

**CENSORSHIP OF LEGAL ACADEMIC SCHOLARSHIP:
CLIENTS AND PREVIOUS EMPLOYERS WHO CANNOT
HANDLE THE TRUTH**

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I. INTRODUCTION

“I was thinking about your plans for a law review article on the San Francisco case.¹ There may be [sic] some ethical issues You should review Rules of Professional Responsibility 1.6 and

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1. The San Francisco case referred to is *State v. Old Republic Title Co., Inc.*, No. 993570 (San Francisco County Court Nov. 9, 2001) [hereinafter *Old Republic Title*]. *Old Republic Title* dealt with the issue of whether or not a title insurance company could legally retain, as additional profits, the interest earned in its escrow accounts from property closings it handled for its customers. Telephone Interview with Holly Ness, Research Attorney for Judge Pollock, San Francisco County Court (Oct. 29, 2001). The California District Court for the District of San Francisco found that Old Republic Title misappropriated approximately \$14 million dollars from its customers. *Id.*

1.9.”²

This paper is a response to an attack on academic freedom³ and academic speech.⁴ The paper reports the author’s encounter with a party’s intent to silence rather than permit healthy debate of a legal issue,⁵ by attempting to censor and suppress a proposed topic for a law review paper.⁶ The letter proposing silence⁷ contains three related arguments for censoring the proposed topic based on the Model Rules of Professional Responsibility, and an additional argument based on the confidentiality portion of an employee handbook.⁸ The strongest argument made was that writing a paper on a particular legal issue would violate the obligation to preserve the confidences and secrets of the former client.⁹ The second Model Rules-based contention for censorship of the proposed topic was that the information to be discussed throughout the paper would be detrimental to the author’s previous employer’s client.¹⁰ As to the last rationale given, the confidentiality clause will be shown to have no binding effect on the author due to the clause’s own language.

This paper has three inter-related purposes. First, it will

2. Letter from Attorney X, Partner, X, Y & Z Law Firm, to Aaron M. Vande Linde, Staff, Volume 28 William Mitchell Law Review 1 (Aug. 17, 2001)(on file with author)[hereinafter August 17 Letter]. Please note the author felt it appropriate to change names so as not to burn any proverbial bridges.

3. “The freedom to teach or to learn without . . . interference.” WEBSTER’S NINTH NEW COLLEGIATE DICTIONARY 48 (1986).

4. Academic speech encompasses both scholarship and teaching in which the author must persuade on the basis of reason and evidence. J. Peter Byrne, *Academic Freedom: A “Special Concern of the First Amendment,”* 99 YALE L.J. 251, 258 (1989). Byrne goes on to state that “academic speech provides our [society’s] most important model of expression that is meaningful as well as free, . . . critical and inspirational . . . much of its value is social - - it contributes profoundly to society at large.” *Id.* at 261.

5. *See supra* note 1.

6. Note that the paper was to fulfill a law review requirement, and only had a slight chance for publication.

7. “I think it makes more sense for you to consider another topic, than to risk ethical issues.” August 17 Letter, *supra* note 2, at 2.

8. X, Y & Z Law Firm, Employee Handbook – Confidentiality, (1999)(on file with author) [hereinafter Confidentiality Clause]. The Confidentiality Clause states confidential information belongs to the firm and its clients and employees, as a condition of employment, who must agree not to divulge or disclose any such confidential information. *Id.*

9. August 17 Letter, *supra* note 2, at 1.

10. The vague drafting technique employed in the August 17 Letter, *supra* note 2, caused this author to make an assumption that Attorney X was trying to avoid any future litigation against his client.

introduce the reader to the concept of academic freedom,¹¹ its origins, and its growth into a constitutionally protected right.¹² Second, the author will debunk the arguments made in favor of censorship – that is, if any reputable legal scholar or practitioner would consider vague references to two particular Rules of Professional Responsibility¹³ to be arguments. Lastly, the paper will demonstrate the interaction between academic freedom and censorship, and propose a solution to abate a previous employer while allowing the author to elevate to higher moral ground. Moreover, by engaging in the type of rigorous debate the author felt should have been afforded his first topic, the paper will further the author's tutelage in the legal field.¹⁴

II. CENSORSHIP AND ACADEMIC FREEDOM

The American concept of academic freedom came to fruition by way of the American Association of University Professors' 1915 General Declaration of Principles.¹⁵ The Committee on Academic Freedom justified for academic freedom on the basis that the "first condition of progress is complete and unlimited freedom to pursue inquiry and publish its results."¹⁶

The scientific method, it was argued, permitted a researcher to test theory against fact; to have a successful scientific endeavor is to have a free exchange among researchers.¹⁷ The Committee further believed that "free employment of the scientific method would lead to" discovering the independently existing truths of the world.¹⁸

11. See *supra* note 3.

12. See *infra* text accompanying notes 27-84.

13. August 17 Letter, *supra* note 2, at 1.

14. See *supra* note 1.

15. General Report of the Committee on Academic Freedom and Academic Tenure, 1 A.A.U.P. BULL. pt. 1, at 15, 17 (1915), *reprinted in* 2 AMERICAN HIGHER EDUCATION: A DOCUMENTARY HISTORY 860, 874-75 (R. Hofstadter & W. Smith eds., 1961)[hereinafter 2 AMERICAN HIGHER EDUCATION]. Pre-Civil War higher education curriculum was trained young men in religious piety as preparation for the clergy or for the professions of law and medicine. 1828 Report of Yale Faculty, *reprinted in* 1 AMERICAN HIGHER EDUCATION: A DOCUMENTARY HISTORY 275 (R. Hofstadter & W. Smith eds., 1961)[hereinafter 1 AMERICAN HIGHER EDUCATION]. This curriculum consisted mainly of class exercises in the fundamentals of ancient language, Greek and Latin, and mathematics – arguably scholarly work lacking in any amount of intellectual strife. F. RUDOLPH, THE AMERICAN COLLEGE AND UNIVERSITY 245-48 (1962).

16. 2 AMERICAN HIGHER EDUCATION, *supra* note 15, at 867.

17. Byrne, *supra* note 4, at 275-77.

18. *Id.* at 277.

Hence, the Committee renounced the view that academic freedom was a right held by the individual faculty member by determining that

the liberty of the scholar within the university to set forth his conclusions, be they what they may, is conditioned by their being conclusions gained by a scholar's method and held in a scholar's spirit; that is to say, the fruits of competent and patient and sincere inquiry, and they should be set forth with dignity, courtesy, and temperateness of language.¹⁹

Thus, the Committee was not arguing academic speech should gain general immunity; it was arguing for an extension of autonomy to academic scholars to propose, research and test new hypotheses within their respective disciplines. Effectively, this merely confined a scholar's work to a specialty without abridging the scholar's freedom to strive for new levels of understanding within a discipline.²⁰ Still, the Committee felt it necessary for each academic to abide by the strictures of the scientific method. Constancy of method would produce scientific speech amounting to pure knowledge.²¹ In turn, it follows that a scholar deviating from the scientific method "would forfeit the opportunity to master the truth."²²

The concept of academic freedom, whose initial stance was for the benefit of the individual professor from interference from the institution, was not codified until 1940.²³ The determination of the American Association of University Professors to do so was based on general endorsement within every major higher education organization in the nation.²⁴ Academic freedom, it was thought, eliminated interference with research and discourse of contentious issues and embodied the noble vision of the academic calling — the advancement of truth.²⁵ Consequently, "those who are able to

19. 2 AMERICAN HIGHER EDUCATION, *supra* note 15, at 860.

20. See R. MACIVER, ACADEMIC FREEDOM IN OUR TIME 6 (1955). To illustrate, MacIver writes, "[A]cademic freedom is . . . a right claimed by the accredited educator . . . to interpret his findings and to communicate his conclusions without being subjected to any interference . . . because the conclusions are unacceptable to some constituted authority within or beyond the institution." *Id.*

21. 2 AMERICAN HIGHER EDUCATION, *supra* note 15, at 875.

22. Byrne, *supra* note 4, at 278.

23. 1940 *Statement of Principles on Academic Freedom and Tenure*, 64 A.A.U.P. BULL. 110 (1978), reprinted in AM. ASS'N OF UNIV. PROFS., POLICY DOCUMENTS & REPORTS 3 (1984) [hereinafter AAUP POLICY].

24. *Id.* at 7-9.

25. Walter P. Metzger, *Profession and Constitution: Two Definitions of Academic*

establish successfully new perspectives in a discipline are likely to become its leaders.”²⁶

A. *Judicial Development of Academic Freedom*

There are two principles that afford legal academic scholarship²⁷ protection under the First Amendment;²⁸ first, that the speech is political in nature,²⁹ and second that the origin of the speech is academic.³⁰ Typically, legal academic scholarship³¹ centers on political speech and deserves extraordinary preservation under the First Amendment.³² Moreover, legal scholarship is able to claim enhanced constitutional protection based on the legal community’s commitment to academic freedom.³³ Legal academic scholarship claims preeminent constitutional protection because of its unsurpassed contribution to societal debates in general. Furthermore, legal academic scholarship attempts to provide society with a careful, self-critical and precise analysis of current legal issues.³⁴

Academic freedom was first espoused by Justice Douglas in his

Freedom in America, 66 TEX. L. REV. 1265, 1276-77 (1988); L. VEYSEY, THE EMERGENCE OF THE AMERICAN UNIVERSITY 311 (1965).

26. Byrne, *supra* note 4, at 284.

27. This amalgamation of words is an attempt to capture the concept of knowledge through learning in a legal institution.

28. U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech . . .”).

29. *Gentile v. State Bar of Nevada*, 111 S.Ct. 2720, 2724 (1991) (Kennedy, J., joined by Marshall, Blackmun, and Stevens, JJ., in Part I) (stating that a lawyer’s political speech which is “critical of the exercise of the State’s power lies at the very center of the First Amendment”).

30. “Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate . . . otherwise our civilization will stagnate and die.” *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) (Warren, C.J., with Black, Douglas and Brennan, JJ.).

31. *See supra* note 27.

32. “The pros and cons of legislative enactments are clearly discussion or dialogue that is highly honored in our First Amendment traditions.” *Pitts. Press Co. v. Pitts. Comm’n on Human Relations*, 413 U.S. 376, 398 (1973) (Douglas, J., dissenting).

33. *See, e.g., Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 312 (1978); *Keyishan v. Bd. of Regents*, 385 U.S. 589, 603 (1967); *Sweezy*, 354 U.S. at 250; *Wieman v. Updegraff*, 344 U.S. 183, 196-98 (1952) (Frankfurter & Douglas, JJ., concurring); *Adler v. Bd. of Educ.*, 342 U.S. 485 (1951).

34. Allan W. Vestal, *Former Client Censorship of Academic Scholarship*, 43 SYRACUSE L. REV. 1247, 1254 (1992).

dissenting opinion in *Adler v. Board of Education*.³⁵ The majority in *Adler* upheld New York's Feinberg Law,³⁶ which was a loyalty test for public school teachers,³⁷ against a First Amendment challenge by New York's public school teachers. The Court's majority opinion treated academic freedom as a personal interest to a particular teacher.³⁸ Arguing that academic freedom is a social interest, and not personal to the instructor, Justices Douglas and Black looked to the statute's educational impact and not merely the effect on an individual teacher.³⁹ Justice Douglas argued against the noxious nature of the Feinberg Law when describing the law as a "system of spying and surveillance."⁴⁰ Justices Douglas and Black established the First Amendment character of academic freedom by stating

[w]here suspicion fills the air and holds scholars in line for fear of their jobs, there can be no exercise of the free intellect. . . . The teacher is no longer a stimulant to adventurous thinking; she becomes instead a pipe line for safe and sound information. A deadening dogma takes the place of free inquiry.⁴¹

Justice Douglas never clearly argued in favor of constitutional protection for academic freedom; rather, he claimed a situation enveloped in suspicion was inconsistent with academic freedom.⁴² Justice Douglas further asserted that the Feinberg Law would hinder the classroom process – for Justice Douglas, "academic freedom denoted an attractive mode of teaching and scholarship rather than a legal right."⁴³

The Court addressed Oklahoma's teacher loyalty test in *Wieman v. Updegraff*.⁴⁴ This time, however, the Court affirmed the First Amendment origin of academic freedom and its social importance.⁴⁵ Albeit Justice Frankfurter never specifically used the

35. 342 U.S. at 510 (Douglas & Black, JJ., dissenting).

36. The *Adler* Court upheld the law on the now-discredited doctrine that government can condition public employment on compliance with any pertinent condition. Byrne, *supra* note 4, at 340 n.147.

37. New York's statute was designed to preclude the employment of anyone who belonged to an organization advocating the violent overthrow of the government. *Adler*, 342 U.S. at 485.

38. *Id.* at 492.

39. *Id.* at 510 (Douglas & Black, JJ., dissenting).

40. *Id.* at 510-11.

41. *Id.* at 510 (emphasis added).

42. *Id.* At the time, academic freedom was understood as the actual process of free inquiry in the classroom. Byrne, *supra* note 4, at 290 n.147.

43. Byrne, *supra* note 4, at 290 n.147.

44. 344 U.S. 183 (1952).

45. *Id.* at 196-98 (Frankfurter & Douglas, JJ., concurring).

words “academic freedom,”⁴⁶ his dynamic writing concerning the social value of educators’ freedom to teach, research, and report indicated the Court’s future justifications for academic freedom.

In *Sweezy v. New Hampshire*,⁴⁷ the Court reversed the conviction of a Marxist⁴⁸ for refusing to answer the State Attorney General’s questions concerning a lecture given at the University of New Hampshire.⁴⁹ The Court based its holding on violations of due process rather than infringement of an academic’s First Amendment academic freedom rights.⁵⁰ Never again would the Court rely on such an odd doctrine⁵¹ to protect academic freedom rights.⁵² However, the plurality opinion approved of constitutional limits on the government’s power to interfere with academic freedom, stating “[w]e do not now conceive of any circumstance wherein a state interest would justify infringement of rights in these fields.”⁵³

46. *Id.*

47. 354 U.S. 234 (1957).

48. The Court described Paul Sweezy solely as a journalist. *Id.* at 245. In fact, Sweezy was the founder of the left wing magazine *Monthly Review*. Byrne, *supra* note 4, at 289, n.139. Moreover, the Court felt because Sweezy did not occupy a university level academic position, the A.A.U.P.’s tradition of academic freedom would not insulate Sweezy. *Sweezy*, 354 U.S. at 245, 254-55.

49. *Sweezy*, 354 U.S. at 245.

50. *Id.* (plurality opinion). Chief Justice Warren’s opinion held that the New Hampshire Attorney General’s questioning violated due process in that New Hampshire’s legislature had made a “broad and ill-defined” delegation to the Attorney General of the investigative power. *Id.* at 254-55.

51. It is important to note that the *Sweezy* decision came down the same day as other related opinions all of which made it more difficult for legislative bodies to reveal and punish subversive citizens. *See Service v. Dulles*, 354 U.S. 363 (1957) (invalidating the dismissal of an allegedly disloyal State Department employee as inconsistent with that department’s procedural guidelines); *Watkins v. United States*, 354 U.S. 178 (1957) (reversing a criminal contempt conviction of a witness who refused to answer the House Un-American Activities Committee’s questions on the ground that the statutory delegation to the Committee was so vague the witness was unable to decide which questions the Committee could compel the witness to answer); *Yates v. United States*, 354 U.S. 298, 318 (1957) (reversing the convictions of Communist Party members for conspiring to violate the Smith Act on the ground that the Smith Act only outlawed advocating violent revolution, not “teaching forcible overthrow as an abstract principle”).

52. Professor Byrne felt the Court’s decision in *Sweezy*, based on a procedural limitation rather than a clear, positive right of academic freedom, reflected the Court’s anxiety about abuses found in the McCarthyism investigations or the Court’s antipathy to pronounce clear, definitive First Amendment rights. Byrne, *supra* note 4, at 289. *See also* Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719, 753 (1975).

53. *Sweezy*, 354 U.S. at 251 (plurality opinion).

Sweezy's plurality and concurring opinions contain several peculiarities. To begin with, never before had the Court hinted that the First Amendment protected academic freedom.⁵⁴ Additionally, Justice Frankfurter relied on non-legal sources to describe the content of the right of academic freedom; arguably, this was due to the lack of precedent in the area.⁵⁵ Likewise both opinions praise academic freedom "by stressing the social utility of free universities."⁵⁶ Moreover, both opinions argued that continued progress in the nation's institutions of higher education requiring freedom of inquiry and discussion. Without such freedoms afforded to academia, its progress would be impaired, which in turn would jeopardize our democratic system of government. Thus government should not interfere with academic freedom.⁵⁷ *Sweezy* vested new constitutional protections in academic freedom through the opinion's "triumphant rhetoric."⁵⁸ Nonetheless, the Court has restricted academic freedom rights in other limited contexts.⁵⁹

B. *Two Challenges to the Concept of Academic Freedom*

1. *Court Affirmations of Restrictions to Academic Freedom*

Regardless of the virtues of legal academic scholarship, the Supreme Court has affirmed bar regulations circumscribing a legal scholar's First Amendment protections in two particular areas: comments made by practicing attorneys involved in pending litigation,⁶⁰ and those regarding the solicitation of commercial

54. *Id.* at 262-63 (Frankfurter, J. concurring).

55. *See supra* notes 36-51 and accompanying text.

56. Byrne, *supra* note 4, at 293.

57. *Sweezy*, 354 U.S. at 250 (plurality opinion); *Id.* at 261-62 (Frankfurter, J. concurring).

58. Byrne, *supra* note 4, at 293.

59. *Barenblatt v. United States*, 360 U.S. 109 (1959). The *Barenblatt* Court affirmed the conviction of an academic for criminal contempt in refusing to answer congressional questions concerning communist activities of University of Michigan graduate students. *Id.* The Court promised to "always be on the alert against intrusion by Congress into this constitutionally protected domain," but emphasized that the university is not a "constitutional sanctuary from inquiry into matters that may otherwise be within the constitutional legislative domain . . ." *Id.* at 112. Thus, *Barenblatt* can be seen as a major blow to the protection of academic freedom, established just two years earlier in *Sweezy*.

60. *In re Sawyer*, 360 U.S. 622 (1958).

speech.⁶¹

The *Sawyer* Court addressed the Ninth Circuit's affirmation of the Hawaiian Supreme Court Order⁶² imposing a one-year suspension from practicing law on petitioner.⁶³ The Hawaiian Bar charged petitioner with violating the ethical code by making speeches and giving interviews regarding a Smith Act trial.⁶⁴ Rejecting a mechanical test based on the pendency of litigation Justice Brennan, writing for the Court, stated an approach proposing that lawyers are free to critique the state of the law, but limits First Amendment rights where there is an "improper attack on [the] administration of justice."⁶⁵

Nevertheless, Justice Stewart warned in his concurrence that "[o]bedience to ethical precepts may require abstention from what in other circumstances might be constitutionally protected speech."⁶⁶ Even though the Court reversed the Ninth Circuit decision,⁶⁷ it was clear that the Court foresaw certain situations in which the attorney should conform to the ethical principles of his or her profession.⁶⁸

Thirty-three years later, the Court would take a narrower view of *Sawyer's* standard.⁶⁹ In *Gentile v. State Bar of Nevada*⁷⁰ the Court

61. *Gentile v. State Bar of Nevada*, 501 U.S. 1030 (1991).

62. *Sawyer*, 360 U.S. at 623 (citing *In re Sawyer*, 41 Haw. 403 (Haw.Terr. 1956)).

63. *In re Sawyer*, 260 F.2d 189 (9th Cir. 1958).

64. *United States v. Fujimoto*, 107 F. Supp. 865 (D.Haw. 1952). Petitioner Sawyer was the attorney of record for defendants. One charge related to a speech that petitioner gave about six weeks after the trial began regarding the presiding judge's lack of impartiality and fairness in conducting the trial. *Sawyer*, 360 U.S. at 624-25. The other charge dealt with Sawyer's interview of a juror after the trial ended with a guilty verdict. *Id.* at 648 (Frankfurter, Harlan, Clark, and Whittaker, JJ., dissenting).

65. *Sawyer*, 360 U.S. at 631, 635.

66. *Id.* at 646-47 (Stewart, J., concurring).

67. *Id.* at 640. The Supreme Court held that the trial record was insufficient to support a finding that Sawyer's out of court speech (at a meeting of the International Longshoremen's and Warehousemen's Union, who happened to also be her client) during the progress of the trial had impugned the presiding judge's integrity or impartiality. *Id.*

68. Justice Stewart expressed this underlying precept by stating that "[a] lawyer belongs to a profession with inherited standards of propriety and honor, which experience has shown necessary for a calling dedicated to the accomplishment of justice." *Id.* at 646 (Stewart, J., concurring).

69. Lawyers are free to criticize the state of the law but with a limitation on a lawyer's First Amendment rights where there is an improper attack on the administration of justice. *Id.* at 635.

70. 501 U.S. 1030 (1991).

was again called on to review another disciplinary proceeding regarding attorney speech.⁷¹ Writing for the Court in Parts I and II, the Chief Justice concluded that the “substantial likelihood of material prejudice” test applied by Nevada satisfied the First Amendment.⁷² According to Chief Justice Rehnquist, this test strikes a balance between an attorney’s First Amendment right to make statements regarding current litigation and the State’s interest in fair trials.⁷³ Thus, when the Chief Justice stated “this Court’s decisions dealing with lawyer’s First Amendment right[s] . . . have balanced the State’s interest in regulating a specialized profession against a lawyer’s First Amendment interest in the kind of speech at issue,”⁷⁴ he was merely constricting the First Amendment rights of attorneys.

Regardless of the Chief Justice’s language, the Court did hold that Rule 177 was void for vagueness.⁷⁵ Justice Kennedy, along with Justices Marshall, Blackmun, Stevens and O’Connor, deemed the safe-harbor language within Rule 177⁷⁶ to have misled Gentile into believing he would not violate any ethical rules by holding a press conference.⁷⁷

Consequently, the Court’s development of the concept of academic freedom since *Adler*⁷⁸ and through *Gentile*⁷⁹ has generally upheld an attorney’s First Amendment rights, and has only sought to restrict those rights in the interest of justice. And more recently the Court set forth a balancing test⁸⁰ requiring state bar associations to balance an attorney’s First Amendment rights with the interests

71. The Nevada Supreme Court found that Dominic Gentile violated Nevada Supreme Court Rule 177 which prohibited an attorney from making extrajudicial statements to the press that he knows or reasonably should know will have a “substantial likelihood of materially prejudicing an adjudicative proceeding.” *Id.* at 1075 (Rehnquist, C.J., Part III).

72. *Id.*

73. *Id.* Chief Justice Rehnquist goes on to state that the “substantial likelihood” test embodied in Rule 177 is constitutional under this analysis for it is designed to protect the integrity and fairness of a State’s judicial system, and it imposes only narrow and necessary limitations on lawyer’s speech. *Id.*

74. *Id.* at 1073-76.

75. *Id.* at 1048.

76. Rule 177(3) provides that a lawyer “may state without elaboration . . . the general nature of the . . . defense . . . notwithstanding subsection 1 and 2(a-f).” *Id.*

77. *Id.* The Court went on to state that “absent any clarifying interpretation by the state court, the Rule fails to provide fair notice to those to whom it is directed.” *Id.* (citing *Grayned v. City of Rockford*, 408 U.S. 104, 112 (1972)).

78. 342 U.S. 485, 510 (1951) (Douglas & Black, JJ., dissenting).

79. 501 U.S. 1030 (1991).

80. See *supra* notes 71-77 and accompanying text.

of the state during disciplinary actions concerning out-of-court speech by an attorney. As such, it is apparent that the Court has struck the appropriate symmetry between its desire to protect the freedoms necessary for meaningful scholarship and the state's right to restrict those rights under certain circumstances.

2. *Ethical Regulations to Academic Freedom*

Additionally, a second challenge to the academic freedom protections for legal academic scholarship is that the ethical regulations typically invoked are subject-oriented regulations, not content-oriented.⁸¹ In this author's particular situation, censorship was directed at non-confidential, generally known information, which the author was exposed to during the course of employment.⁸²

A broad reading of Ethical Code 4-5⁸³ would bar legal scholars and legal academics from participating in public policy debates on issues with which both, arguably, have knowledge and expertise. An obvious conclusion is that EC 4-5 is a content-based regulation based on the language that "authorities must . . . examine the content of the message that is conveyed"⁸⁴ in order to determine if a violation of EC 4-5 occurred.

As applied to this author's previous dilemma, the censorial former employer proclaimed that "the client will be upset . . . no matter what slant you put on it."⁸⁵ In effect, this meant the former employer and its client wished to keep the specific legal issue below the proverbial radar screen for as long as possible. Consequently, one is able to easily discern that, although a lawyer's freedom of speech is not favored in all situations,⁸⁶ in cases concerning academic scholarship, whatever its source, the First Amendment

81. Vestal, *supra* note 34, at 1256.

82. The Model Rules permit a lawyer [and arguably legal scholar] to use information relating to a former client that is in the "public domain." MODEL RULES OF PROF'L CONDUCT R.1.9(c)(1)(2001) (emphasis added) [hereinafter PROF'L CONDUCT]. However, "a lawyer [legal scholar] should not use information acquired in the course of the representation of a client to the disadvantage of the client." MODEL CODE OF PROF'L RESPONSIBILITY EC 4-5 (1981) [hereinafter PROF'L RESP.].

83. PROF'L RESP., *supra* note 82. Note that Minnesota replaced the Model Code of Professional Responsibility with the ABA Model Rules of Professional Conduct.

84. FCC v. League of Women Voters, 468 U.S. 364, 383 (1983).

85. August 17 Letter, *supra* note 2, at 2.

86. See *supra* text accompanying notes 59-82.

secures a lawyer, legal scholar or academician his or her academic freedom rights.

III. ONE'S DUTY TO MAINTAIN CLIENT CONFIDENCES

“A lawyer [legal scholar] shall not reveal information relating to representation of a client unless the client consents after consultation[. . .]”⁸⁷ The reference to this rule⁸⁸ implied that writing a paper, with a possibility of publication, would inappropriately disclose client confidences and/or secrets.⁸⁹

The retort to this rationale is elementary. The previous paper topic⁹⁰ would not disclose any client confidences⁹¹ or secrets⁹² as defined.⁹³ Which, in turn, begs the question, how a court would rule if a would-be officious intervenor invoked Model Rules of Professional Conduct 1.6 and 1.9 to censor a proposed piece of legal academic scholarship?⁹⁴

87. PROF'L CONDUCT, *supra* note 82, at 1.6(a) (emphasis added). The comments explain further that “[t]he confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source.” *Id.* at cmt. 6.

88. August 17 Letter, *supra* note 2.

89. *Id.* Again, The point must be stressed that since the former employer chose to make vague references – arguably, an attempt to blur the specific charge – the author has had to make assumptions as to the particular language and charge leveled.

90. *See supra* note 1.

91. Client confidences are “information protected by the attorney-client privilege under applicable law[.]” PROF'L RESP., *supra* note 82, at DR 4-101(A) (emphasis added).

92. Secrets are “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 likely be detrimental to the client.” *Id.* Note that the Model Rules of Prof'l Conduct “eliminate[d] the two-pronged duty under the Model Code of Prof'l Responsibility in favor of a single standard protecting all information about a client ‘relating to the representation.’” PROF'L CONDUCT, *supra* note 82, at Model Code Comparison cmt. 1.

93. To provide the reader with a basis for this statement, I note that the initial twelve pages of text to the first topic contained citations to the following: two Federal statutes; three Arizona statutes; two California statutes; three Minnesota statutes; one Arizona case; one California case; one Texas case; one Washington case; as well as references to legal encyclopedias and legal dictionaries. The former client is neither mentioned nor analogized to in the first paper. Aaron M. Vande Linde, *Interest Earned in Escrow Accounts: An Escrow Agent's Profits or Not?* (Aug. 2001) (incomplete, unpublished manuscript, on file with author).

94. “I doubt that a physician who broadcast the confidential disclosures of his patients could rely on the constitutional right of free speech to protect him from professional discipline.” *In re Sawyer*, 360 U.S. 622, 646 (1959) (Stewart, J. concurring).

Since the type of speech involved was political in nature,⁹⁵ the regulation may be challenged as vague⁹⁶ and overbroad.⁹⁷ One authority believes censorship of “all information relating to the representation”⁹⁸ is overbroad “absent any requirement that disclosure of the information have an associated harm.”⁹⁹ Considering the previous paper topic contained no confidences or secrets, why would the author’s former employer seek to censor the research, writing and possible publication of a legal issue? Two rationales are readily apparent.

A. *Preservation of Client Confidences*

1. *Duty of Confidentiality*

The preservation of client confidences is a real concern for practitioners. The duty of confidentiality is grounded in evidentiary law’s attorney-client privilege.¹⁰⁰ This privilege arose in the seventeenth century as an outgrowth of the general principle that to reveal another’s confidences was dishonorable.¹⁰¹ Later in the eighteenth and nineteenth centuries, the reasoning shifted to the proper functioning of the legal system as a whole. The attorney-client privilege, in its traditional form, holds that:

(1) where legal advice of any kind is sought (2) from a professional legal adviser in his/her capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his/her instance permanently protected (7) from disclosure by him/herself or by the legal adviser, (8)

95. Vestal, *supra* note 34, at 1260-61 (citing NAACP v. Button, 371 U.S. 415, 432 (1963)).

96. The vagueness doctrine originated in the 14th Amendment’s Due Process Clause, U.S. CONST. amend. XIV, § 1, and is a basis for striking down legislation containing insufficient warning of what conduct is unlawful. *Connally v. Gen. Constr. Co.*, 269 U.S. 385, 391 (1926) (stating that a law is unconstitutionally vague when people “of common intelligence must necessarily guess at its meaning”).

97. The overbreadth doctrine serves to invalidate legislation, which regulates more speech than the Constitution allows to be regulated. *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61 (1981) (stating that a law whose aim was to prohibit nude dancing, but actually prohibited all live entertainment, was overbroad).

98. PROF’L CONDUCT, *supra* note 82, at cmt. 6.

99. Vestal, *supra* note 34, at 1261.

100. DEBORAH L. RHODE, PROFESSIONAL RESPONSIBILITY – ETHICS BY THE PERVASIVE METHOD 223 (2d ed. 1998).

101. GEOFFREY C. HAZARD, JR., ETHICS AND THE PRACTICE OF LAW 58-62 (1978).

except [if] the protection be waived.¹⁰²

2. *Preservation of Individual Rights*

A second justification for confidentiality is that an overarching objective of our legal system is the preservation of individual rights. Our legal system requires its participants to seek attorney assistance so as to protect a client's legal interests. It is a self-evident truth that unless clients feel free to provide all relevant information an attorney cannot provide adequate representation for the client.¹⁰³ An assurance of confidentiality seemingly injects trust into the attorney client relationship. This trust allows a client to openly consult with an attorney and disclose key facts, which could be legally helpful to the client. Thus, without a duty of confidentiality enmeshed in our legal system, a client likely would be overly cautious in revealing information, which would in turn deprive a client from the effective assistance of counsel.¹⁰⁴

Likewise, a duty of confidentiality allows clients facing criminal prosecution to fully exercise their Sixth Amendment right to counsel¹⁰⁵ and their Fifth Amendment privilege against self-incrimination.¹⁰⁶ Whereupon an attorney could be compelled to reveal confidential information, a client's reliance on one constitutional guarantee effectively would compromise the other guarantee.¹⁰⁷

Nonetheless, the broad scope of our current confidentiality rules does have its critics. One such critique asserts that the elementary priorities found in the traditional confidentiality rationale are "perverse" because those priorities favor clients who withhold information out of irresponsible motives at the expense of innocent third parties.¹⁰⁸ Moreover, riddled throughout the

102. John S. Dzienkowski, *Lawyers as Intermediaries: The Representation of Multiple Clients*, 1992 U. ILL. L. REV. 741, 784 (1992); John P. Frowe, *The Legal Ethics of Louis Brandeis*, 17 STAN. L. REV. 683, 702 (1965).

103. HAZARD, *supra* note 101, at 69.

104. *State v. Williams*, 207 N.W.2d 98, 104 (Iowa 1967) (defining effective assistance of counsel as "conscientious, meaningful representation wherein accused is advised of his rights and honest, learned and able counsel is given a reasonable opportunity to perform the task assigned").

105. U.S. CONST. amend. VI.

106. *Id.* at amend. V.

107. RHODE, *supra* note 100, at 226.

108. *Id.* at 227 (citing *Klemm v. Superior Court*, 142 Cal. Rptr. 509, 512 (1977)).

current Code¹⁰⁹ are numerous exceptions to confidentiality,¹¹⁰ which erode the duty to maintain confidences. Hence a review of the common law rationale of confidentiality is needed.

3. *Two common law rules of confidentiality*

Turning to the law of agency¹¹¹ the most applicable rule states:

[u]nless otherwise agreed, after the termination of the agency the agent: . . . (b) has a duty to the principal not to use or disclose to third persons trade secrets, . . . or other similar confidential matters given to him only for the principal's use[.] The agent is entitled to use general information concerning the . . . business of the principal . . . if not acquired in violation of his duty as agent[.]¹¹²

An argument for censorship based upon this provision¹¹³ is unpersuasive, however, for three reasons.

First, section 396(b)'s language limits its application to "trade secrets . . . or other similar confidential matters"¹¹⁴ and does not include non-confidential, non-secret, public-domain information.¹¹⁵ Second, section 396(b) contains a specific entitlement for the former agent to use "general information concerning the method of business of the principal."¹¹⁶ Third, an agent's obligation under section 396 "is directed to 'commercial activity and competition between rival businesses,'"¹¹⁷ and *not to the type of public policy debate involved in a law review article.*

The Restatement of the Law Governing Lawyers¹¹⁸ provides

109. PROF'L CONDUCT, *supra* note 82.

110. *Id.* at 1.6(a), 1.6(b)(1)(2), 1.9(c)(1); *see also* DEBORAH L. RHODE & DAVID LUBAN, LEGAL ETHICS 495-96 (2d ed. 1995).

111. RESTATEMENT (SECOND) OF AGENCY (1957).

112. *Id.* at § 396 (emphasis added).

113. Note, this argument was not made in the August 17 Letter; its inclusion in this paper is to fully analyze the duty of confidentiality from numerous perspectives.

114. RESTATEMENT (SECOND) OF AGENCY: USING CONFIDENTIAL INFORMATION AFTER TERMINATION OF AGENCY § 396(b) (1957).

115. *See* discussion *infra* Part IV.A.

116. RESTATEMENT (SECOND) OF AGENCY: USING CONFIDENTIAL INFORMATION AFTER TERMINATION OF AGENCY § 396(b) (1957).

117. *Penguin Books USA, Inc. v. Walsh*, 756 F. Supp. 770, 786 (S.D.N.Y. 1991) (rejecting RESTATEMENT (SECOND) OF AGENCY § 396(b) and (c) as grounds for censoring book on the Iran-Contra Affair by former associate counsel with Office of Independent Counsel), *appeal dismissed, vacating as moot and remanding with direction to dismiss*, 929 F.2d 69 (2d Cir. 1991).

118. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS (2000). Unlike the ABA's Model Rules of Professional Conduct and the Model Code of

specific guidance for the legal community regarding confidentiality. Section 60 proposes a general duty to safeguard client confidences in that “during and after representation of a client: (a) the lawyer may not use or disclose confidential client information . . . if there is a reasonable prospect that doing so will adversely affect a material interest of the client”¹¹⁹

Client information is confidential when it consists of information regarding a client or the client’s matter contained in documents, or other communiqués, “*other than information that is generally known.*”¹²⁰ The initial drafters provided further clarification of the duty of confidentiality in the official comments to sections 111 and 112.¹²¹ The comments give further guidance on when information becomes “generally known.”¹²² And the comments give special treatment to “generally known information about the law that a lawyer derives from representing clients.”¹²³ It follows, consequently, that what a lawyer acquires into his or her legal knowledge base through experience, research, scholarship and the like becomes the lawyer’s to “employ for the benefit of all clients, for law reform efforts, or for the lawyer’s personal use”¹²⁴ such as writing.

Professional Responsibility, the Restatement is not a set of regulations. Rather, the Restatement is a series of principles (or “black letter rules”) going beyond the ethics rules to cover other areas affecting the practice of law (e.g., vicarious liability, tort doctrines relating to malpractice, and attorney-client evidentiary privilege).

119. *Id.* at § 60.

120. *Id.* at § 59 (emphasis added).

121. RESTATEMENT OF THE LAW GOVERNING LAWYERS §§ 111, 112 (Tentative Draft No. 3, 1988). The definition of confidential client information includes information and communications that were not strictly private in nature when the lawyer first received them. It also may apply to information that originates in strict secrecy but then becomes known by others . . . *so long as the information does not become generally known.*” *Id.* (emphasis added)

122. *Id.* at cmt. e. The American Law Institute designated information as generally known “when the information is so public that a person interested in knowing the information could obtain it . . . without special knowledge or substantial difficulty or expense.” *Id.*

123. *Id.* at cmt. f. This comment excludes from the definition of confidential client information generally known information about the law that a lawyer, or legal scholar, derives from representing clients. It further states that “[s]uch information becomes part of the general set of skills and fund of information possessed by the lawyer . . . Unlike other kinds of generally known information . . . *information about the law is to be considered generally known.* . . .” *Id.* (emphasis added).

124. *Id.* at cmt. f.

B. Contrasting the need for a free flow of information

A direct consequence of the first rationale favoring censorship is practitioners would not seek a free flow of information and would not carefully parse a piece of legislation to provide for such a free flow of information. “Practitioners [thus] tend to ignore the precise rules in this area, and opt for secrecy if there is any issue of confidentiality.”¹²⁵ On the other hand, legal academics desire the freest exchange of information, and delve deep for substantive direction from the guiding principles as to what is and is not permissible.¹²⁶ While a legal scholar may be immune to the practitioner’s concerns for commercial gain, the scholar does have a critical stake in the freest exchange of information, and thus will focus earnestly on the particular rules to determine whether or not the rules permit disclosure.

The vague reference to the Rules of Professional Conduct¹²⁷ indicates a lack of concern with whether or not the referenced rule actually prohibited this author’s actions. Was it thought that leveling an ethical violation against a legal scholar would be dispositive without further debate?² The author could only speculate and refuses to do so here. Considering the former employer claimed confidential status of the information, though it has been shown to be otherwise, i.e. information in the public domain, the rules would permit disclosure.¹²⁸

IV. DISCLOSURE OF INFORMATION DETRIMENTAL TO A FORMER
CLIENT

“A lawyer [legal scholar] . . . whose present or former firm has formerly represented a client in a matter shall not thereafter: (1) use information relating to the representation to the disadvantage of the former client[.]”¹²⁹ “You learned about the San Francisco case . . . while doing research for a client . . . ; a law review article

125. Vestal, *supra* note 34, at 1261.

126. Upon receiving the August 17 Letter, the author immediately consulted the Model Rules of Professional Conduct, and within three to four days amassed numerous decisions and articles regarding the issues presented in the August 17 Letter.

127. August 17 Letter, *supra* note 2, at 1; PROF’L CONDUCT, *supra* note 82, at 1.6.

128. PROF’L CONDUCT, *supra* note 82, at 1.9(c)(1).

129. *Id.*

on the topic is likely to have an adverse effect on the client. . . .”¹³⁰
The response to this line of reasoning is three-fold.

A. *Generally Known Information*

First, the rationale that Rule 1.9¹³¹ requires silence of any information damaging to the former client is simply wrong. A plain reading of the Rule distinctly permits disclosure of generally known information.¹³² A prerequisite, when analyzing Rule 1.9(c)(1) must be to establish what the drafters meant by the term of art “generally known.” The sole guidance given by the drafters is analogous to information found in the “public domain.”¹³³ Delving further, an organic meaning of public domain is found in the tenets of copyright law, setting forth public ownership status of writings, publications and the like not protected by copyrights.¹³⁴ Likewise, the “fair use” doctrine¹³⁵ establishes that scholarship and research is not an infringement of a valid copyright. “Generally known,” as stated in the Code,¹³⁶ thus encompasses information devoid of copyright protection found in the public sphere.

Turning to the issue presented, the first paper’s topic and

130. August 17 Letter, *supra* note 2, at 1.

131. PROF’L CONDUCT, *supra* note 82, at 1.9(c)(1).

132. *Id.* (stating “[a] lawyer who has formerly represented a client . . . shall not thereafter: (1) use information relating to the representation . . . except . . . when the information has become generally known. . . .” (emphasis added)). See also discussion *supra* Part III.A and text accompanying notes 107-114.

133. PROF’L CONDUCT, *supra* note 82, at 1.9(c)(1) Model Code Comparison cmt. 3 (stating, “it is a necessity to define when a lawyer may make use of information about a client after the client-lawyer relationship has terminated”). While there was no termination of the client-lawyer relationship, there was a termination of an employment relationship—the author resigned his position to accept other employment. Thus, because of a termination of the employment relationship and even though the author’s position was that of a law clerk, the client-lawyer relationship ended with regards to the author’s involvement with his former employer’s client.

134. 17 U.S.C.A. § 107 (1976); see generally EDMUND W. KITCH & HARVEY S. PERLMAN, INTELLECTUAL PROPERTY AND UNFAIR COMPETITION 396-98 (discussing the nature of ownership rights to published works under copyright law).

135. 17 U.S.C.A. § 107 (1976). This doctrine balances the author’s traditional ownership rights with First Amendment values allowing for criticism and comment, and scholarly use. To balance these equities, one must look to the following:

(1) purpose and character of use (i.e. is the use commercial or educational in nature?); (2) nature of copyrighted work; (3) amount and substantiality of portion used in relation to the copyrighted work as a whole; and (4) effect of the use. *Id.*

136. PROF’L CONDUCT, *supra* note 82, at 1.9(c)(1).

information¹³⁷ became generally known prior to the initial research and formulation of a position on the legal issue.¹³⁸ Moreover, even if copyright law deemed the information protected, research and scholarly comment of the information would not infringe the copyright.¹³⁹ Hence, no duty to maintain confidences so as to avoid detriment to the former client existed upon mental conception of the first topic. The rationale is, arguably, once confidential information becomes public, no disclosure of confidential information by an attorney could cause a detriment because any detriment occurred when the information became public knowledge.¹⁴⁰ The duty to maintain potentially detrimental confidences should have no application if the information is generally known. Therefore, the expansionist reading¹⁴¹ of Rule 1.9(c)(1) is not a reasonable reading, and is not supported in the field of legal ethics.¹⁴²

B. *Information as Property*

Second, censorship would be improper based on a client claiming information as property. The former employer asserted that learning of a legal issue while doing research for the client supports the notion that the client holds a property interest in the

137. See *supra* text accompanying note 1.

138. *Old Republic Title Must Pay \$17 Million to Customers*, L.A. TIMES, May 12, 2001, at C2; Jim Herron Zamora, *Old Republic Fined Additional \$15 million / Title company to Pay Damages in Fraud Case*, SAN FRANCISCO CHRON., June 12, 2001, at C2. See generally Robert C. Farrell, *Limited Practice Officers and Admission to Practice Rule 12: Taking or Not?*, 23 SEATTLE U. L. REV. 735 (2000) (discussing typical escrow transactions and Washington's treatment of limited practice officers with regards to escrow transactions); John C. Murray, *Insured Closings: Title Company Agents and Approved Attorneys*, 456 P.L.I. REAL ESTATE 1161, 1173-75 (2000) (discussing the information borrowers and lenders need to know in today's market); Michael C. Patton & Robert W. Sargeant, *Recent Developments in Title Insurance Law*, 35 TORT & INS. L.J. 639, 647-50 (1999) (discussing court treatment of agent malfeasance in the title insurance context).

139. See *supra* note 134.

140. Cf. L. RAY PATTERSON, *LAWYER'S LAW: PROCEDURAL, MALPRACTICE AND DISCIPLINARY ISSUES* 129-32 (4th ed. 1998).

141. Preventing a legal scholar from using public domain information in legal academic scholarship to which he or she was exposed during the course of private employment. See August 17 Letter, *supra* note 2, at 1.

142. See generally OLAVI MARU, *DIGEST OF BAR ASSOCIATION ETHICS OPINIONS* ¶ 1536 (1970) (N.J. 49 (Op. 50)) (differentiating between an attorney who discloses "information which is a matter of public record" to a research firm compiling information, and "confidential information" which an attorney may reveal only with client permission).

knowledge gained.¹⁴³ This extraordinary position is specious at best, and is in direct conflict with the Model Code of Professional Responsibility.

Similarly, Canon 8¹⁴⁴ provided that “[a] lawyer should assist in improving the legal system.”¹⁴⁵ This statement is premised on the fact that “lawyers are uniquely qualified to make significant contributions to the improvement of the legal system.”¹⁴⁶ Additionally, the commentary asserts that

[b]y reason of education and experience, lawyers are especially qualified to recognize deficiencies in the legal system and to initiate corrective measures therein. Thus they [lawyers] should participate in proposing and supporting legislation and programs to improve the system, *without regard to the general interests or desires of clients or former clients.*¹⁴⁷

The essence of this issue then is whether the experience gained by the attorney becomes the property of the client or the property of the attorney. A straightforward and definitive answer is found in Canon 8; an attorney’s experiences are not a former client’s property.¹⁴⁸ In fact, legal scholars and attorneys also have an ethical obligation to society at large to research and comment via legal academic scholarship for changes in the law.¹⁴⁹

Likewise, the former employer’s proposed position of censorship cuts against the grain of Canon 7.¹⁵⁰ An attorney or legal scholar’s loyalty obligation to a former client “implies no obligation to adopt a personal viewpoint favorable to the interests or desires of [the] client. . . . [an attorney or legal scholar] *may take positions on public issues and espouse legal reforms . . . without regard to the individual view of any client.*”¹⁵¹

143. August 17 Letter, *supra* note 2, at 1. Effectively, the former employer, on behalf of its client, claimed a property interest in a legal issue presented to a California court. *See supra* note 1.

144. PROF’L RESP., *supra* note 82. Please note that the Model Code of Professional Responsibility retains only persuasive weight with respect to the author’s situation due to Minnesota’s enactment of the Model Rules of Professional Conduct.

145. *Id.*

146. *Id.* at EC 8-8.

147. *Id.* at EC 8-1 (emphasis added).

148. *Id.* at Canon 8.

149. *Id.* at EC 8-2 (providing that “[i]f a lawyer believes that the . . . absence of a rule of law . . . contributes to an unjust result, he [or she] should endeavor by lawful means to obtain appropriate changes in the law”).

150. *See id.* at Canon 7.

151. *Id.* at EC 7-17 (emphasis added).

C. *Treatment within Restatement of Law Governing Lawyers*

The Restatement addresses the issues of whether a lawyer, or legal scholar, can take a position on a public policy question adverse to a former client.¹⁵² “A lawyer may publicly take personal positions on controversial issues without regard to whether the positions are consistent with those of some or all of the lawyer’s clients[.]” The public policy discussion of the proposed topic, which was the target of the former employer’s censorship, is clearly applicable in this instance.¹⁵³

The idiosyncrasies in approach, the practitioners’ client-centric focus and the academicians’ public policy-centered focus, are clearly demonstrated in the Restatement discussion above. Focusing on client representation and starting with the opinion that maintaining client secret’s is the primary goal, “it is easy to assume that there should be a common law duty not to use any information from a representation, even non-confidential, public domain information, to the detriment of [a] client.”¹⁵⁴ In the alternative, by focusing on public policy debates the “non-confidential, public domain character of information becomes dispositive, not the fact that the lawyer was serving a client when exposed to the information.”¹⁵⁵ Consequently, a legal scholar retains any experience gained during the course of employment as his or her personal property, and is free to research, analyze, and advocate for changes in the law without any apprehension of violating the ethical considerations of the legal profession.

V. CONFIDENTIALITY CLAUSE CONSIDERED, BUT DISMISSED

While it has already been established that no confidential duty existed as to the information to be used,¹⁵⁶ It is still necessary to refute the final argument in favor of censorship. That argument

152. RESTATEMENT OF THE LAW GOVERNING LAWYERS: LAWYER OPENLY EXPRESSING PUBLIC POLICY VIEWS INCONSISTENT WITH CLIENT POSITIONS § 114 (Tentative Draft No. 3, 1988).

153. Once again, I stress that the proposed topic was not only addressing a novel issue in the law; it was to afford a legal scholar with an opportunity to engage in an in-depth analysis of the issue and propose a framework for analysis should the issue present itself to a Minnesota court.

154. Vestal, *supra* note 34, at 1292.

155. *Id.* at 1293.

156. The information has been shown to be “generally known information” and information within the “public domain” and as such, no confidential duty exists. *See supra* Parts III., IV.

being – “you must keep the information that you learned as an employee of the firm confidential.”¹⁵⁷

A. *Confidentiality Clause*

“As a result of . . . employment . . . you will . . . have access to confidential information As a condition of employment, you must agree that . . . you will not at any time divulge or disclose . . . any such information, whether or not it has been designated specifically as ‘confidential’ or ‘attorney work product.’”¹⁵⁸ This is the language the former employer now relies upon to censor a proposed law review paper. In order to determine the effectiveness of the clause, it is necessary to parse its language and analyze it against the backdrop of current Minnesota case law.

First, the language of the former employer’s confidentiality clause signifies the boundaries of the confidential duty imposed upon its employees. The clause begins by presenting an employee with an ambiguous definition of what the firm considers to be confidential,¹⁵⁹ and conditions employment on the employee’s agreement not to divulge or disclose such information. The confidentiality clause goes on to incorporate Minnesota Rules of Professional Conduct 1.6 into the agreement, and requires an employee’s strict adherence to Rule 1.6.¹⁶⁰ The clause does not set forth any duty to maintain client confidences after termination or resignation. The clause’s language – “[a]s a condition of your employment,” “except in the responsible exercise of your job,” and “[a]ll employees” – establishes that the confidential duty only applies to its then current employees. The purview of the clause itself thus has no binding effect on an employee who has resigned his/her post at the firm.

The drafters signaled their resolve that employees maintain confidences by including the confidentiality requirements of Rule 1.6 on its employees and calling for strict adherence to that Rule.

157. August 17 Letter, *supra* note 2.

158. Confidentiality Clause, *supra* note 8.

159. The Confidentiality Clause provides its definition of confidential information by way of a seemingly non-exhaustive list of confidential matters. *Id.*

160. *Id.* Rule 1.6 “Confidentiality of Information” mandates that an attorney shall not reveal confidential client information unless the client consents after consultation, or the attorney has a reasonable belief that revealing such information will prevent bodily harm, or the attorney reasonably believes is necessary to establish a claim or defense in an action between the attorney and client. PROF’L CONDUCT, *supra* note 82, at 1.6.

However, the drafters failed to utilize language that extends the confidential duty to former employees. Only the language of the clause itself can show the drafters' intent, and this language fails to continue the duty found in Rule 1.9.¹⁶¹ Without direct evidence of the drafters' intent to extend the confidential duty, one cannot surmise the drafters meant to charge former employees with an extended duty of confidentiality.

Moreover, the grammatical structure of the clause negates a finding that the language "you will not *at any time* divulge or disclose"¹⁶² prolongs a former employee's duty to maintain confidences. Because the language is framed in the terms "[a]s a condition of employment," the clause limits itself to the duration of an employee's stint with a firm. One might protest that this is solely a semantic exercise, allowing the author another avenue to breach one of the sacred tenets—duty of confidentiality—of the legal profession. However, the lessons of statutory construction mandate every word has meaning within the statute and no word is superfluous.¹⁶³ Accordingly, the intent of the confidentiality clause must be determined by the plain language of the clause and within the bounds of its grammatical structure; construing the clause any other way demonstrates a general lack of understanding in contract interpretation.

B. *Minnesota Case Law Applied to a Hypothetical Situation*

Turning now to a hypothetical situation: if the proposed paper had actually been written,¹⁶⁴ could the former employer rely on its confidentiality clause to censor the proposed paper topic?

Minnesota courts carefully scrutinize restrictive covenants when determining enforceability because the covenants limit an employee's ability to work and earn a living. As such, restrictive

161. This position assumes that once an employee resigns his/her position with a firm, the firm's clients become the former employee's former clients. PROF'L CONDUCT, *supra* note 82, at 1.9. Even though the former employee was not in fact an attorney, the former employee possesses the confidential client information intimated to in Rule 1.9. Thus one is able to conclude that the duty to avoid conflicts with former clients extends to a firm's former employees.

162. Confidentiality Clause, *supra* note 8.

163. *Jarecki v. G.D. Searle & Co.*, 367 U.S. 303, 307 (1961) (stating that a word "gathers meaning from the words around it"). *See also* ANTONIN SCALIA, A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW (1997) (arguing against the use of legislative history as an interpretive tool).

164. *See supra* note 1 and accompanying text.

covenants are generally looked upon with disfavor.¹⁶⁵ Minnesota courts have further held that a restrictive covenant “must not impose any greater restriction on the employee than is necessary to protect the employer’s business.”¹⁶⁶ ¹⁶⁷ As applied to this author’s previous situation, the following queries need be resolved.

First, did the confidentiality clause impair the author’s ability to work in the legal field and earn a living? At first glance, the answer is no. The author was engaged in writing and research to fulfill a law review requirement, and by itself this would not appear to limit one’s earning potential. Despite the initial appearance, one can argue that indeed the author’s ability to work and earn income was impaired. On account of the former employer’s censorial position, the author had reason to cease work on the initial paper, ascertain whether or not the censorial position had merit, and act accordingly. To do so required the author’s time, and thus diverted the author’s attention from new job responsibilities as well as detracting from the author’s adequate class preparation. Reducing the amount of time the author could spend on class preparation clearly will have a correlation to an ability to earn an income as an attorney; without above average grades a law school graduate is behind the proverbial eight ball in the job market.

Second, does the confidentiality clause impose a greater restriction than is necessary to protect the employer’s business? That is, is the clause reasonable? In analyzing the confidentiality clause’s reasonableness, the court would consider the nature and character of the employment, nature and extent of the business, the time frame in which the restriction is imposed, and balance should be struck between the interests of the employer and the employee.¹⁶⁸

It is easily shown that the clause is for the protection of client confidences and general firm information, arguably a reasonable goal. Regardless, as previously explained, the clause’s reach does not extend to former employees.¹⁶⁹ If a reviewing court were not initially to find the truth in the previous sentence, it would need to

165. E.g., *Bennett v. Storz Broadcasting Co.*, 134 N.W.2d 892, 898 (Minn. 1965).

166. *Id.* at 899. In like manner, the Minnesota courts validate restrictive covenants when it is necessary to protect the employer’s business. *Id.*

167. *Id.*

168. *Dynamic Air, Inc. v. Bloch*, 502 N.W.2d 796, 799 (Minn. Ct. App. 1993).

169. *See supra* Part V.A.

toil in its determination of reasonableness. The nature and character of employment and nature of business are directly correlative, and should not be thought of as two distinct areas.¹⁷⁰ The clause contains no time limitation for maintaining confidential information.¹⁷¹ In order to strike a balance between these two competing forces, a court may necessarily have to “blue pencil a covenant, that is, to modify so as to render it reasonable and enforceable.”¹⁷² To do so the court would have to engage in judicial paternalism, which courts typically are not inclined to do. Nonetheless, a reasonable solution could have been reached by allowing the former employee, your author, to write a paper on the proposed topic with the understanding that the paper need be devoid of any confidential information. In spite of the aforementioned reasonable solution, no charge was brought to enforce the confidentiality clause and the only solution proposed was that your author substitute the first topic with another.

VI. CONCLUSION

The vague reasoning in favor of censorship set forth by the former employer was insufficient. The argument calling for the author to uphold his duty to maintain client confidences and secrets has been shown to have no application to information that has become generally known. Moreover, its own language disproved the specific rule cited by the former employer.¹⁷³ Secondly, the detriment to the former client argument also fell victim to its own language, and appears to be flatly contrary to established authority. Lastly, the confidentiality agreement was shown to have no application by the very nature of the instrument itself. Yet it is somehow a scant outcome by honestly establishing that the arguments for censorship are vacuous and unconvincing. What remains galling is that the issue would even arise in the first place. Regardless of the fallacies shown in the censors position, the author decided to shift long paper topics based on the Golden

170. The nature and character of the employment was legal research and writing; the firm utilized this research and writing to provide clients with memorandum of law addressing novel legal areas.

171. Confidentiality Clause, *supra* note 8.

172. *Dynamic Air*, 502 N.W.2d at 800 (citing *Bess v. Bothman*, 257 N.W.2d 791, 794-95 (Minn. 1977)).

173. PROF'L RESPONSIBILITY, *supra* note 82, at 1.7.

Rule—do unto others as you would have them do onto you.¹⁷⁴

Long ago, one academic rejoiced and celebrated in the thought that the “principle of fear has been almost wholly banished from systems of education” as well as learning had become recognized “as an independent interest of the community.”¹⁷⁵ And today the principle that “the scholar is especially encouraged to participate in the public forum”¹⁷⁶ should once again ring true.

174. “In everything, therefore, treat people the same way you want them to treat you, for this is the Law and the Prophets.” *Matthew 7:12* (NEW AMERICAN STANDARD BIBLE 2000).

175. 2 JOSIAH QUINCY, *THE HISTORY OF HARVARD* 445-46 (1977). Quincy went on to conclude by asserting that attempts were being made “to rescue the general mind from the vassalage in which it has been held by sects of the church, and by parties in the state; giving to that interest . . . a vitality of its own, having no precarious dependence . . . on subserviency to particular views[.]” *Id.*

176. Borris I. Bittker, *Developments in the Law – Academic Freedom*, 81 HARV. L. REV. 1045, 1048 (1968).