as private legal papers, however, the archive itself may take an active role in protecting confidentiality by creating special restrictions and rules of access.<sup>88</sup> Archivists may create these rules after carefully considering the law and guidance from various sources, including the wishes of the donor.<sup>89</sup>

An important advantage of curator-imposed restrictions is the increased willingness of donors to give more complete and extensive collections if the donors believe that institutions will protect their gifts and guard their privacy.<sup>90</sup> Accordingly, a lawyer attempting to obtain consent from a client in order to donate papers may find the types of restrictions that archives often place on manuscript collections helpful.<sup>91</sup> The lawyer may consult with the institution as to what types of restrictions are available, and may present these restrictions to the client as assurance that the institution will maintain the client's confidentiality.<sup>92</sup> Alternatively, the lawyer may propose that the lawyer and the client work together to create restrictions which the

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87. See K. DUCKETT, *MODERN MANUSCRIPTS: A PRACTICAL MANUAL FOR THEIR MANAGEMENT, CARE, AND USE* 224 (1975) (stating that forms of restrictions on access are bounded only by imagination of donor and acceptability to curator); also McReynolds, *supra* note 5, at 7 (discussing archivists' means of dealing with legal papers). McReynolds states that one method of dealing with lawyers' papers is not to address the issue of confidentiality at all if the issue has not been a problem for the donor. *Id.*; G. Peterson & T. Peterson, *Archives & Manuscripts: Law*, Soc. OF AM. ARCHIVISTS 26 (1985) (listing three options as to who may impose restrictions on donations). The donor, the donor's designee, or the archivist may establish restrictions on collections. *Id.*

88. See Holbert, *Archives & Manuscripts: Reference & Access*, Soc. OF AM. ARCHIVISTS (1977) (discussing types of restrictions that archivist or donor may impose on access to materials); Peterson & Peterson, *supra* note 87 (stating that archivist may impose restrictions on collections).

89. See, Holbert, *supra* note 88, at 6 (asserting that restrictions may be mandated by law or regulation, imposed by donors, or be necessary to protect archive from invasion of privacy suits); McReynolds, *supra* note 5, at 5 (stating that archivists and curators are bound by privacy laws, deeds of gift and other rules); Hinchey & McCausland, *Access and Reference Services*, in *KEEPING ARCHIVES 190-91* (A. Pederson ed. 1987) (suggesting that archivists must consider clientele served by archive, sensitivity and confidentiality of records, protection of individual privacy and donor-imposed restrictions in formulating access policies); also Chalou, *supra* note 85, at 52 (asserting that any archive holding information given in confidence should have capacity to develop and use restrictions).

90. See K. DUCKETT, *supra* note 87, at 225-26 (discussing restrictions imposed on collections by curators). Conversely, Duckett states that unless archivists voluntarily restrict modern collections, they must expect donors to censor their own material heavily prior to giving the material to an institution. *Id.*

91. See *supra* notes 66-70 and accompanying text (discussing consent requirement for lawyers wishing to donate papers).

92. See *supra* notes 84-91, *infra* notes 93-123 and accompanying text (discussing various restrictions that archives impose upon collections, degrees of protection afforded by each method and which client needs various restrictions would serve).

client believes will adequately protect the client's interests, using as guidelines the kinds of restrictions that curators themselves impose on collections.<sup>93</sup> These restrictions fall under three basic categories.<sup>94</sup>

The first of these is a sealed collection.<sup>95</sup> This type of restriction is used rarely and is the most difficult for an institution to administer.<sup>96</sup> Only the donor or the donor's assignees have access to sealed papers, which typically document a secret or controversial matter.<sup>97</sup> Archivists give these collections extra protection, and the donor typically sets a time period during which the archive seals the collection.<sup>98</sup> Archivists vary in their opinions as to what should be the maximum duration of this time period, but most agree that the time period should be "reasonable."<sup>99</sup> Whether the collection consists of legal papers or other types of manuscripts, this method is the least desirable from the archivist's point of view.<sup>100</sup> The sealed collection is the most expensive to maintain and gives the least consideration to the interests of those who might gain valuable historical information from the collection.<sup>101</sup> A client with a strong interest in maintaining confidentiality may prefer this type of restriction because the client may determine at what time the archive may permit access to the papers by anyone other than the lawyer or the client.<sup>102</sup> The sealed collection ensures the physical preservation of documents that the lawyer believes to be of historical significance, while fulfilling the client's desire for the strictest degree of confidentiality.<sup>103</sup>

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93. See *supra* note 87 and accompanying text (discussing willingness of some archives to impose restrictions requested by donor); see also *infra* notes 96-123 and accompanying text (describing various available restrictions on collections).

94. See K. DUCKETT, *supra* note 87, at 224-25 (describing sealed, closed and limited access collections).

95. See *id.* at 224 (describing sealed collection); see also Holbert, *supra* note 88 at 6-7 (discussing sealing and closing as means of putting restrictions on collections).

96. See K. DUCKETT, *supra* note 87, at 224 (asserting that sealed collection is used less today because, due to strict maintenance procedures, sealed collection is difficult for archive to administer).

97. See *id.* (describing when sealing procedure is commonly evoked and who may have access to sealed collections). Duckett states that when access is limited to the donor and the donor's assignees, the collection should be sealed and the conditions for breaking the seal should be clearly defined. *Id.*

98. See *id.* (discussing various time periods imposed on sealed collections).

99. See *id.* (stating that time period for which documents are sealed must be reasonable one, and suggesting that twenty-five years is reasonable time). Duckett states that a person's lifetime plus fifty years would be the maximum acceptable time period. *Id.* Duckett asserts, however, that a specific period of time running from the date of acquisition is easier for an archive to administer because the exact date of death may be difficult to determine. *Id.*

100. Interview with Sarah K. Wiant, Law Librarian, Washington & Lee University School of Law, in Lexington, Virginia (Jan. 15, 1991); see also Holbert, *supra* note 88, at 6 (stating that no excuse for archive holding material that is permanently sealed exists if there is no hope of relaxation of ban on use); Chalou, *supra* note 85, at 52 (stating that archive must weigh both number and time period of restrictions offered by donors).

101. Interview with Sarah K. Wiant, *supra* note 100.

102. See K. DUCKETT, *supra* note 87, at 224 (suggesting various time periods for which archivists or donors seal collections).

103. See *id.* at 224 (stating that only donor or assignees have access to sealed collection,

The second category of restricted collection is the closed or partially closed collection.<sup>104</sup> The major difference between this type of restriction and the sealed collection is that the archivist processes the documents before the archive closes the collection.<sup>105</sup> The concern with the time limit on restricted access applies to closed collections as well as to sealed collections.<sup>106</sup> However, allowing the archivist and the archive staff the opportunity to glean valuable information from the papers before the archive forecloses access to all or part of the documents somewhat alleviates the drawbacks associated with an extended period of restriction on a closed collection.<sup>107</sup> Modern archives frequently use the closed collection restriction.<sup>108</sup> Archives also use this restriction to close parts of collections when open access to all of the documents may prove harmful to the donor.<sup>109</sup>

Documents under limited access make up the third category.<sup>110</sup> The archive itself provides the means for a limited access collection, but the donor sets the restrictions by giving specific instructions to the archive as to who may have access to the documents, when those individuals may have access and under what conditions the archive may grant access.<sup>111</sup> Restrictions of this type are set by donors who desire to donate their papers for beneficial use and at the same time wish to retain control over their

and that sealed collections are given extra protection to mitigate against accidents and to remove extra temptation from curious).

104. *See id.* at 224 (describing closed collection); *see also* Holbert, *supra* note 88, at 6-7 (discussing sealing and closing as means of restriction on collection).

105. *See* K. DUCKETT, *supra* note 87, at 224 (stating that closed collection is administered similarly to sealed collection, except that curator and staff process documents before closing collection).

106. *See id.* (stating that closed collections are handled and administered quite similarly to sealed collections).

107. *See id.* (stating that curator and staff have access to closed collection).

108. *See id.* at 225 (stating that closing of segments of collections has become quite common in modern collections). Duckett cites an example of partial closing of collections of papers of a person who has held government office pending reclassification of secret status by the government. *Id.* Duckett states that perhaps the most widely publicized examples of partially closed collections are the large segments of papers in the presidential libraries which have been closed by government archivists after receiving the collections, most of which were unscreened. *Id.* Government archivists have closed a large portion of such material for "reasons of propriety." *Id.*; *see also* Holbert, *supra* note 88, at 6 (discussing circumstances in which archivists close collections). Holbert asserts that archivists use temporary closings of collections until they are processed, or when the ownership or legal status of an accession may be in doubt. *Id.*

109. *See* K. DUCKETT, *supra* note 87, at 225-26 (stating that archives commonly close segments of collections, especially when collection contains papers of person who has held government office). According to Duckett, archivists impose these restrictions because they accept unscreened collections, and they feel it is their obligation to protect the donor. *Id.*

110. *See id.* at 224-25 (discussing forms of limited access to document collections).

111. *See id.* (describing forms of limited access that donors can impose on gifts). Duckett lists several forms of limited access that donors may wish to impose on collections. *Id.* Donors may wish to approve all requests to use a collection, as well as allow researchers to take notes or make copies from the collection, or the donors may delegate the power of approval to an institution. *Id.* at 225. Donors may wish to limit access to a biographer. *Id.*

gifts.<sup>112</sup> In addition to other limitations, an archive may require a researcher to whom the archive has given access to the papers to agree not to use any information directly related to the lawyer-client relationship or the names of any persons identified in that information.<sup>113</sup> This type of restriction on a collection will address best the concerns of a client who has a strong interest in confidentiality relating only to a certain use of the papers or to the access of a certain group of persons to the confidential information contained therein.<sup>114</sup> For example, a client may set restrictions prohibiting journalists from examining the papers for use in a media story or broadcast, or may restrict access to a biographer.<sup>115</sup>

In addition to the three major categories of restrictions on collections, archives attempt to solve the problems surrounding the donation of lawyers' papers by establishing a special screening process.<sup>116</sup> This process involves lawyers, who are retained by the archive to go through the donated papers before the archive permits any public access and to identify the documents that may conflict with confidentiality considerations if anyone should disclose information contained therein.<sup>117</sup> The screening process thus places the responsibility on a third party with professional knowledge of the issues of confidentiality and the legal rules involved, instead of placing the responsibility on the archivist and the staff.<sup>118</sup> In a situation where client consent is impossible, this type of restriction may serve the interests of the donating lawyer.<sup>119</sup> Members of the legal profession are more aware than the archivist of the collection of ethical restrictions and the possible ramifications of breaching the codes of ethics and thus lawyer-recommended restrictions reduce the risk of disciplinary action against the donating lawyer.<sup>120</sup> The screening process, however, may not protect the client's interest to the same

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112. See *id.* at 224 (pointing out that donors may particularly wish to maintain publication or censorship controls over donated papers).

113. See McReynolds, *supra* note 5, at 8 (stating that archives place responsibility of maintaining confidentiality on researcher).

114. See *supra* notes 110-113 and accompanying text (discussing limited access method used by archivists to impose restrictions on collections); see *infra* note 111 and accompanying text (discussing limited access and fact that donor may place restrictions on who may examine papers and for what purpose).

115. See *supra* note 111 and accompanying text (describing forms of limitations that donors may impose on access).

116. See McReynolds, *supra* note 5, at 7-8 (discussing screening process to identify and restrict access to confidential client papers). According to McReynolds, a screening process was proposed for the records of the Center for Constitutional Rights in New York City when the Center was donating papers to a library and for NAACP Legal Defense and Educational Fund records going to the Library of Congress. *Id.* at 7.

117. See *id.* at 7 (discussing use of lawyers in screening process).

118. See *id.* (stating that lawyers who are bound by ethical codes, and who know laws, put stamp of approval on collection).

119. See *infra* note 120 and accompanying text (discussing why screening process may best serve interests of donating lawyer when client consent is unavailable).

120. See McReynolds, *supra* note 5, at 8 (discussing use of lawyers in screening process). Archivists also benefit from a screening arrangement. *Id.* McReynolds states that the screening process provides archivists with a "clean" collection as well as provides some protection from members of the legal profession. *Id.*

extent that a sealed collection protects the client's interest.<sup>121</sup> The papers that are significant to a lawyer screening the collection are not necessarily those that are significant to a client.<sup>122</sup> The client, therefore, may be hesitant to consent to donation when a screening process is the only restriction available, and when the archivist and staff still have access to the papers before the archive closes the collection.<sup>123</sup>

The restrictions that an archive places on document collections are of no help to a lawyer when a client has refused to consent to donation of papers.<sup>124</sup> Limited access, for example, is the most common method archives use to deal with confidentiality problems and was the method that a prominent civil rights lawyer and the Library of Congress decided upon in a recent case involving donation of the lawyer's records.<sup>125</sup> The lawyer and the Library reached a compromise that permitted researchers to examine the papers, but which required researchers to obtain permission from living clients or clients' executors before publication of any confidential client information.<sup>126</sup> Under the compromise, however, once the client dies and no longer has an active estate, researchers may publish or report any information contained in the files.<sup>127</sup> According to the District of Columbia Bar opinion discussed above, however, such a compromise is unacceptable.<sup>128</sup> The lawyer wishing to donate private papers in that case inquired whether limiting access to "bona fide historians," who would be required to check

121. See *id.* at 7-8 (asserting that one defect in screening process is that examination of records is sometimes perfunctory and truly does not protect confidentiality of clients).

122. See *supra* note 49-51 and accompanying text (discussing Florida State Bar opinion and committee's holding that interests of client should be dominant consideration in disposition of client files).

123. See K. DUCKETT, *supra* note 87, at 226 (expressing concern that unless archivists voluntarily restrict collections, archivists must expect donors to censor their own material heavily).

124. See *supra* notes 69-75 and accompanying text (discussing consent requirement as set out in Committee on Legal Ethics of the District of Columbia Bar opinion); see also *supra* notes 52-62 and accompanying text (discussing other ethics committee opinions concerning donation of client papers and requiring consent of client); see generally MODEL CODE, *supra* note 17, DR 4-101(C)(1) (imposing consent requirement on disclosure by lawyer of confidences or secrets); MODEL RULES, *supra* note 17, Rule 1.6(a) (imposing consent requirement in order for lawyer to reveal confidential information relating to client); *supra* note 35 and accompanying text (discussing requirement of client consent imposed on lawyer by ethics rules).

125. See McReynolds, *supra* note 5, at 8 (discussing method of limited access used by Washington, D.C. civil rights lawyer Joseph Rauh); see also Kaplan, *supra* note 7, at 36 (discussing compromise agreement between Library of Congress and Joseph Rauh regarding collection of Rauh's papers).

126. See Kaplan, *supra* note 7, at 36 (discussing compromise agreement between Library of Congress and Joseph Rauh regarding collection of Rauh's papers).

127. See McReynolds, *supra* note 5, at 8 (discussing nature of agreement between Library of Congress and Joseph Rauh).

128. See Comm. on Legal Ethics of the District of Columbia Bar, Op. 128, at 6 n.2 (1983) (declining to accept limited access restrictions on lawyer's papers as alternative to client consent to donate papers).

with the donor or the donor's representative, would comply with the confidentiality rules.<sup>129</sup> The committee stated that because of the absolute nature of the consent requirement, limits on the scope of disclosure or restrictions on access to disclosed information cannot substitute or diminish the need for client consent.<sup>130</sup> Other ethics committees are in accord with the District of Columbia Bar opinion on this issue.<sup>131</sup>

The Committee on Legal Ethics of the Oregon State Bar addressed a similar question.<sup>132</sup> The educational institution to which the lawyer wished to donate files submitted a statement of the institution's ability to protect the files and to prevent criticism in regard to confidential communications.<sup>133</sup> The committee expressed its opinion that the institution's statement should be disregarded because it was not directly related to the lawyer-client relationship, was argumentative, and inferred a breach relating to the rules of confidentiality.<sup>134</sup> Accordingly, the problem of reconciling the lawyer's ethical duty of confidentiality when a lawyer wishes to donate papers is not so easily solved.<sup>135</sup> The issue of protecting confidential communications is a more serious problem than most lawyers recognize.<sup>136</sup> Lawyers must consider carefully the ramifications of making compromises with archives receiving private papers and of depending upon restrictions imposed by the archive to satisfy an ethical obligation.<sup>137</sup>

The available restrictions may be helpful, however, in opening up some negotiation on the issue of donating papers with a hesitant client.<sup>138</sup> If the client is willing to consent to donation only if the lawyer or the archive receiving the papers imposes certain restrictions, the lawyer first must ascertain exactly what types of papers the lawyer has included in the gift.<sup>139</sup>

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129. *Id.*

130. *Id.* at 6, n.2.

131. See Comm. on Legal Ethics of the Oregon State Bar, Op. 105 (1962) (rejecting ability of institution to protect files as alternative to client consent), *quoted in* Oklahoma Bar, Legal Ethics Op. 301 (1983).

132. Comm. on Legal Ethics of the Oregon State Bar, Op. 105 (1962).

133. *Id.*

134. *Id.*

135. See *supra* notes 60-62, 76-81 and accompanying text (discussing failure by ethics committees to address issue of donation of private papers and to provide guidance to lawyer wishing to donate papers).

136. See *supra* notes 53-55 and accompanying text (discussing Committee on Legal Ethics of the Oregon State Bar opinion stating that donation of private papers to institution without client's consent, even in light of restrictions on access, infers breach of rules of confidentiality); *supra* note 72 and accompanying text (discussing possible consequences of lawyer's breach of ethical duty of confidentiality).

137. See *supra* note 72 and accompanying text (discussing possible consequences of lawyer's breach of ethical duty of confidentiality).

138. See *supra* notes 84-123 and accompanying text (discussing types of restrictions that donors or archivists may impose on collections and discussing situations in which client may wish to utilize various restrictions).

139. Cf. Comm. on Professional and Judicial Ethics of the State Bar of Michigan, Op. R-5 (1989) (discussing law firms' retention of client files). The Michigan Bar committee drew

The lawyer must then consult with the client to determine the extent to which disclosure of those documents will affect the client's interest in confidentiality.<sup>140</sup> Moreover, in proposing restrictions on access, the lawyer must consider any other special circumstances surrounding the particular case or cases.<sup>141</sup>

The provisions for confidentiality made by lawyer-donors and archivists do ensure that an institution will maintain client confidentiality to one degree or another after the lawyer has donated papers.<sup>142</sup> None of these methods of restriction on access, however, aid a lawyer in answering the threshold question of whether the lawyer may donate private papers at all under an ethics code that puts no time limit on confidentiality.<sup>143</sup> The rules of ethics, as interpreted in the Committee on Legal Ethics of the District of Columbia Bar opinion, give the lawyer a great degree of discretion after the death of the client or under other "changed circumstances" to determine what constitutes a "secret."<sup>144</sup> Because of this high degree of responsibility that ethics rules impose upon a lawyer, ethics disciplinary boards will hold the lawyer responsible for disclosure of any material that proves to be embarrassing to the client or the client's estate.<sup>145</sup> Thus a lawyer risks the lawyer's reputation and practice when donating papers that contain any information about a particular client or case.<sup>146</sup>

distinctions between certain kinds of documents in the files and their subsequent treatment when a law firm wishes to dispose of or retain the documents. *Id.* The committee stated that a law firm may retain or destroy attorney work product documents relating to the case as the firm sees fit. *Id.* Law firms must separate out and account for items that constitute client property, however, and must offer the items to the client before disposing of the documents or records. *Id.*

140. *Cf. id.* (discussing requirement that lawyer consult with client before retaining or destroying items in files that belong to client).

141. *See supra* note 97 and accompanying text (discussing archivists' use of sealing method for dealing with controversial or highly sensitive matters); *supra* note 108 (discussing special situations where archivists closed parts of collections).

142. *See supra* notes 84-123 and accompanying text (discussing types of restrictions archivists may impose on collections).

143. *See supra* notes 128-34 and accompanying text (discussing Committees on Legal Ethics of the District of Columbia and Oregon State Bar opinions with regard to restrictions on access and client confidentiality); *see also supra* notes 60-62, 76-81 and accompanying text (discussing failure of ethics committees to provide guidance to lawyers considering donating private papers).

144. *See Comm. on Legal Ethics of the District of Columbia Bar, Op. 128, at 5 n.1 (1983)* (stating that question of whether changed circumstances eliminate any potential detriment or embarrassment to client must be determined by lawyer contemplating disclosure); *see also supra* notes 74-76 and accompanying text (discussing failure of Committee on Legal Ethics of the District of Columbia Bar opinion to address action lawyer should take under "changed circumstances").

145. *See supra* note 68 and accompanying text (discussing Committee on Legal Ethics of the District of Columbia Bar opinion regarding lawyer's responsibility for deleting client "secrets" from papers); *see also supra* note 72 and accompanying text (discussing possible consequences of lawyer's breach of duty of confidentiality).

146. *See supra* note 72 and accompanying text (discussing possible consequences of lawyer's breach of duty of confidentiality).

Consequently, the restrictions on access do not solve the problem of client confidentiality in a situation where client consent is impossible,<sup>147</sup> because the restrictions are not an adequate substitute for the lawyer exercising professional judgment.<sup>148</sup> A lawyer depending on these restrictions to protect confidential communications necessarily has reached a conclusion that the duty of confidentiality is not absolute after the passage of time,<sup>149</sup> after the death of a client,<sup>150</sup> or in the event that obtaining consent is impossible or impractical.<sup>151</sup> Ethical opinions holding that none of these circumstances terminate the lawyer's duty of confidentiality make such a determination extremely difficult for any lawyer.<sup>152</sup> Accordingly, a lawyer's fear of the repercussions of a decision to donate papers may deter the lawyer from donating private papers at all.<sup>153</sup> Ethics rules and decisions as they now exist may thus deprive researchers, historians, and society as a whole of a valuable historical resource.<sup>154</sup>

In light of the conflicting interests of lawyers and archivists in disclosure of a lawyer's private papers, an amendment to the ethics codes may help to alleviate the tension between the interests of the two groups.<sup>155</sup> An

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147. See McReynolds, *supra* note 5, at 10 (discussing circumstances where obtaining consent is infeasible). McReynolds asserts that the papers of the late Edward Bennett Williams, for example, should be "a goldmine of information." *Id.* at 9. A small collection of lawyers' papers representing one or two clients would present archivists with little difficulty in complying with consent requirement; however, obtaining consent from every client who provided confidential information to Williams would be infeasible. *Id.* at 10.

148. See Comm. on Legal Ethics of the District of Columbia Bar, Op. 128, at 6 n.2 (1983) (stating that restrictions on access do not affect need to obtain client consent); Comm. on Legal Ethics of the Oregon State Bar, Op. 105 (1962) (discussing archive restrictions on collections in relation to requirement of client consent).

149. See Virginia State Bar Ethics Comm., Op. 812 (1986) (stating that "the mere passage of time does not affect the ongoing requirement of an attorney to preserve confidentiality of his client"); see also MODEL CODE, *supra* note 17, EC 4-6 (stating that obligation of lawyer to preserve confidences and secrets of client continues after termination of lawyer's employment). Several state ethics codes incorporate Model Code EC 4-6 as a discretionary or advisory standard. See, e.g., GEORGIA CODE OF PROFESSIONAL RESPONSIBILITY EC 4-6 (1983) (incorporating Model Code EC 4-6); NEBRASKA CODE OF PROFESSIONAL RESPONSIBILITY EC 4-6 (1990) (incorporating Model Code EC 4-6); OHIO CODE OF PROFESSIONAL RESPONSIBILITY EC 4-6 (1970) (incorporating Model Code EC 4-6).

150. See *supra* note 42 and accompanying text (discussing effect of death of client on duty of confidentiality).

151. See Comm. on Legal Ethics of the District of Columbia Bar, Op. 128, at 3, 5 (1983) (requiring lawyer to obtain client consent even when obtaining consent is time consuming and onerous).

152. Cf. *supra* notes 125-27 and accompanying text (discussing agreement between Library of Congress and Joseph Rauh as solution to problems of confidentiality in donating private papers).

153. See also *supra* notes 125-27 (discussing agreement between Library of Congress and Joseph Rauh as solution to problems of confidentiality in donating private papers).

154. See *supra* notes 1-5 and accompanying text (discussing historical significance of lawyers' papers); *supra* note 72 and accompanying text (discussing possible consequences of breach of ethical duty of confidentiality).

155. See Kaplan, *supra* note 7, at 37 (discussing various viewpoints on imposing statutory limit on confidentiality).



amendment would provide a method for lawyers to donate their private papers for research and scholarship purposes without breaching the ethical duty of confidentiality. The proposed amendment provides an exception to the general rule of nondisclosure of confidential information relating to the representation of clients. This exception could be added to the exceptions already existing in most ethics codes.<sup>156</sup> The exception should take the following form:

- (A) A lawyer may disclose information relating to the representation of a client, including information in written form, that the lawyer reasonably believes to be of historical significance, for the sole purpose of research and scholarship use,
- (1) with the informed consent of an individual client or entity client, or
  - (2) with the consent of a deceased or dissolved client's representative.

The lawyer may disclose the information only after full disclosure to and consultation with the client or the client's representative, and under such terms and conditions as the client or representative may dictate, including any restrictions the client or representative may wish to impose upon access to papers left in the possession of an archivist or institution.

- (B) If, after making every reasonable attempt to obtain consent, the lawyer
- (1) is unable to locate the client or a representative, and consent is therefore unavailable, or
  - (2) the lawyer makes a good faith determination that obtaining consent will be excessively burdensome or otherwise impracticable, and
  - (3) there is no previous agreement with the client regarding the disposition of the information.

The lawyer may disclose the information twenty-five years after the death of the client or the dissolution of an entity client, subject to whatever terms and conditions the lawyer may deem necessary or appropriate.

An exception for historical information, rather than a blanket time limit on the duty of confidentiality, would preserve the time-honored confidentiality surrounding the lawyer-client relationship.<sup>157</sup> The proposed exception would allow a lawyer to reconcile the duty of confidentiality with the interests of historians and scholars, and society in general, in information that may shed new light on certain notable persons or events, or on specific

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156. See MODEL CODE, *supra* note 17, DR 4-101(C)(1)-(4) (stating when lawyer may reveal confidences or secrets of clients); MODEL RULES, *supra* note 17, Rule 1.6(b) (stating under what circumstances lawyer may reveal confidential information); *supra* notes 34-36 and accompanying text (discussing exceptions to confidentiality contained in ethics codes).

157. See notes 24-29 and accompanying text (discussing duty of confidentiality that ethics codes impose upon lawyers); see also *infra* notes 161-70 and accompanying text (discussing how proposed amendment preserves ethical duty).

aspects of life in certain time periods.<sup>158</sup> The exception, therefore, would provide a narrow channel through which ethics codes may exempt information beneficial to society from the ethical requirement of strict confidentiality. The exception would permit, but not require, a lawyer to disclose the information and would allow the client to retain the freedom and flexibility to work with the lawyer and the institution to impose whatever restrictions the client desires as a condition to the client's consent.<sup>159</sup> Alternatively, if consent is unavailable, the lawyer would have an opportunity to impose whatever restrictions the lawyer wishes in light of the type of documents in the collection and the specific information contained therein.<sup>160</sup>

While the amendment incorporates the interests of archivists, historians and researchers and allows for utilization of traditional archival methods in preserving historically significant documents, this exception does not jeopardize the policies that lie at the core of the lawyer's ethical duty.<sup>161</sup> The amendment preserves both the lawyer's moral obligation<sup>162</sup> not to reveal client "secrets" and promotes free and open communication between client and lawyer.<sup>163</sup> The exception works to preserve these policies in several ways. First, the amendment imposes a stringent obligation on the lawyer to preserve client confidentiality by requiring full disclosure to and consultation with the client regarding the lawyer's desire to donate papers and the requirement of client consent.<sup>164</sup> Second, the provision's consent requirement assures that the client can still feel secure in revealing confidences of any nature to the lawyer, because the client knows that the lawyer can reveal no information whatsoever without the client's authorization.<sup>165</sup> Third, if

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158. See *supra* notes 1-5 and accompanying text (discussing uses and potential historical significance of lawyers' papers); see also *supra* note 86 and accompanying text (discussing value of legal papers as recognized by courts and efforts of archives to balance archivists' interests with duty of confidentiality).

159. See *supra* notes 84-123 (discussing available restrictions that donors and archivists may impose on collections).

160. See *supra* notes 84-123 and accompanying text (discussing available restrictions that donors and archivists may impose upon collections).

161. See *infra* notes 162-69 and accompanying text (discussing ways in which proposed amendment works to maintain lawyer's obligation of confidentiality).

162. See *supra* note 26 and accompanying text (discussing lawyer's moral obligation to maintain client confidentiality).

163. See *supra* notes 26, 30-33 and accompanying text (discussing rationale of open communication between client and lawyer and its application in context of ethical duty).

164. See Comm. on Professional and Judicial Ethics of the State Bar of Michigan, Op. R-5 (1989) (discussing retention of client records). The Michigan Bar committee recommended that a law firm discuss the eventual disposition of client files with the client at the beginning of the lawyer-client relationship, after specific transactions are completed, or after the representation is completed by contacting the client to ask about disposing of the files after the firm's retention period has expired. *Id.* The committee stated that if a lawyer cannot locate a former client after a reasonable period of time, the lawyer may decide how to dispose of the files. *Id.* In its discussion of "disposal" of client files, however, the committee did not mention donating files to archives, but discussed only returning the files to the client or destroying the files. *Id.*

165. See *supra* note 26 and accompanying text (discussing importance of lawyer's obligation of confidentiality in assuring free and open communication between client and lawyer).

the client fears the repercussions of any disclosure on future generations, the requirement of consent by the client's estate, if at all possible, assures the client that those who stand to be injured by the disclosure of private information may prevent such disclosure.<sup>166</sup> Finally, should the matter be a highly sensitive one, the possible future unavailability of consent or impracticability of obtaining that consent should not interrupt frank communication between lawyer and client.<sup>167</sup> The amendment conditions disclosure of information, in the case of unavailability or impracticability of consent, upon the absence of any agreement between lawyer and client regarding disposition of the information.<sup>168</sup> Thus, the client may enter into an agreement with the lawyer stating that the lawyer will never reveal all or any portion of the information relating to a particular matter.<sup>169</sup>

The notion of an exception to confidentiality under certain circumstances is not unprecedented. In the sphere of the attorney-client privilege,<sup>170</sup> a

166. See *supra* note 26 and accompanying text (discussing effect and potential consequences of threat of future disclosure on openness of lawyer-client communication).

167. See *infra* notes 168-69 and accompanying text (discussing provision in proposed amendment conditioning disclosure on absence of prior agreement between lawyer and client that lawyer will not disclose confidential information).

168. See *supra* notes 79-81 and accompanying text (discussing consent requirement when consent is unavailable or impracticable to obtain and lack of guidance from ethics codes or opinions for lawyers faced with this issue).

169. See *supra* note 168 and accompanying text (discussing provision in proposed amendment conditioning disclosure on absence of prior agreement between lawyer and client that lawyer will not disclose confidential information).

170. See 1 G. HAZARD & W. HODES, *supra* note 26, at 90 (emphasizing that while professional-ethical rules of confidentiality are related to evidentiary rule of attorney-client privilege, professional-ethical rules of confidentiality also differ from privilege in important respects); Redlich, *Disclosure Provisions of the Model Rules of Professional Conduct*, 1980 AM. B. FOUND. RES. J. 981, 982 (stating that values that underlie attorney-client privilege form principal ingredients of ethical standards of confidentiality in Model Code, but acknowledging fundamental differences between privilege and Model Code); Myrick, *supra* note 20, at 80-84 (stating that although ethical obligation and evidentiary privilege share common policy justification, ethical rules and privilege are not co-extensive); Hazard, *An Historical Perspective on the Attorney-Client Privilege*, 66 CALIF. L. REV. 1061, 1064 (1978) (discussing differences between "privilege rule" and rules of professional ethics).

The underlying rationale of the attorney-client privilege is to encourage free and open communication between lawyer and client. See J. WIGMORE, EVIDENCE §§ 2290, 2291 (McNaughton rev. ed. 1961) (stating that law must prohibit compelled disclosure, except with client's consent, in order to promote freedom of consultation of legal advisers by clients and remove apprehension of compelled disclosure by the legal advisers); see also M. LARKIN, FEDERAL TESTIMONIAL PRIVILEGES §2.01 (1990) (stating that purpose of privilege is to protect and foster free communication between legal advisers and clients); 1 S. GREENLEAF, A TREATISE ON THE LAW OF EVIDENCE §238, at 319-20 (15th ed. 1892) (stating that without privilege no man would consult legal adviser or come safely into court). The attorney-client privilege forms the basis for the lawyer's ethical duty of confidentiality, though the ethical duty extends beyond the policy of open communication between lawyer and client. See *supra* note 26 and accompanying text (discussing rationale behind ethical duty of confidentiality).

The chief difference between the attorney-client privilege and the ethical duty of confidentiality lies in the scope of their application. See MODEL CODE, *supra* note 17, EC 4-4

concept closely related to the ethical duty of confidentiality, courts recognize an exception to the strict confidentiality that surrounds lawyer-client communications in the area of wills.<sup>171</sup> Though the courts generally view the attorney-client privilege as extending beyond the death of the client,<sup>172</sup> courts

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(stating that attorney-client privilege is more limited than ethical obligation of lawyer to guard confidences and secrets of client); MODEL RULES, *supra* note 17, Rule 1.6 comment (stating differences in scope and application of attorney-client privilege and rule of confidentiality established in professional ethics). The use of the attorney-client privilege is restricted to situations where an investigative body compels the lawyer to testify about the lawyer's confidential communications with a client, enabling the lawyer to refuse to answer questions regarding the communications or produce documents generated by those communications. See Redlich, *supra*, at 982 (discussing situation in which attorney-client privilege applies); G. HAZARD & W. HODES, *supra* note 26, at 90 (discussing when client may use attorney-client privilege). See J. WIGMORE, *supra*, §2292, at 554, for the traditional statement of the evidentiary privilege:

(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.

*Id.* The limited scope of the attorney-client privilege places any request for the lawyer's documents for research purposes outside the bounds of the privilege. See MODEL RULES, *supra* note 17, Rule 1.6 comment (stating that attorney-client privilege applies in judicial and other proceedings in which lawyer may be called as witness or otherwise required to produce evidence concerning client). The lawyer, however, must consider the possible detrimental effect the lawyer's voluntary disclosure of private documents may have on future use of the privilege as it relates to the particular client. See M. LARKIN, *supra*, §2.06 (stating that court ordinarily will find waiver if client, through lawyer, discloses contents of communications or advice of attorney to someone outside relationship); also MODEL CODE, *supra* note 17, EC 4-4 (stating that lawyer should endeavor to act in manner which preserves evidentiary privilege, and that lawyer should advise client of attorney-client privilege and assert privilege in timely manner unless waived by client).

171. See *U.S. v. Osborn*, 409 F. Supp. 406, 410 (D. Or. 1975) (asserting that lawyer may disclose client communications respecting preparation or execution of client's will), *aff'd in part, vacated in part, rev'd in part*, 561 F.2d 1334 (1977); *Clark v. Turner*, 183 F.2d 141, 142 (D.C. Cir. 1950) (asserting that lawyer may disclose client communications respecting tenor of client's will or intent when disclosure is sought in litigation between parties all claiming under deceased client's will).

172. See *In Re John Doe Grand Jury Investigation*, 408 Mass. 480, 485, 562 N.E.2d 69, 72 (Mass. 1990) (concluding that attorney-client privilege should not yield, either before or after client's death, to society's interest in obtaining every man's evidence); *Baldwin v. Commissioner*, 125 F.2d 812, 814 (9th Cir. 1942) (stating that privilege does not terminate at death of client); *T.C. Theatre Corp. v. Warner Bros. Pictures*, 113 F. Supp. 265, 268 (S.D.N.Y. 1953) (stating that lawyer is enjoined for all time, except as lawyer may be released by law, from disclosing matters revealed to lawyer by reason of confidential lawyer-client relationship). See also J. WIGMORE, *supra* note 170, §2323 at 630-31 (asserting that subjective freedom of client to communicate with lawyer could not be attained if after client's death, lawyer could be compelled to disclose confidences); 1 S. GREENLEAF, *supra* note 170, §243 (stating that protection given by privilege does not cease at death of client); M. LARKIN, *supra* note 170, §2.08 (stating that privilege survives death of client); C. McCORMICK, *HANDBOOK OF THE LAW OF EVIDENCE* §94 (2d ed. 1972) (stating that protection afforded by privilege will, in general, survive death of client).

have adopted a different treatment of the privilege with respect to wills<sup>173</sup> by carving special exceptions out of the privilege in this area.<sup>174</sup>

One commentator has labeled one of these exceptions as "waiver by representative."<sup>175</sup> The attorney-client privilege allows a lawyer to refuse to answer questions or present evidence regarding a client when a court compels a lawyer to so respond in a judicial or other proceeding.<sup>176</sup> Only the client may waive the privilege.<sup>177</sup> In the area of wills, however, the lawyer may possess valuable information about the intent of a deceased client due to the lawyer's role in the preparation of a contested will.<sup>178</sup> In proceedings where the parties all claim under the deceased client's will, courts have denied the lawyer the right to invoke the privilege, thereby permitting a party claiming under the will to call the lawyer to the stand to testify regarding the execution or preparation of the will.<sup>179</sup> The lawyer's testimony,

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173. See cases cited *supra* note 171 (discussing disclosure of client communications regarding client's will); see generally Note, *Wills and the Attorney-Client Privilege*, 14 GA. L. REV. 325 (1980) [hereinafter *Wills*] (surveying methods courts apply to avoid strict application of attorney-client privilege in area of wills); Note, *The Attorney-Client Privilege*, 19 U. RICH. L. REV. 559, 570-71 (1985) (discussing effect of death of client on attorney-client privilege); J. WIGMORE, *supra* note 170, §2329, at 639-40 (discussing waiver by deceased client's representative); M. LARKIN, *supra* note 170, §2.08 (discussing exceptions to principle that attorney-client privilege survives death of client).

174. See *Wills*, *supra* note 173, at 332-43 (describing exceptions to attorney-client privilege in will disputes).

175. See *id.* at 333 (discussing waiver of attorney-client privilege by client's representative after client's death).

176. See G. HAZARD & W. HODES, *supra* note 26, at 90 (stating that unlike rule of confidentiality, attorney-client privilege applies when question is whether lawyer can be compelled to testify about lawyer's professional consultations with client, and that privilege enables lawyer to refuse to answer questions at formal proceedings, such as trials or depositions, directed at discovering what client told lawyer, and to refuse to produce written confidential communication from client to lawyer); MODEL CODE, *supra* note 17, EC 4-4 (stating that privilege is more limited than ethical obligation of lawyer to guard confidences and secrets of client); MODEL RULES, *supra* note 17, Rule 1.6 comment (stating that attorney-client privilege applies in judicial and other proceedings in which lawyer may be called as witness or otherwise required to produce evidence concerning client); see also *supra* note 170 (discussing scope of application of attorney-client privilege).

177. See *American Standard Inc. v. Pfizer Inc.*, 828 F.2d 734, 745 (Fed. Cir. 1987) (stating that attorney-client privilege is privilege of client, not lawyer); *In re von Bulow*, 828 F.2d 94, 100 (2d Cir. 1987) (stating that privilege belongs solely to client and may only be waived by client, and that lawyer may not waive privilege without client's consent); *Henderson v. U.S.*, 815 F.2d 1189, 1192 (8th Cir. 1987) (stating that attorney-client privilege belongs to and exists solely for benefit of client); J. WIGMORE, *supra* note 170, §2290, at 544, §2321, §§2327-29 (discussing waiver of privilege); M. LARKIN, *supra* note 170, §2.05 (asserting that attorney-client privilege exists for benefit of client and, therefore, only client may waive privilege) and §2.06 (same).

178. See *Wills*, *supra* note 173, at 329 (asserting that lawyer who drafted will is valuable source of evidence regarding client's intent).

179. See *Glover v. Patten*, 165 U.S. 394, 406-08 (1897) (holding that statements made by deceased to counsel respecting execution of will are not privileged in suit between devisees under will); see also *Wills*, *supra* note 173, at 333 (discussing waiver of attorney-client privilege by representative and asserting that rationale underlying exception to privilege is protection of estate and proper disposition of estate).

therefore, is not the result of a true "waiver," but is the result of a court-created exception to the attorney-client privilege, because the court, not the client's representative, has the discretion to deny the privilege.<sup>180</sup> Courts permit only the parties who represent the testator's interest or who claim under the estate to call a lawyer to the witness stand.<sup>181</sup> Ethics committees also have addressed the "waiver by representative" exception and have extended the exception into the area of the lawyer's ethical duty of confidentiality.<sup>182</sup>

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180. See *Wills*, *supra* note 173, at 333 (stating that use of term "waiver" in phrase "waiver by representative" is misleading).

181. See *id.* at 333-37 (describing disagreement among courts as to who is representative for purpose of waiver by representative exception to attorney-client privilege); *Glover v. Patten*, 165 U.S. at 406 (asserting that when contest is between heirs or next of kin, otherwise privileged communications are not within reason of rule requiring their exclusion).

182. See Mississippi State Bar, Op. 119 (1986) (holding that lawyer owes duty of confidentiality to deceased client but may reveal confidences and secrets with consent of client's personal representative or heirs or when required by law or court order); ABA Comm. on Professional Ethics and Grievances, Formal Op. 91 (1933) (holding that because privilege is for protection of client's interests, client's personal representative or heirs may waive privilege after client's death); Washington State Bar Code of Professional Responsibility Comm., Formal Op. 175 (1982) (holding that client's personal representatives or heirs may waive attorney-client privilege after client's death).

See also Comm. on Professional and Judicial Ethics of the State Bar of Michigan, Op. CI-693 (1981) (holding that lawyer, who believed that some of client's heirs fraudulently acted to subvert client's intentions, properly notified other heirs as to advisability of obtaining counsel). The Michigan State Bar Ethics Committee extended the "waiver by representative" exception to the privilege into the area of the lawyer's ethical duty to preserve the confidences of clients. The lawyer in that case possessed information regarding the true intentions of his deceased client as a result of the lawyer's preparation of the client's will. *Id.* at 1-2. The committee stated that because a court would not consider the information to be privileged if the will were contested, the information was neither a "confidence" nor a "secret" as defined in the ethics code. *Id.* at 4. The committee summarized Michigan law regarding the waiver by representative exception to the attorney-client privilege, citing cases which held that communications between lawyer and client during the preparation of a will are not privileged. *Id.* at 3-4. The committee then noted that confidential material that falls under this exception is not privileged and, therefore, is not a "confidence" as defined in Disciplinary Rule 4-101 of the Code of Professional Responsibility. *Id.* The committee then considered whether information gained by a lawyer drafting a will was a "secret" as defined by DR 4-101. *Id.* at 4-5. The committee observed that the information gained by a lawyer who drafted a will was unique because the client intended for the information to remain inviolable until the client's death. *Id.* at 5. Accordingly, the committee determined that the client, in allowing the lawyer to draft the will, clearly desired that the lawyer reveal the client's intentions concerning the disposition of the client's property after the client's death. *Id.* Because the client wished for the lawyer to make public the information concerning the client's will, the committee held that this information did not constitute a "secret" under DR 4-101. *Id.*; Disciplinary Commission of the Alabama State Bar, Ethics Op. RO-88-21 (1988) (holding that lawyer may offer testimony, if subpoenaed to do so, as to deceased client's testamentary capacity at time of execution of will and power of attorney, provided lawyer first asserts attorney-client privilege regarding such testimony). The commission determined that the lawyer was in compliance with Alabama Disciplinary Rule 4-101(C)(4), which states that a lawyer may reveal "confidences or secrets when required by law, provided that a lawyer required by a tribunal to make disclosure may first avail himself of all appellate remedies available to him." *Id.*

The proposed amendment to the ethics codes embodies the concept underlying the "waiver by representative" exception to the attorney-client privilege with regard to the parties who represent the deceased client's interest in the documents and in nondisclosure of "confidences and secrets" or any information relating to the lawyer's representation of that client.<sup>183</sup> The proposed amendment would not constitute a "waiver" in the true sense, because the duty of confidentiality belongs solely to the lawyer, and because no outside party has the power to relieve the lawyer from the moral obligation imposed by ethics codes.<sup>184</sup> The proposed amendment would provide instead an exception to the ethical duty of confidentiality for "confidences" that may be of some historical value, allowing a lawyer to donate valuable documents only after obtaining permission from representatives of the deceased client to waive the lawyer's duty of confidentiality with regard to the papers in question.<sup>185</sup>

The proposed amendment places a time limit on the duty of confidentiality that is similar to the time limit placed upon a copyright interest by statute.<sup>186</sup> The term of statutory copyright in works created on or after January 1, 1978 begins upon the creation of the work and endures for the life of the author plus fifty years after the author's death.<sup>187</sup> This term was a drastic change from the protection afforded under common law copyright, which dictated that a work was protected in perpetuity unless and until such work was either published or had obtained a statutory copyright as an unpublished work.<sup>188</sup> The drafters of the new legislation presented various rationales for the fifty-year time limit, including the rationale that a system based upon the life of the author avoids confusion and uncertainty because the date of death is clear and definite.<sup>189</sup> The twenty-five year provision in the proposed amendment is necessary to provide the lawyer, who desires to donate papers, with a definite framework for donating the papers without breaching the ethical duty of confidentiality in the event that a client's consent is unavailable or impracticable for the lawyer to obtain.<sup>190</sup>

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183. See *supra* note 181 and accompanying text (discussing who may call lawyer to witness stand to testify regarding deceased client's will).

184. See MODEL RULES, *supra* note 17, Preamble (stating that every lawyer is responsible for observance of Rules and discussing various duties of lawyers in many capacities).

185. See *supra* notes 59-62, 74-75 and accompanying text (discussing consent requirement for lawyer wishing to donate papers and ambiguities concerning from whom lawyer may obtain consent if client is dead).

186. See 17 U.S.C.A. §302(a) (West 1978) (stating that copyright in work created on or after January 1, 1978 subsists from time of creation and, except as provided for in remaining subsections of statute, endures for term consisting of life of author plus fifty years after author's death).

187. See 2 M. NIMMER & D. NIMMER, NIMMER ON COPYRIGHT §9.01[A][1] (1990) (discussing duration of copyright for works created on or after January 1, 1978).

188. *Id.* at §9.01[B].

189. *Id.* at §9.01[A][2].

190. See *supra* notes 53-55, 57-59, 69-73 and accompanying text (discussing consent requirement for lawyer wishing to donate private papers to university archive); see also *supra* notes 60-62, 76-81 and accompanying text (discussing failure of ethics committees to provide guidance to lawyer considering donating private papers).

Defining the duration of the duty of confidentiality by means of setting a definite time period is important to a donating lawyer, but the question of duration with regard to a change in ownership is of equal importance when papers become the property of a deceased lawyer's heirs or partnership.<sup>191</sup> The question then becomes whether the duty of confidentiality attaches to the papers and thus extends beyond the death of the lawyer, or whether the ethical duty thereupon ceases to exist.<sup>192</sup> The Mississippi State Bar considered whether a lawyer's duty of confidentiality extends beyond the lawyer's death.<sup>193</sup> The lawyer was a sole practitioner whose wife became the executrix of his estate.<sup>194</sup> The bar committee noted that if an executor of a lawyer's estate is not a lawyer, the applicable ethics code and the other laws governing lawyers do not apply.<sup>195</sup> Additionally, the committee observed that if the executor is a lawyer, the executor is privy to confidentiality, but only to the extent necessary to examine and dispose of the files.<sup>196</sup> If, however, the executor is engaged in the practice of law with the deceased lawyer at the time of death, the executor in effect becomes the client's lawyer and has full access to the files.<sup>197</sup> The committee held that because the spouse did not practice law with her husband, she was not privy to confidentiality.<sup>198</sup>

The Mississippi State Bar opinion indicates that the duty of confidentiality does not attach to tangible property such as documents, but that the duty requires the existence of a person, or a lawyer in particular, in order to exist and endure.<sup>199</sup> Whether the donation of a lawyer's papers involves issues of client confidentiality at all thus depends on who is responsible for the papers after the lawyer's death. If papers are left in the possession of a nonlawyer executor, the executor may do with them as the executor wishes.<sup>200</sup> Ethics codes and ethics committee decisions, however, strongly encourage lawyers to provide for the protection of client confidences after termination of the lawyer's practice.<sup>201</sup> A lawyer who is a sole practitioner

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191. See *infra* notes 193-200 and accompanying text (discussing Mississippi State Bar Opinion No. 114 regarding duty of lawyer's wife, as executrix of lawyer's estate, to maintain confidentiality with regard to client files in her possession).

192. See *infra* notes 200-01 and accompanying text (discussing Mississippi State Bar's opinion regarding whether duty of confidentiality extends beyond lawyer's death).

193. Mississippi State Bar, Op. 114 (1986).

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.*

199. See *supra* notes 194-98 and accompanying text (discussing Mississippi State Bar opinion).

200. See *supra* notes 194-98 and accompanying text (discussing Mississippi State Bar opinion).

201. See MODEL CODE, *supra* note 17, EC 4-6 (stating that lawyer should provide for protection of confidences and secrets of client following termination of lawyer's practice, whether due to death, disability or retirement). EC 4-6 suggests that upon termination of a



may direct the administrator of the lawyer's estate to give the lawyer's papers to another lawyer in case of the lawyer's retirement or death.<sup>202</sup> Alternatively, if the lawyer is a partner in a law firm, the partnership agreement may provide for the continuation of the partnership business after a partner retires or dies, leaving other partners in the firm in charge of the deceased lawyer's papers, and thus transferring access to client files and the duty of confidentiality to the lawyers who take over the client or case.<sup>203</sup>

If the death of a lawyer transfers the duty of confidentiality to another lawyer, the question still remains whether that lawyer may donate the documents.<sup>204</sup> A lawyer may desire to donate the papers according to the deceased lawyer's wishes, or the lawyer later may become aware of the research value of the papers through a request for the documents or through the lawyer's own examination of the collection.<sup>205</sup> The requirement imposed by ethics committees, that the donating lawyer attempt to obtain the consent of the client, is still in effect and the donating lawyer still must comply with the requirement.<sup>206</sup> If obtaining consent from the client or from the client's representative is impossible, no further guidance exists for the donor who does not wish to risk an ethical breach by donating material that contains client information.<sup>207</sup> The specific limitation on the duration of the

lawyer's practice, a lawyer should return the client's personal papers to the client and should deliver the lawyer's papers to another lawyer or should destroy the papers. *Id.* Whatever method the lawyer chooses, EC 4-6 urges that the instructions and wishes of the client should be a dominant consideration. *Id.*; see also GEORGIA CODE OF PROFESSIONAL RESPONSIBILITY EC 4-6 (1983) (incorporating Model Code EC 4-6); NEBRASKA CODE OF PROFESSIONAL RESPONSIBILITY EC 4-6 (1990) (incorporating Model Code EC 4-6); OHIO CODE OF PROFESSIONAL RESPONSIBILITY EC 4-6 (1970) (incorporating Model Code EC 4-6).

Ethics committees have stressed the importance of maintaining the confidentiality of client files in various situations. See New Hampshire Bar, Op. 1989-90/2 (1989) (stating that lawyer may use off-site retrieval service to store closed client files provided that lawyer selects service carefully and uses due care to protect client confidentiality); Comm. on Professional and Judicial Ethics of the State Bar of Michigan, Op. R-5 (1989) (stating that law firms, corporate legal departments, legal service organizations and solo practitioners must establish appropriate policy regarding retention of client records). The Michigan Bar opinion asserts that a firm can fulfill its duty of confidentiality by delivering client files to the client or by destroying them selectively with client consent. *Id.* The opinion states that the firm may maintain or destroy documents constituting firm property, such as attorney work product, as the firm sees fit. *Id.*

202. MODEL CODE, *supra* note 17, EC 4-6.

203. See Mississippi State Bar, Op. 114 (1986); *supra* notes 196-99 and accompanying text (discussing issue of lawyer fiduciary); see also Pennsylvania Bar, Op. 87-78 (1988) (stating that withdrawing partners and remaining partners and associates have continuing obligation to preserve confidences and secrets of all clients, regardless of arrangement between lawyers concerning ownership of files).

204. See *supra* notes 196-99 and accompanying text (discussing Mississippi State Bar opinion holding that duty of confidentiality transfers to lawyer fiduciary).

205. See *supra* notes 1-5 and accompanying text (discussing various ways in which archivists find historical value in lawyers' papers).

206. See *supra* notes 53-55, 57-59, 69-73 (discussing consent requirement for lawyers wishing to donate private papers).-

207. See *supra* notes 60-62, 76-81 and accompanying text (discussing failure of ethics

duty of confidentiality, as incorporated into the proposed exception to the duty of confidentiality, applies to all lawyers. The exception allows both primary donors and donors acting as fiduciaries to comply with the ethical rules while allowing historians and researchers to benefit from valuable historical resources.<sup>208</sup>

The interest of society in obtaining new information for the reinterpretation and analysis of history is great, and lawyers, more than any other group, have played an important role in forming and shaping history through their involvement in events and with persons in the forefront of historical movements. Lawyers' papers tell the story of these major historical players and happenings, and document an ever-changing society.<sup>209</sup> If our modern society is to benefit from the lawyer's role as an historical player, a provision must be made for the important information contained in lawyers' papers to be studied properly and used for scholarship and research.<sup>210</sup>

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committees to provide guidance for lawyers wishing to donate private papers); *see also supra* notes 129-34 and accompanying text (discussing Committee on Legal Ethics of the District of Columbia Bar and Oklahoma Bar opinions relating to duty of confidentiality in light of possible restrictions on access).

208. *See supra* notes 85-86 and accompanying text (discussing archivists' view of legal papers as historically significant); *supra* notes 147-154 (discussing lawyers' interest in upholding ethical duty of confidentiality).

209. *See supra* notes 1-5 and accompanying text (discussing valuable historical information that archivists and researchers may glean from lawyers' private papers).

210. *See supra* notes 155-69 and accompanying text (discussing proposed amendment that would allow lawyers to donate papers containing historically significant information).

