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The Duty of Confidentiality

BY ROGER C. CRAMTON

The duty of confidentiality prohibits a lawyer from revealing information about a client without the client's consent. But the duty is far from absolute, and it evaporates when a client abuses the lawyer's confidentiality by using it to further criminal activity.

That principle is central to the proposals by the ABA Commission on Evaluation of the Model Rules of



Professional Conduct (Ethics 2000) to change the provisions that address confidentiality.

Under current Model Rule 1.6 (Confidentiality of Information), a lawyer may reveal client information in only three circumstances: 1) when impliedly authorized to do so; 2) in a fee controversy with a client or to defend against charges of misconduct in representing a client; or 3) "to prevent the client from committing a crime that is likely to result in imminent death or substantial bodily harm."

The proposed amendments to Rule 1.6 would broaden the bodily harm exception, and create new exceptions to prevent and rectify client fraud in matters on which the lawyer provided services. The comment to the rule also would be revised to state that a lawyer may reveal client information to secure legal advice about the lawyer's own obligations, and "to comply with other law or a court order."

Under an expanded bodily harm exception, a lawyer who reasonably believes that disclosure is necessary to prevent "reasonably certain death or substantial bodily harm" may do so regardless of whether the client is the source of the threatened harm or whether the harm is the product of criminal activity.

Thus, a lawyer who learns that another person has been sentenced to die for a crime the client committed would be permitted to disclose that information. In another situation, a lawyer may disclose that a client

accidentally discharged toxic waste into a public water supply to prevent death or substantial injury even though no crime was committed.

Permission to Disclose Fraud

Regarding client fraud, the proposed revisions to Model Rule 1.6 would permit a lawyer to disclose information to prevent or rectify a crime or fraud by the client—in furtherance of which the lawyer's services were used—that is reasonably certain to cause financial injury to another party.

In doing so, the revisions would abandon the narrow definition of exceptions to confidentiality now contained in Model Rule 1.6 in favor of a broader approach

Proposed Changes: Broader permission to disclose confidences to prevent physical or financial harm to third parties.

that has been largely adopted by the states.

In more than three-quarters of the state professional conduct rules for lawyers, an express exception to the confidentiality rule would permit an attorney to disclose the prospective or ongoing criminal fraud of a client. A minority of those states would require the lawyer to disclose.

Defenders of the current version of Model Rule 1.6 argue that it, in combination with a broad reading of Model Rule 1.2(d) (Scope of Representation), permits the attorney to raise a red flag without disclosing confidential information. But these signals may not be understood by unsuspecting fraud victims, and in some cases cannot even be sent.

The proposed changes to the ABA Model Rules regarding confidentiality should breach no expectations because they are consistent with the moral intuitions of both lawyers and clients. Moreover, the crime-fraud exception of the attorney-client privilege and the broad self-defense exception of both privilege and confidentiality cover much of the same ground, exist in every state and have not adversely affected confidentiality.

Finally, it is shameless for a professional conduct code to assert that lawyers may disclose information to protect their own financial interests while prohibiting them from doing so when clients, abusing the attorney-client relationship, are defrauding third parties.

Indeed, some think disclosure by attorneys should be mandatory when life is threatened, or certain ongoing or future client crimes are involved.

But situations in which a breach of confidentiality should be contemplated are often morally complex ones in which practical judgment is properly influenced by a variety of circumstances. And there is the fear that mandatory provisions will be more likely to result in civil liability when a lawyer fails to disclose.

At the same time, the amendments will help reassure lawyers that disclosure often is the right thing to do. □

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