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PROPOSED AMENDMENT TO
RULE OF PROFESSIONAL CONDUCT 1.6 –
AUTHORIZING DISCLOSURE OF
CONFIDENTIAL INFORMATION OF
DECEASED CLIENTS

Committee on Professional Responsibility

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THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK
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New York’s existing Rules of Professional Conduct permit a lawyer to reveal the confidential information of a client – living or deceased – to the extent that the lawyer reasonably believes necessary to prevent “reasonably certain death or substantial bodily harm.” New York Rule of Professional Conduct (“RPC”) § 1.6(b)(1). This Rule permits an attorney to disclose confidential information to prevent, for example, the execution of an innocent person.¹ In this Report, the Committee on Professional Responsibility proposes an amendment to the New York Rules that would go one step further and would permit the disclosure of a client’s confidential information to prevent or rectify the conviction of an innocent person – but only after the death of the client who imparted the confidential information.

In Part I of this report, we set forth our proposed amendment to RPC 1.6(b). In Part II, we present the background to and context for the proposed rule. In Part III, we discuss the interplay between the professional rules regarding client confidentiality and the evidentiary rules regarding attorney-client privilege. Finally, in Part IV we marshal the arguments in favor of the proposed rule, and address the principal objections thereto.

I. The Proposed Amendment to Rule 1.6 and its Commentary

The Following Unnumbered Paragraph should be included in Rule 1.6(b), following Rule 1.6(b)(6):

This rule does not prohibit a lawyer from revealing or using confidential information, to the extent that the lawyer reasonably believes necessary, to prevent or rectify the conviction of another person for an offense that the lawyer reasonably believes the other person did not commit, where the client to whom the confidential information relates is deceased.

Proposal for the Following Commentary to the Amended Rule:

¹ Some commentators have argued that “substantial bodily harm” includes, or should be interpreted to include, the consequences of wrongful incarceration. See Restatement (Third) of the Law Governing Lawyers, sec. 66, cmt. c (“serious” bodily harm” includes “the consequences of events such as imprisonment for a substantial period”); Colin Miller, “Ordeal by Innocence: Why There Should be a Wrongful Incarceration/Execution Exception to Attorney-Client Confidentiality,” *Northwestern L. Rev. Colloquy*, 102:391 (2008) (proposing that “reasonably certain substantial bodily harm” should be construed to include wrongful incarceration). The proposed rule discussed herein takes no position on this interpretation of Rule 1.6(b)(1).

Nothing in this subsection shall be construed to limit the lawyer's reliance on subsection 1.6(b)(1), where the "reasonably certain death or substantial bodily harm" to be prevented arises from the conviction referenced in this subsection.

In exercising discretion under this subsection, a lawyer shall give due consideration to: (1) the wishes of the deceased client, if known; (2) the magnitude of the punishment or other harm resulting from the wrongful conviction; (3) the credibility of the deceased client's admissions and the degree to which such admissions exculpate the convicted person; (4) the likelihood that revealing the confidential information will actually prevent or rectify the wrongful conviction; and (5) the likely effect, if any, of the disclosure on the estate of the deceased client, such as the financial or economic effects that could arise from a lawsuit or other claim against the estate, and any effect on the reputation or other intangible interests of the client's beneficiaries.

II. Background

In recent years, a number of instances have arisen in which lawyers have come forward to disclose confidential information previously imparted by a deceased client in order to rectify a wrongful conviction. One such case involved the Chicago conviction of Alton Logan, who was tried, convicted, and sentenced to life imprisonment for the 1982 murder of a security guard. At the same time, two lawyers learned from a different client, who was convicted of murdering a police officer, that Logan was entirely innocent and that their own client had shot the security guard to death. Independent evidence corroborated the client's claim. The lawyers memorialized their client's admission but did not disclose it until 26 years later, after their client had died. On April 18, 2008, after a hearing in which the lawyers' evidence was admitted, the Illinois trial court ordered a new trial and Logan was released. *See generally* Michael Miner, *The Greater of Two Evils: When is it OK to Let an Innocent Man Rot in Jail?*, Chicago Reader, Jan. 31, 2008.

In another case, Southern District Judge Denny Chin granted habeas relief to vacate the Bronx County murder conviction of two men who had served thirteen years in prison. *See Morales v. Portuondo*, 154 F.Supp.2d 706 (S.D.N.Y. 2001). In that case, a lawyer came forward

after his client's death to disclose that the two convicted defendants were in prison for a murder to which his client had confessed. Judge Chin held that, even though the lawyer's testimony was covered by the attorney-client privilege, it was admissible under the due process clause to prevent fundamental unfairness. *Id.* at 730-31. Based on the lawyer's testimony and other evidence (including a confession to a priest), the court concluded that the convicted defendants were actually innocent and granted writs of habeas corpus releasing them and barring the State from retrying them. *Id.* at 733-34. The court did not address whether the lawyer acted ethically in coming forward.

The ethical issue arising from an attorney's disclosure of client confidences was also confronted in the case of Lee Wayne Hunt in North Carolina. Hunt has served more than twenty years of a life sentence for murder. In 2007, North Carolina Chief Appellate Defender, Staples Hughes, came forward to testify that his former client, Hunt's co-defendant, had confessed to Hughes after his arrest that he alone had committed the murder and that Hunt had nothing to do with it. Hughes only disclosed the information after the death of his client. The court hearing Hunt's motion for a new trial not only disallowed Hughes' evidence and denied Hunt's motion, but it took the additional step of reporting Hughes to the state disciplinary authority for disclosing client confidences. Ultimately, after a lengthy process, Hughes was cleared of any ethical wrongdoing when the complaint against him was dismissed.² *See* Adam Liptak, *When Law Prevents Righting a Wrong*, N.Y. TIMES, May 4, 2008.

² Professor Bruce A. Green submitted an affidavit on Hughes's behalf in the North Carolina disciplinary action in which he argued, citing existing rules: "It is reasonable to conclude . . . that a lawyer has discretion to disclose a deceased client's confidences to prevent an innocent person's wrongful, extended confinement. The disciplinary rules are rules of reason. Even absent an explicit exception, lawyers may have discretion to disclose client confidences when paramount social values, like those recognized by the explicit exceptions, are at stake." *See* Affidavit of Bruce A. Green, submitted in the Matter of Staples S. Hughes, North Carolina State Bar Grievance Committee, Bar File No. 07G0139 ("Green Aff."), at p. 6. Another expert on legal ethics, Professor Nancy J. Moore, also submitted an affidavit on Hughes's behalf, arguing that the prevention of "certain bodily harm" – an exception to confidentiality under existing North Carolina rules – would include the prevention of a sentence of life

As a result of cases like these, Massachusetts and Alaska have recently adopted exceptions to their confidentiality rules that permit the disclosure of a confidence to prevent the wrongful execution or incarceration of another. *See* Massachusetts Rule of Prof. Conduct, Rule 1.6(b)(1) (lawyer may reveal confidential information “to prevent the wrongful execution or incarceration of another”); Alaska Rules of Prof. Conduct, Rule 1.6(b)(1) (lawyer may reveal a client’s confidence to extent lawyer reasonably believes necessary “to prevent reasonably certain: (A) death; (B) substantial bodily harm; or (C) wrongful execution or incarceration of another”). In addition, the American Bar Association’s Criminal Justice Section recently considered a proposed amendment to Model Rule 1.6 that would permit the disclosure of the confidential information of a deceased client in order to prevent the “wrongful conviction” of another person. *See* American Bar Association, Criminal Justice Section, Proposed Recommendation to Amend Rule 1.6(c) of the Model Rules Of Professional Conduct (“ABA Crim. Justice Sec. Proposal”).

III. The Relationship Between the Ethical Rule Requiring Confidentiality and the Attorney Client Privilege

In New York, the attorney-client privilege is codified at CPLR § 4503(a)(1):

Confidential communication privileged. Unless the client waives the privilege, an attorney or his or her employee, or any person who obtains without the knowledge of the client evidence of a confidential communication made between the attorney or his or her employee and the client in the course of professional employment, shall not disclose, or be allowed to disclose such communication, nor shall the client be compelled to disclose such communication, in any action, disciplinary trial or hearing, or administrative action, proceeding or hearing conducted by or on behalf of any state, municipal or local governmental agency or by the legislature or any committee or body thereof. Evidence of any such communication obtained by any such person, and evidence resulting therefrom, shall not be disclosed by any state, municipal or local governmental agency or by the legislature or any committee or body thereof. The relationship of an attorney

imprisonment under a wrongful conviction, and that Hughes’ disclosure was therefore justified. *See* Affidavit of Nancy J. Moore, submitted in the Matter of Staples S. Hughes, North Carolina State Bar Grievance Committee, Bar File No. 07G0139, at p. 4.

and client shall exist between a professional service corporation organized under article fifteen of the business corporation law to practice as an attorney and counselor-at-law and the clients to whom it renders legal services.

There is no question that, under common law, the privilege survives the death of the client.³ See *Swidler & Berlin v. United States*, 524 U.S. 399 (1998) (noting general common law acceptance that attorney-client privilege survives death of client, and upholding privilege after death of client to prevent compelled disclosure of attorney's notes of interview with deceased client).⁴

The relation between the "law" of attorney-client privilege and the rules of professional conduct is summarized as follows in NYSBA RPC 1.6 comment [3]:

The principle of client-lawyer confidentiality is given effect in three related bodies of law: the attorney-client privilege of evidence law, the work-product doctrine of civil procedure and the professional duty of confidentiality established in legal ethics codes. The attorney-client privilege and the work-product doctrine apply when compulsory process by a judicial or other governmental body seeks to compel a lawyer to testify or produce information or evidence concerning a client. The professional duty of client-lawyer confidentiality, in contrast, applies to a lawyer in all settings and at all times, prohibiting the lawyer from disclosing confidential information unless permitted or required by these Rules or to comply with other law or court order.

The privilege is a rule of discovery and evidence – the rule governs the *compelled disclosure and evidentiary admissibility* of confidential information, but does not govern attorney ethics. For example, in *State v. Macumber*, 544 P.2d 1084 (Ariz. 1976), two attorneys received an informal ethical opinion permitting them to disclose confidential information. The state's high court subsequently held that, based on the attorneys' proffer, their information was privileged and inadmissible in judicial proceedings, but it cast no doubt on the propriety of the

³ In abrogation of common law, California's Evidence Code § 954 limits the lawyer-client privilege to the "holder" of the privilege, and thus is deemed to expire when the deceased client's estate is finally distributed and the personal representative discharged.

⁴ In dissent, Justice O'Connor argued that the privilege should not "act as an absolute bar to the disclosure of a deceased client's communications." *Swidler & Berlin*, 524 U.S. at 413 (O'Connor, J., dissenting). In Justice O'Connor's view, "the paramount value that our criminal justice system places on protecting an innocent defendant should outweigh a deceased client's interest in preserving confidences." *Id.*

attorneys' voluntary disclosure. In discussing this case, Cornell law professor Roger C. Cramton noted:

[T]he ethical propriety of a lawyer disclosing information without the client's consent 'tells us nothing about the admissibility of the information disclosed.' The professional duty of confidentiality and the attorney-client privilege are separate doctrines, although they have overlapping objectives. . . . The disclosure [in *Macumber*] was viewed as ethically permissible (i.e., not in violation of the lawyer's duty of confidentiality). Nevertheless, the lawyer's testimony concerning the client's communication was not admissible in a subsequent hearing challenging the allegedly wrongful conviction.

Roger C. Cramton, *Lawyer Disclosure to Prevent Death or Bodily Injury: A New Look at *Spaulding v. Zimmerman**, 2 J. Inst. Leg. Eth. 163, 178-79 (1999) (quoting *Purcell v. District Attorney*, 676 N.E.2d 436, 438 (Mass. 1997)).

Although the ethical rule and the evidentiary privilege are distinct proscriptions, the overlap between the two was exemplified in *People v. Vespucci*, 192 Misc.2d 685, 745 N.Y.S.2d 391 (Nassau Cty. Ct. 2002). There, an attorney in possession of information from a deceased client that was exculpatory of a murder defendant sought (on Professor Roy Simon's advice) an ethics opinion from the Nassau County Bar Association. *Id.* at 687, 745 N.Y.S.2d at 393. He was advised to disclose to defense counsel and to the prosecution that he had exculpatory information that he could not otherwise reveal. *Id.* The court noted the absence of controlling New York authority in the area and discussed approaches from around the country. *Id.* at 689-92, 745 N.Y.S.2d at 394-97. Ultimately, after determining (*in camera*) that the statements would probably have constituted inadmissible hearsay, and that the substance of the deceased client's exculpatory information was available from another non-privileged source, the court declined to order disclosure of the content of the information. *Id.* at 694-95, 745 N.Y.S.2d at 398-99. Thus, the court in *Vespucci* resolved the attorney's ethical dilemma only after considering the

admissibility of the statement under the attorney-client privilege and hearsay rules, as well as the availability of another non-privileged source of the information.

It is fair to say that any amendment to the rules of attorney conduct would not, absent legislative action, alter the reach of the statutory privilege. Thus, an attorney's disclosure of confidential information under the proposed amendment would not ensure its availability under compelled disclosure or its ultimate admissibility in court.

IV. Basis for the Proposed Rule

We believe that our proposal is necessary to prevent the professional discipline of attorneys who come forward, after the death of a client, to reveal confidential information that would exonerate a wrongfully convicted person. We further believe that the value in rectifying such wrongful convictions outweighs the breach of attorney-client confidence, after the death of the client. The proposed rule would be discretionary, rather than mandatory, meaning that an attorney would exercise discretion when deciding whether to reveal confidential information, in accordance with such considerations as the nature of the information, the client's expressed wishes, the extent of the punishment faced by the wrongly convicted individual, and the extent to which disclosure would adversely affect interests of the client or client's estate even after the client's death.

As Professor Green observed in his affidavit in the *Hughes* matter, that an attorney has discretion to disclose information does not mean that he or she should necessarily do so:

Professional discretion should be exercised in accordance with relevant considerations. Those would include in this situation: whether the deceased client's admissions are credible and clearly exculpate the convicted person; whether disclosure may be effective in preventing unjust punishment and is necessary to do so; the extent of the punishment that the innocent person faces; whether the deceased client's interests would be harmed in any way by disclosure; and whether posthumous disclosure is contrary to the deceased client's clearly stated wishes.

Green Aff. at pp. 7-8.

In sum, we recommend our proposal for the same reasons as those set forth by the proponents of the proposal submitted to the ABA's Criminal Justice Section, namely that "[t]he proposed exception strikes a reasonable balance between the public interest in encouraging and protecting disclosures from the client to the lawyer, on one hand, and the public interest in protecting the integrity of the criminal justice process and in protecting individuals from the unjustified loss of liberty, on the other." ABA Crim. Justice Sec. Proposal at p. 4.

We recognize that there are those who have principled arguments in opposition to the Rule we propose. For instance, The National Association of Criminal Defense Lawyers ("NACDL") has publicly opposed this ABA proposal. *See* Letter of Norman L. Reimer, April 25, 2009. While recognizing "the importance of freeing persons wrongly convicted of crimes," the NACDL Board concluded that "the attorney-client privilege is too important to justify yet another exception." The principal objections raised by the NACDL, each of which we believe are outweighed by the benefits imparted by the Rule, are as follows:

First, the NACDL argues that the amendment is unnecessary because instances in which application of the amendment would arise are extremely rare and are typically resolved by the lawyers involved pursuant to their conscience. According to the NACDL, there is no evidence that there are lawyers who would have chosen not to make disclosures in these circumstances due to ethical constraints, indicating that any salutary impact of the amendment would be minimal. While application of this amendment may be rare, we believe that attorneys should not have to choose between "their conscience" and facing disciplinary charges in order to come forward, under the circumstances discussed herein, to prevent the wrongful convictions of innocent persons. Moreover, because we only have information for those lawyers who have

chosen to disclose confidential information of a deceased client in these circumstances, we have no way of knowing just how many lawyers actually had or have such information, but have chosen not to disclose for fear of violating an ethical rule.

Second, the NACDL argues that an amendment is unnecessary because the existing rules already permit disclosure with the client's informed consent. Moreover, as noted above, some commentators have suggested that, even under existing rules, there is an implicit exception for cases involving wrongful conviction, under the theory that long-term incarceration constitutes "substantial bodily harm" under RPC 1.6(b)(1). We do not agree that the current rules address this specific issue, and believe that the amendment will serve an important public policy interest in that it will prevent the wrongful convictions of innocent persons, with or without the client's consent. Further, while we do not take a position as to whether long-term incarceration constitutes "substantial bodily harm" within the meaning of RPC 1.6(b)(1), we believe that this view is sufficiently controversial as to continue to serve as a deterrent to lawyers who may possess exculpatory information from a deceased client. The amendment will unequivocally permit disclosure in certain limited circumstances, thus enabling lawyers to come forward and prevent or redress the wrongful conviction of innocent persons, without fear of disciplinary consequences.

Third, the NACDL argues that the amendment would dilute adherence to the privilege after the client's death, and would underestimate a client's interest in confidentiality after death. Again, we believe that the public policy arguments in favor of this amendment are important enough to warrant a rule change. Moreover, we believe that the rule is narrowly tailored in that it only applies to the confidences of deceased clients, and only permits the disclosure of

information that would prevent or rectify the conviction of a person for an offense that the lawyer reasonably believes the person did not commit, subject to the attorney's discretion.

Fourth, the NACDL further argues that the amendment would undermine the attorney-client relationship to the extent that an attorney would have to explain the exception to a client at the inception of the representation. We believe, to the contrary, that there are many facets to the attorney-client relationship and that there are already recognized exceptions to an attorney's duty to protect confidential client information that don't undermine the attorney-client relationship (for example, the crime-fraud exception). We have no reason to suspect that our proposal will be any different. Moreover, even were this exception required to be disclosed at the outset of a representation, as Professor Green argued in the *Hughes* matter, "there is no reason to believe that clients will be less forthcoming if, as an implicit exception to the confidentiality duty, lawyers are permitted to exercise sound discretion based on considerations such as these to prevent wrongful confinement after the client's death." Green Aff. at p. 8.

Finally, the NACDL argues that the amendment does not address the question of retroactivity; *i.e.*, what lawyers are to do about confidences already imparted. We do not object to the retroactive application of this amendment because, as we have noted above, we believe that the amendment is narrowly tailored and addresses important policy considerations.

V. Conclusion

While there are principled reasons both to support and to oppose the proposed amendment, for the foregoing reasons, the Committee believes that the former outweigh the latter. We respectfully urge adoption of the proposed amendment to Rule 1.6(b).