No. _____

In The
Supreme Court of the United States

VIRGINIA STATE BAR, *ex rel.*
THIRD DISTRICT COMMITTEE,

Conditional Cross-Petitioner,

v.

HORACE FRAZIER HUNTER,

Conditional Cross-Respondent.

On Conditional Cross-Petition For Writ Of Certiorari To The Supreme Court Of Virginia

CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the First Amendment affords lawyers a commercial speech right to publicly disseminate information about clients that was obtained by reason of representation, without client consent and without regard for the embarrassment or detriment caused to their clients, simply because the information is otherwise available in some public record.

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Virginia Attorney General Kenneth T. Cuccinelli, II, on behalf of Appellee below, Virginia State Bar, *ex rel.* Third District Committee, respectfully conditionally cross-petitions this Court for a Writ of Certiorari to review the portion of a judgment of the Supreme Court of Virginia not drawn into question by Respondent Horace Frazier Hunter in his pending Petition, No. 12-1379, at 12 n.1.

INTRODUCTION

This conditional cross-petition involves a lawyer, Horace Frazier Hunter, who blogged about his clients' criminal proceedings to burnish his image as a committed and successful criminal defense attorney despite the duty of confidentiality and the duty to maintain client "secrets" owed by members of the legal profession to their clients. Virginia requires that members of its bar first obtain consent before revealing information obtained through representation of a client, even if not subject to attorney-client privilege, if the client has asked the lawyer to keep the information confidential or if that information would be embarrassing or detrimental to the client. This rule represents Virginia's version of the traditional and nearly universal restriction upon attorneys disclosing client "secrets," as they are

commonly termed in the literature on regulation of the legal profession.[1]

Hunter contended below, and the Supreme Court of Virginia agreed, that this duty of confidentiality ends, and his right of free expression begins, the moment the information enters into a public record, such as a court filing, even though the information is not generally known. Cross-Petitioner respectfully submits that this holding undermines the authority of the Virginia State Bar to ensure the legal profession's performance of its fiduciary duties and the protection of the public trust reposed in lawyers. Moreover, it calls into question the constitutionality of lawyer confidentiality requirements throughout the United States, placing that decision at odds with nearly every other state court system. Accordingly, should Hunter's Petition be granted, this Court should also take up the question presented here and affirm that, whatever others may be entitled to do, lawyers have no constitutional right to disseminate embarrassing or detrimental client information, gained by representation, without client consent,

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[1] *See* C. Wolfram, Modern Legal Ethics § 6.7.2, at 297 (1986) ("The secrets rule. . . . is much broader [than t]he confidence rule[, which] simply duplicates the coverage of the attorney-client testimonial privilege." It "covers a great deal more" and has "no necessary connection with the privacy of communication concept that underlies the protection of confidences."); *see also Adams* v. *Franklin*, 924 A.2d 993, 996-97 (D.C. 2007) (discussing the distinction between "confidences" and "secrets").

even if that information is available in a public record. Lawyers must for the public good remain duty-bound to keep their client's secrets and thereby uphold the public trust.

OPINIONS BELOW

The final judgment rendered by the Supreme Court of Virginia on the constitutionality of applying Va. Sup. Ct. R. pt. 6, § II, 1.6(a) is styled as *Hunter* v. *Virginia State Bar,* ex rel. *Third District Committee*, 285 Va. 485, ___ S.E.2d ___ (2013), and is reproduced at Appendix A, pages 1a through 32a, of Hunter's Appendix in Case No. 12-1379.[2] The unpublished memorandum opinion of a three-judge circuit court, addressing the constitutionality of the Third District Committee's Determination that Respondent Hunter violated Rule 1.6(a), is styled *Virginia State Bar,* ex rel. *Third District Committee* v. *Hunter*, No. CL 12-335-7 (Va. Cir. Ct. 2012), and is reproduced at Appendix B, pages 33a through 39a, of that same Appendix.

[2] All citations to the Appendix will refer to the appendix filed in *Hunter* v. *Virginia State Bar,* ex rel. *Third District Committee*, No. 12-1379.

JURISDICTION

The Supreme Court of Virginia issued its decision on February 28, 2013, and Hunter timely filed his Petition for Writ of Certiorari on May 21, 2013. *See* Sup. Ct. R. 13.1. That Petition was docketed on May 23, 2013, making this conditional cross-petition due on June 24. *See* Sup. Ct. R. 12.5; Sup. Ct. R. 13.4; Sup. Ct. R. 30.1. Therefore, this Court has jurisdiction to consider both Hunter's Petition and this Conditional Cross-Petition under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The provisions of the United States Constitution involved in this matter read "Congress shall make no law . . . abridging the freedom of speech, or of the press," U.S. Const. amend. I, and "No State shall . . . deprive any person of life, liberty, or property without due process of law." U.S. Const. amend. XIV, § 1.

The statutory provision involved in this matter reads, in pertinent part:

A lawyer shall not reveal information protected by the attorney-client privilege under applicable law or other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to

the client unless the client consents after consultation. . . .

Va. Sup. Ct. R. pt. 6, § II, 1.6(a) (hereinafter "Rule 1.6").[3]

STATEMENT OF THE CASE

In March 2011, the Virginia State Bar (the Bar) brought charges against Hunter, a Richmond-based criminal defense lawyer, for violating, among other rules, Rule 1.6 of the Virginia Rules of Professional Conduct by posting about his clients' criminal cases on his trademarked blog. The blog, "This Week in Richmond Criminal Defense," "is accessible from his law firm's website, www.hunterlipton.com," (App. 2a-3a), "rather than [being] an independent site dedicated to the blog." (App. 12a.) Besides being hosted on the same website, the blog also uses "the same frame for the pages openly soliciting clients," and its pages include displays of "the firm name, a photograph of Hunter and his law partner, and a 'contact us' form." (App. 12a-13a.) Hunter's blog does not allow "for discourse about the cases, as

[3] These rules are promulgated by the Supreme Court of Virginia pursuant to authority vested in it by Virginia law, *see* Va. Code Ann. § 54.1-3909, are obligatory upon "[a]ll persons engaged in the practice of law in the Commonwealth," and are enforced by the "Virginia State Bar[,] . . . an administrative agency of the Court. . . ." Va. Code Ann. § 54.1-3910; *see* Va. Code Ann. § 54.1-3900.

non-commercial commentary often would by allowing readers to post comments," but instead "invites the reader to 'contact us' the same way one seeking legal representation would contact the firm through the website." (App. 13a-14a.)

Hunter dedicated twenty-one of the blog's thirty posts to discussing criminal cases in which he had represented the defendant, a fact he highlighted in each post. (App. 4a, 12a.) Hunter "only blogged about his cases that he won," used "the client's name" in each posting, and did so without the client's consent. (App. 4a, 15a-16a.) Hunter explained his decision not to seek client consent, arguing that he did not need it on the ground that "all the information that he posted was public information" because it had been aired in court. (App. 3a-5a.) It was established below, however, that "the information in Hunter's blog posts 'would be embarrassing or be likely to be detrimental' to clients," that "he did not receive consent from his clients to post such information," and that the incidents upon which the Bar proceeded were not generally known in the surrounding community, although "all such information had previously been revealed in court."[4] (App. 3a-5a; App. 41a.)

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[4] Like the rules of other States, Virginia's Rules of Professional Conduct permit attorneys to "use information" about *former* clients not protected by attorney-client privilege "when the information has become generally known." *See* Va. Sup. Ct. R. pt. 6, § II, 1.9(c)(1).

The Third District Committee of the Virginia State Bar,[5] in finding a Rule 1.6 violation, cited various posts as examples. (App. 41a.) In one such post, Hunter identified his client by first initial and last name, reported the name of the high school where the client taught, and noted that the client's charge for assaulting a fellow teacher after a verbal altercation on school grounds was ultimately dismissed, naming himself and his law firm as having argued the case.[6] (*Id.*) And in another post cited by the Committee, Hunter recited his client's full name, that she was charged with cocaine possession, and that he argued the matter. Giving the prosecution's evidence, Hunter noted that she was arrested "in a motel room along with three other individuals" in which there were "three smoking devices," and disclosed that her blood tested positive for cocaine. He announced that she was found not guilty, despite these inculpatory facts, on the ground that there was insufficient evidence that she had actually possessed

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[5] District Committees of the Virginia State Bar often initially adjudicate alleged violations of the Virginia Rules of Professional Conduct that are prosecuted by Virginia State Bar Counsel, *see* Va. Code Ann. § 54.1-3935(A), (C), and are comprised of Virginia lawyers as well laypersons. *See, e.g.*, Virginia State Bar, Third Dist. Comm. Section II: 2012-13 Comm., http://www.vsb.org/site/about/third-district-committee-section-ii (last updated Sept. 27, 2012).

[6] This posting remains available at Hunter & Lipton, PC, *Henrico Teacher Not Guilty of Assault*, http://hunterlipton.com/index.php/news/details/henrico-teacher-not-guilty-of-assault/ (last visited June 14, 2013).

the cocaine.[7] (*Id.*) Hunter disclosed this "potentially embarrassing information about his clients on his blog 'in order to advance his personal economic interests.'" (App. 19a.) Accordingly, the Committee "found by clear and convincing evidence that Mr. Hunter violated Rule 1.6 by disseminating client confidences without client consent" in his blog, and that, under an "objective standard," these "postings were likely to be embarrassing or detrimental to" those clients. (App. 41a, 5a.)

Hunter appealed that determination, among others that are the subject of his Petition, to a three-judge panel of the Circuit Court for the City of Richmond appointed pursuant to Va. Code Ann. § 54.1-3935(B), (App. 5a, 33a-34a), contending that the determination that he violated Rule 1.6 violated his First Amendment rights. (App. 35a.) After entertaining briefing and argument, the three-judge circuit court unanimously agreed, summarily dismissing the Rule 1.6 Determination against Hunter "[a]t the conclusion of the proceedings." (App. 34a-36a, 5a.) Because the circuit court affirmed the Committee's determinations that Hunter had violated two other Virginia Rules of Professional Conduct—regarding "Communications Concerning a Lawyer's Services" and "Advertising," Va. Sup. Ct. R. pt. 6, § II,

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[7] This posting also remains available at Hunter & Lipton, PC, *Halifax Woman Not Guilty of Possession of Cocaine*, http://hunterlipton.com/index.php/news/details/halifax-woman-not-guilty-of-possession-of-cocaine/ (last visited June 14, 2013).

7.1(a)(4), 7.2(a)(3)—by posting no disclaimer on his blog posts, (App. 2a-3a & n.3, 5a-6a, 36a), Hunter exercised his appeal as of right to the Supreme Court of Virginia. Va. Code Ann. § 54.1-3935(E); (App. 1a, 6a). The Bar cross-petitioned from the circuit court's dismissal of the Rule 1.6 determination against Hunter. (App. 19a.)

The Supreme Court of Virginia concluded that "Hunter's blog posts, while containing some political commentary, are commercial speech" that enjoy reduced First Amendment protection. (App. 12a, 15a.) That court noted that Rule 1.6 forbids attorneys from disclosing "two types of information: 1) that which is protected by the attorney-client privilege, and 2) that which is public information but is embarrassing or likely to be detrimental to the client," and that Hunter had only been "charged with disseminating the lat[t]er type of information." (App. 19a.) With respect to that information, the court concluded that the Commonwealth "may not" "prohibit an attorney from discussing information about a client or former client that is not protected by attorney-client privilege without express consent from that client" where the information has been made public. (*Id.*) In doing so, the Court rejected the Bar's contention "that lawyers, as officers of the Court, [may be] prohibited from engaging in speech that might otherwise be constitutionally protected." (*Id.*)

Instead, the Supreme Court of Virginia, noting "that attorney speech about public information . . . is protected by the First Amendment," relied on cases

emphasizing the presumptive "'openness . . . of a criminal trial under our system of justice,'" and concluded that attorneys enjoyed the same constitutional right as the public and the press to make truthful statements regarding matters that had been made public in court proceedings, even if the information regarded the attorney's client and was embarrassing or detrimental to a client. (App. 19a-21a) (quoting *Richmond Newspapers, Inc.* v. *Virginia*, 448 U.S. 555, 573 (1980)). The court rejected the Bar's arguments that its restrictions were constitutional "even though others can disseminate this information because an attorney repeating it could inhibit clients from freely communicating with their attorneys or because it would undermine public confidence in the legal profession." (App. 22a.) In doing so, the Supreme Court of Virginia concluded that Rule 1.6 fails the less exacting First Amendment test endorsed by this Court in *Gentile* v. *State Bar of Nevada*, 501 U.S. 1030, 1051-52, 1075 (1991).

Giving no weight to the unique fiduciary obligations that attorneys assume, the court concluded that "[t]o the extent [such] information is aired in a public forum, privacy considerations must yield to First Amendment protections. . . . [A] lawyer is no more prohibited than any other citizen from reporting what transpired in the courtroom."[8] (App.

[8] Two Justices of the Supreme Court of Virginia dissented from the majority's application of commercial speech, rather than political speech, doctrine to Hunter's blog posts and from

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22a.) Accordingly, the Supreme Court of Virginia affirmed the circuit court's holding that Rule 1.6 could not be constitutionally applied to these circumstances, but did affirm the circuit court's determination that Hunter had violated two other Virginia Rules of Professional Conduct. (App. 24a.) Hunter proceeded to timely petition this Court for a writ of certiorari on the determinations that were affirmed and this conditional cross-petition from the Bar now follows.

REASONS FOR GRANTING THE CONDITIONAL CROSS-PETITION

This Cross-Petition presents the Court with the question of whether a near universal rule of legal ethics is consistent with the First Amendment. An affirmative answer has long been assumed, but this Court has not settled the question. In the absence of direct guidance, the Supreme Court of Virginia interpreted the attorney's right to speak as overriding fundamental fiduciary duties owed to clients. In concluding that the First Amendment affords attorneys the right to disseminate client secrets—information about a client obtained by reason of representation and disseminated for the attorney's

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the majority's conclusion that the Virginia Rules of Professional Conduct could constitutionally require Hunter to include disclaimers on his blog posts, but "agree[d] with the majority's resolution of the Rule 1.6 issue." *See* (App. 25a.)

benefit without the client's consent—simply because they had previously been aired in court, the Supreme Court of Virginia erroneously decided an important question of federal law that this Court should resolve. Because it decided the question in a manner that is at odds with both the decisions and the practices of nearly every other state judicial system and this Court's jurisprudence, if the Court elects to grant the underlying Petition for Certiorari, it should also grant this Cross-Petition. *See* Sup. Ct. R. 10(b), (c).

I. The Supreme Court of Virginia's Erroneous Holding that Rule 1.6 Violates the First Amendment Should Be Reviewed Because It Calls into Question a Foundational and Effectively National Canon of Legal Ethics that Preserves the Fiduciary Nature of Legal Representation.

It is axiomatic that an attorney must always "maintain confidentiality of information relating to the representation" unless the client consents to disclosure, Va. Sup. Ct. R. pt. 6, § II, 1.6 note 2b. The reason for this rule is clear: confidentiality "contributes to the trust that is the hallmark of the client-lawyer relationship," Model Rules of Prof'l Conduct R. 1.6 cmt. 2, *available at* http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_6_confidentiality_of_information/comment_on_rule_1_6.html (last visited June 15, 2013), and, like the attorney-client privilege, engenders client trust and

"encourage[s] full and frank communication between attorneys and their clients and thereby promote[s] broader public interests in the observance of law and the administration of justice." *Swidler & Berlin* v. *United States*, 524 U.S. 399, 403 (1998) (quoting *Upjohn Co.* v. *United States*, 449 U.S. 383, 389 (1981)).

This aspect of the confidentiality duty specifically advances the public's interest in "'the full development of facts essential to proper representation of the client'" through broad attorney access to client information; "'encourages people to seek early legal assistance'"; and engenders greater client, and public, confidence in the legal profession. *In the Matter of Skinner*, 740 S.E.2d 171, 173 (Ga. 2013) (quoting Ga. Rules of Prof'l Conduct R. 1.6 cmt. 2). In concluding that this principle and these interests must give way to an attorney's First Amendment right to engage in commercial speech about his client's criminal records, the decision below calls into question this application of a time-honored principle of attorney-client relations to shield from appropriate bar regulation a subject of growing concern. *See, e.g.*, *id.* at 172-73 (entertaining, for the first time, a claim of "a violation of Rule 1.6 by means of internet publication," and citing the fact that "the supreme courts of two states," Illinois and Wisconsin, had imposed discipline on an attorney for posting client secrets online).

A. The Supreme Court of Virginia's Decision Calls into Question the Constitutionality of Many States' Attorney Confidentiality Rules.

By ruling that Virginia's version of the client secrets prong of the attorney confidentiality duty does not meet constitutional muster, the Virginia Supreme Court implied that all other States cannot apply that aspect of their attorney confidentiality rules either. This follows from the fact that Virginia's secrets duty is no broader than that of any other State, and is narrower than that of many States.

In Virginia, unlike in States that have adopted the American Bar Association's Model Rules of Professional Conduct (ABA Model Rules) formulation, the protected information about the client must have been "gained in the professional relationship," i.e., while representing the client, and the client must either have requested that the attorney not disclose it or it must be objectively apparent that disclosure of the information would be harmful to the client. *Compare* Va. Sup. Ct. R. pt. 6, § II, 1.6(a) ("A lawyer shall not reveal . . . information *gained in the professional relationship* that the client has requested be held inviolate or the *disclosure of which would be embarrassing or would be likely to be detrimental to the client* unless the client consents after consultation." (emphases added)), *with* Model Rules of Prof'l Conduct R. 1.6(a), *available at* http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_6_confidentiality_

of_information.html (last visited June 15, 2013) (providing that "[a] lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent"). Plainly, the ABA Model Rules' approach is not limited in the means by which the information was obtained, the nature of the information disclosed, or by the interests of the client. Model Rules of Prof'l Conduct R. 1.6 cmt. 3, *available at* http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_6_confidentiality_of_information/comment_on_rule_1_6.html (last visited June 15, 2013) ("[T]he confidentiality rule . . . applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source."). In fact, in adopting this particular language, the Virginia State Bar knowingly "rejected as too broad" "the definition of 'client information' as set forth in the ABA Model Rules, which includes all information 'relating to' the representation." Va. Sup. Ct. R. pt. 6, § II, 1.6 (note "Virginia Code Comparison").

Although many States follow the ABA Model Rules' more restrictive approach to attorney confidentiality without substantive modification,[9]

[9] *See, e.g.*, Colo. Rules of Prof'l Conduct R. 1.6(a), *available at* http://www.cobar.org/index.cfm/ID/22144 (last updated Mar. 13, 2012) (following the ABA Model Rules approach); Fla. Rules of Prof'l Conduct R. 4-1.6(a), *available at* https://www.floridabar.org/TFB/TFBResources.nsf/Attachments/0A266C6138C4A15685256B29004BD617/$FILE/RRTFB%20CHAPTER%204.pdf?Open

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some States have narrowed this "very broad obligation of confidentiality" by interpretation to cover only disclosures where "there is a risk or potential for harm to the client's interests." *Harris* v. *Balt. Sun Co.*, 625 A.2d 941, 947 (Md. 1993). In any case, the bars of 49 of 50 States, as well as the District of Columbia and Virgin Islands, enforce some form of an ABA-based rule with confidentiality limitations at least as restrictive as Virginia's. *See* Am. Bar. Ass'n, *Chronological List of States Adopting Model Rules*, http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/chrono_list_state_adopting_model_rules.html (last visited June 15, 2013); Cal. Rules of Prof'l Conduct R. 3-100(A) & Discussion 1,

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Element (last updated May 1, 2013) (same); 2010 Ill. Rules of Prof'l Conduct R. 1.6(a), *available at* http://www.iardc.org/newrules2010.htm#RULE_1.6:_CONFIDENTIALITY_OF_INFORMATION (last visited June 15, 2013) (same); Mass. Rules of Prof'l Conduct R. 1.6(a), *available at* http://www.mass.gov/obcbbo/rpc1.htm#Rule 1.6 (last visited June 15, 2013) (same); N.J. Rules of Prof'l Conduct R. 1.6(a), *available at* http://www.judiciary.state.nj.us/rules/apprpc.htm#x1dot6 (last visited June 15, 2013) (same); Ohio Rules of Prof'l Conduct R. 1.6(a), *available at* http://www.supremecourt.ohio.gov/LegalResources/Rules/ProfConduct/profConductRules.pdf (last visited June 15, 2013) (same); Penn. Rules of Prof'l Conduct R. 1.6(a), *available at* http://www.padisciplinaryboard.org/documents/RulesOfProfessionalConduct.pdf (last visited June 15, 2013) (same); Tenn. Rules. of Prof'l Conduct R. 1.6(a), *available at* http://www.tsc.state.tn.us/rules/supreme-court/8 (last visited June 15, 2013) (same); Wis. Rules of Prof'l Conduct for Att'ys R. 1.6(a), *available at* http://www.wicourts.gov/sc/rules/chap20a.pdf (last visited June 15, 2013) (same).

available at http://rules.calbar.ca.gov/Rules/RulesofProfessionalConduct/CurrentRules/Rule3100.aspx ("A member shall not reveal information protected from disclosure by Business and Professions Code section 6068, subdivision (e)(1) without the informed consent of the client." The referenced statute codifies non-disclosure of "information relating to the representation" as "a fundamental principle"); N.Y. Rules of Prof'l Conduct R. 1.6(a), *available at* http://www.nysba.org/Content/NavigationMenu/ForAttorneys/ProfessionalStandardsforAttorneys/NYRulesofProfessionalConduct4109.pdf ("A lawyer shall not knowingly reveal confidential information," which "consists of information gained during or relating to the representation of a client, whatever its source, that is (a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential."); Tex. Disciplinary Rules of Prof'l Conduct R. 1.05(a), (b), *available at* http://www.texasbar.com/AM/Template.cfm?Section=Grievance_Info_and_Ethics_Helpline&Template=/CM/ContentDisplay.cfm&ContentFileID=96 (last visited June 5, 2013) ("[A] lawyer shall not knowingly: 1) Reveal confidential information of a client or a former client to: (i) a person that the client has instructed is not to receive the information; or (ii) anyone else [except the client's representatives and other members of the law firm]," confidential information being defined to include "Unprivileged client information," i.e., "all information relating to a client or furnished by the client, other than privileged

information, acquired by the lawyer *during the course of* or by reason of the representation of the client" (emphasis added)).

The ethical requirement that lawyers maintain client information not protected by attorney-client privilege thus has become the American rule of attorney confidentiality, applying in every one of the States that comprise our Union. The Virginia Supreme Court's decision now casts constitutional doubt over this virtually national rule of ethical legal practice, and in so interpreting the Constitution's commands, has decided an important question of federal law that this Court should resolve. Sup. Ct. R. 10(c).

B. The Supreme Court of Virginia's Decision that Ethical Regulations May Not Restrict Lawyers from Disseminating Client Secrets Simply Because the Information Has Been Aired in Court Conflicts with the Decisions of Other State High Courts Affirming Protection for Previously Published Client Secrets.

Just as it is well established that the lawyer's duty of confidentiality to clients runs to client "secrets" as well as attorney-client privileged information, it is also settled that mere disclosure, and even entry into a public record such as a court document, does not relieve attorneys of their ethical duty under state rules of professional regulation. *See*

Emle Indus., Inc. v. *Patentex, Inc.*, 478 F.2d 562, 572-73 (2d Cir. 1973) ("[T]he client's privilege in confidential information disclosed to his attorney 'is not nullified by the fact that the circumstances to be disclosed are part of a public record, or that there are other available sources for such information, or by the fact that the lawyer received the same information from other sources.'" (quoting H. Drinker, Legal Ethics 135 (1953)). Rather, under the rules of ethics, an attorney retains that duty, even after the representation ends, unless the information has become "generally known." Model Rules of Prof'l Conduct R. 1.9(c)(1), *available at* http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_9_duties_of_former_clients.html; *accord* Va. Sup. Ct. R. pt. 6, § II, 1.9(c)(1). The Supreme Court of Virginia implicitly affirmed this understanding by interpreting Virginia's Rule 1.6 as covering such public information, only to conclude that so restricting attorney speech is unconstitutional.

Contrary to the decision below, state high courts have affirmed that attorneys may be prohibited from disclosing "a confidence or secret of his client," notwithstanding the First Amendment's protections. *See Am. Motors Corp.* v. *Huffstutler*, 575 N.E.2d 116, 120 (Ohio 1991) (quotations omitted). And they have routinely affirmed disciplinary action against an attorney for revealing information relating to the representation of a client, including information filed with a court or involving a client's criminal record.

See, e.g., *Akron Bar Ass'n* v. *Holder*, 810 N.E.2d 426, 434 (Ohio 2004) (rejecting the argument that a client's "criminal record was not a 'secret,' inasmuch as it was a matter of public record and a matter that Wright had himself revealed to others," along with the contention "that [the attorney's] disclosure, even if it was of a secret, was not likely to be detrimental"); *Bd. of Att'ys Prof'l Responsibility* v. *Harman*, 628 N.W.2d 351, 360-61 (Wis. 2001) (per curiam) (disciplining an attorney for disseminating a client's medical records even though they had previously been filed in an earlier civil proceeding); *In re Anonymous*, 654 N.E.2d 1128, 1129 (Ind. 1995) (disciplining attorney disclosure even where the parties "agree[d] that the information gained by the respondent about the [client's] case was readily available from public sources and not confidential in nature"); *Lawyer Disciplinary Bd.* v. *McGraw*, 461 S.E.2d 850, 860-61 (W. Va. 1995) (rejecting an argument "that he did not breach his ethical duty of confidentiality because the information he disclosed . . . had been previously revealed or 'made public' "). Although placing attorney confidences in the blogosphere is a relatively new method of violating the duty of confidentiality, Hunter is not the first attorney to be disciplined for "publishing a blog with information related to [his] legal work." *Office of Lawyer Regulation* v. *Peshek*, 798 N.W.2d 879 (Wis. 2011) (noting that the blog published, inter alia, "confidential information about [the attorney's] clients" with "information sufficient to identify those

clients" and imposing a 60-day suspension of the attorney's license).

The widely shared sense of the States' judicial systems is that these sorts of attorney confidentiality restrictions do not run afoul of the First Amendment. As the Supreme Court of California put it, a "'lawyer's right to freedom of expression is modified by the lawyer's duties to clients. . . . The requirement that a lawyer not misuse a client's confidential information . . . similarly applies to discussion of public issues.'" *Oasis W. Realty, LLC* v. *Goldman*, 250 P.3d 1115, 1123 (Cal. 2011) (quoting Rest. 3d Law Governing Lawyers, § 125, cmt. e, p. 315). In sum, the Virginia Supreme Court's holding that the First Amendment affords Hunter a right to blog about his client's criminal charges because that information has, in some fashion, been made public runs contrary to the settled understanding prevailing in other States that "'[l]awyers are officers of the court and, as such, may legitimately be subject to ethical precepts that keep them from engaging in what otherwise might be constitutionally protected speech.'" *Id.* at 1124 (quoting *Gentile*, 501 U.S. at 1081-82 (O'Connor, J., concurring)); *see also Office of Disciplinary Counsel* v. *Gardner*, 793 N.E.2d 425, 429 (Ohio 2003) ("[A]ttorneys may not invoke the federal constitutional right of free speech to immunize themselves from even-handed discipline for proven unethical conduct.").

C. The Supreme Court of Virginia's Holding that the First Amendment Affords Attorneys the Right to Publish Client Secrets Without Client Consent Was Erroneous and Should Be Reviewed and Reversed by This Court.

"'Membership in the bar is a privilege burdened with conditions.'" *Gentile*, 501 U.S. at 1066 (quoting *In re Rouss*, 116 N.E. 782, 783 (N.Y. 1917) (Cardozo, J.)). For over 125 years, state bars have promulgated and enforced codes of legal ethics to make plain to attorneys the nature of the fiduciary obligation they are undertaking when they represent a client. *Id.* Although lawyers cannot be "denied any of the common rights of citizens," they do function as "officer[s] of the court, and like the court itself, [are] instrument[s] . . . of justice." *Id.* at 1074 (quotations omitted). As a result, it has long been understood that lawyers may be "subject to ethical restrictions on speech to which an ordinary citizen would not be." *Id.* at 1071 (citing *In re Sawyer*, 360 U.S. 622 (1959)). "Even in an area far from the courtroom and the pendency of a case, . . . a lawyer's right under the First Amendment to solicit business and advertise, contrary to promulgated rules of ethics, [is not] protected by the First Amendment to the same extent as those engaged in other businesses." *Id.* at 1073.

Under the standard established in *Gentile* for state restrictions on attorney speech, the courts are to "weigh[ ] the State's interest in the regulation of a specialized profession against a lawyer's First

Amendment interest in the kind of speech . . . at issue." *Id.* at 1073, 1075. Under this balancing test, a state regulation of attorney speech—even one that restricts an attorney's zealous representation of his client's interests—that "is designed to protect the integrity and fairness of a State's judicial system, and . . . imposes only narrow and necessary limitations on lawyers' speech" should be upheld as constitutional. *Id.* at 1075. The State's interest in requiring lawyers to keep their client's secrets, and so uphold the "integrity and fairness" of the legal system, outweighs Hunter's interest in disseminating the details of his legal successes for self-promotional purposes and over the wishes of his clients.

As this Court stated in *Ohralik* v. *Ohio State Bar Association*, "[i]n addition to its general interest in protecting consumers and regulating commercial transactions, the State bears a special responsibility for maintaining standards among members of the licensed professions." 436 U.S. 447, 460 (1978). "The interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts.'" *Id.* (quoting *Goldfarb* v. *Va. State Bar*, 421 U.S. 773, 792 (1975), and affirming "that the States have a compelling interest in the practice of professions within their boundaries"). "While lawyers act in part as 'self-employed businessmen,' they also act 'as trusted agents of their clients. . . .'" *Id.* (quoting *Cohen* v. *Turley*, 366 U.S. 117, 124 (1961)). As

the legal profession has recognized in adopting these attorney confidentiality limitations on disclosure, the trust reposed in attorneys is undermined when an attorney peddles client information for his own gain, especially if the attorney knows, or should know, that disclosure of the information would be detrimental to his clients.

The "lawyer's First Amendment interest in the kind of speech . . . at issue"—here Hunter's interest in reporting on his client's criminal charges and favorable results to burnish his reputation as a criminal defense attorney—plainly does not outweigh the State's interest in requiring that attorneys abide by their fiduciary obligations to their clients. Virginia's rule limiting attorney dissemination of client secrets is a "narrow and necessary limitation," *Gentile*, 501 U.S. at 1074, applicable here only to the extent the information was "gained in the professional relationship" and objectively likely to be harmful to the client. *See* Va. Sup. Ct. R. pt. 6, § II, 1.6(a). This limitation plainly advances the Commonwealth's interest in maintaining client and public trust in the legal profession by ensuring that lawyers remain faithful agents of their clients.[10]

[10] No court has previously suggested that the mere fact that a member of the public could investigate these clients' criminal records in the files of a clerk's office, *see* Va. Code Ann. §§ 17.1-208, 17.1-213; *Daily Press, Inc.* v. *Commonwealth*, 285 Va. 447, 456, 739 S.E.2d 636, 641 (2013), diminishes the State's interest in preserving the fiduciary nature of the attorney-client

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Va. Sup. Ct. R. pt. 6, § II, 1.6 note 2b (noting that, in requiring confidentiality, "the client is thereby encouraged to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter"); *see* Model Rules of Prof'l Conduct R. 1.6 cmt. 2, *available at* http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_6_confidentiality_of_information/comment_on_rule_1_6.html (last visited June 15, 2013) (noting that the limitation on disclosure "contributes to the trust that is the hallmark of the client-lawyer relationship.").

Finally, unlike the attorney in *Gentile*, Hunter and others who violate Rule 1.6 and similar requirements are not taking "reasonable steps to defend a client's reputation and reduce the adverse consequences of indictment," 501 U.S. at 1043, but are doing just the opposite, further weakening their already reduced First Amendment interest in engaging in self-promotion. In disseminating client information that attorneys should know their client would not want disseminated, they violate an implicit understanding of confidentiality—a violation that the First Amendment has never been understood to protect. *See, e.g.*, *Cohen* v. *Cowles Media Co.*, 501 U.S. 663 (1991). Accordingly, the Supreme Court of Virginia erred in concluding that the First

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relationship or increases the attorney's commercial speech rights.

Amendment voids Rule 1.6's confidentiality requirement for client secrets.

CONCLUSION

For all the reasons stated above, if the Court grants the petition in No. 12-1379, the Court should also grant this conditional cross-petition and reverse the decision of the Supreme Court of Virginia holding that Virginia's client secrets requirement violates the First Amendment.

Respectfully submitted,

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