



Ethics: Problems Relating to Confidentiality

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In order to analyze the two hypotheticals, it is important to review Rule 1.6(a) of the ABA Model Rules of Professional Conduct (which are the basis for the ethics rules in well over 40 states) which mandates confidentiality for "information related to the representation." The category of protected information is thus quite broad. The information is protected even if it emanates from someone other than the client - for example, a friend or even an enemy - and the client need not even be aware of the existence or content of the information.

Rule 1.6(b) contains a number of exceptions to the general mandate of confidentiality imposed by Rule 1.6(a). The most controversial exceptions relate to what may be called the public policy exceptions, i.e., exceptions where the lawyer is permitted to breach confidentiality to protect an interest other than that of the client. Prior to 2002, Model Rule 1.6(b)(1) permitted a lawyer to disclose protected information without the client's consent only to prevent a client from committing a crime that was reasonably likely to result in imminent death or substantial bodily harm. In 2002 the ABA's House of Delegates amended Rule 1.6(b)(1) to permit a lawyer to disclose information to prevent reasonably certain death or substantial bodily harm. The 2002 version differed from the prior version in that it permitted disclosure to prevent a serious physical injury even if the conduct involved is not a crime and even if the conduct will be engaged in by someone other than the client.

In 2003 the ABA House of Delegates adopted further public policy exceptions. Following the nationwide furor that resulted from the collapse of Enron and other corporations the House of Delegates adopted two further exceptions to confidentiality. New Model Rule 1.6(b)(2) permits disclosure to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services. New Model Rule 1.6(b)(3) permits disclosure to prevent, mitigate, or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or that has resulted from the client's commission of a crime or fraud in furtherance of which the client used the lawyer's services.

Although these changes in Rule 1.6(b) are revolutionary as far as the Model Rules are concerned, they may not be as radical when viewed from the perspective of state ethics codes. Many of the states which adopted the ABA Model Rules adopted a version of Rule 1.6(b) permitting much wider disclosure than the ABA version. Those states which have adopted the ABA Model Rules and whose ethics codes now permit less disclosures than the newly revised version of Rule 1.6 now must decide whether to amend their codes to conform with the new version of Rule 1.6

Hypothetical A. You have been representing Husband in a domestic relations matter. The judge hearing the case has scheduled a conference to be attended by both parties and their lawyers. Prior to the hearing the judge told both you and the other lawyer that he was going to give to Wife the exclusive use and possession of the marital home and order Husband out of the home. The judge told you to tell your client. On the way to the hearing your client stated to you: "I won't let my wife get that house. I'd rather burn the house down than lose it. I know that she's going away and when she comes back that house will be nothing but cinders." You did not reply to this statement because you were shocked both by its content and by the strength of Husband's emotions. You have, occasionally in the past, regarded Husband as having a very short fuse. May you or must you make disclosure?

Discussion points:

1. The statement is protected by the rules of confidentiality under Rule 1.6(a) because it is "related to the representation."

2. Rule 1.6(b)(1) - as amended in 2002 - permits disclosure which the lawyer reasonably believes necessary to prevent reasonably certain death or substantial bodily harm.

a. One question under Rule 1.6(b)(1) is whether the arson is "reasonably certain" to cause death or substantial bodily harm. Husband states that he plans the arson when no one is at home. Still, I would find Rule 1.6(b)(1) to be applicable.

b. The other question under Rule 1.6(b)(1) is whether the lawyer can "reasonably believe" that disclosure is necessary based simply on one statement by the client. Shouldn't the lawyer have to have a further discussion before the lawyer can be said to have reasonable grounds to believe that disclosure is necessary? Is there enough of a showing here?

3. It may be interesting to consider the analysis if one were to conclude that Rule 1.6(b)(1) is not available because there is no showing that the client's action will cause "reasonably certain death or substantial bodily harm." New Rule 1.6(b)(2) - which was added in 2003 - permits disclosure to prevent a client's crime or fraud which is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services.

It is the underlined clause which is the problem here; the client will not have used the lawyer's services to burn down the house. Some states may permit disclosure to prevent a crime or fraud injuring financial property, but without having the extra requirement regarding the use of the lawyer's services. If so, disclosure would be permitted. Note, however, that in such states there is still the problem discussed above - can the lawyer reasonably believe that the client actually intends to take the action on the sole basis of the client's single statement?

4. Note also that disclosure under Model Rule 1.6(b) is permissive only; i.e., a decision regarding disclosure is within the lawyer's discretion. Authorities indicate that whatever decision the lawyer makes - whether disclosure or non-disclosure - is non-reviewable. Still, if you opt to disclose you do face the burden of having to prove that the conditions of 1.6(b) that permit disclosure have been met. That is, if lawyer does disclose in accordance with Rule 1.6(b)(1), the disclosure, to be protected, must be in accordance with the Rules - i.e., "reasonable belief" and "disclosure necessary to prevent reasonably certain death or substantial bodily harm." In other words, there is more of a burden to be met if lawyer decides to exercise discretionary right

to disclose. On the other hand, non-disclosure - depending on the facts - may or may not be actionable under other substantive law - e.g., criminal law.

Hypothetical B. You have represented Husband in a divorce action. The action culminated in the signing of a property settlement agreement between the spouses and the incorporation of the agreement into a divorce decree. The agreement and the decree call for the payment of periodic sums in the nature of alimony. After the agreement was incorporated into the decree, you found out, from Husband's ex girlfriend, that Husband had concealed \$600,000 in assets and had both lied about his finances and submitted false documents. What are your ethical rights and obligations?

Discussion Points:

1. The information from the girlfriend is protected by Rule 1.6(a) because it is information relating to the representation. The source of the information is irrelevant. Likewise, the time when the information was learned seems irrelevant as long as the information "relates to the representation." The duty of confidentiality continues even after termination of the representation.

The ethical duty of confidentiality contrasts here with the law relating to the attorney client privilege. The attorney client privilege is a rule of evidence that is relevant in judicial proceedings. The ethical duty of confidentiality is an ethical obligation that is far broader in scope than the privilege. The two are not interchangeable concepts, although there are similarities. In the hypothetical above, the information from the girl friend would not be covered by the privilege because it is not a communication from the client seeking legal advice.

2. Rule 3.3 deals with the lawyer's duty of candor to the tribunal. Rule 3.3(a)(3) imposes an obligation on a lawyer to take remedial measures, including disclosure, if the lawyer learns that the lawyer has submitted false evidence. However, Rule 3.3(c) provides that this obligation ends when the proceeding has been concluded.

The key question here is thus whether it can be said that the proceeding has been concluded since an order for future periodic payments is still outstanding. I would argue, Yes, because nothing is now pending before a judge. On the other hand, the order still calls for ongoing payments and can be modified if appropriate, so it can also be respectably argued that the matter has not been finally ended.

3. Even if there is no disclosure obligation under Rule 3.3(a)(3), the lawyer may nonetheless be permitted to disclose. New Model Rule 1.6(b)(3), inter alia, permits disclosure to mitigate or rectify substantial injury to the financial interests or property of another that has resulted from the client's commission of a crime or fraud in furtherance of which the client used the lawyer's services. Note that here the client has clearly used the lawyer's services in the commission of the crime or fraud.

This permission to make disclosure to mitigate or rectify an injury is a substantial departure from the pre-2003 version of Rule 1.6(b). In the past, the Model Rules permitted disclosure only to prevent conduct. Now the Model Rules permit disclosure to mitigate or rectify past conduct. Note, however, that some states have long had provisions permitting disclosure to mitigate or rectify past conduct. However, the importance of the change made in the Model Rules is that now it is likely that many more states will add such a provision to their ethics codes.