Attorney-Client Confidentiality and Harm to Third Persons

Philip Halpern
University at Buffalo School of Law

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The Dilemma

What should a criminal defense lawyer do upon learning as a result of a confidential communication with a client that a third person may be in imminent danger of death? Suppose the client tells the lawyer that hours before he stabbed a child whom he left in an isolated area. When asked by the lawyer about the extent of injury, the client responds, "I cut her, I'm not sure how badly."

In this situation, the instinct of a non-lawyer would be to pick up the phone and call the police to tell them that a critically injured person may be found at a particular location. Initially, a lawyer's instincts would probably be similar. However, having reached for the phone, the lawyer might hesitate, saying to himself or herself: "I can't disclose this information; disclosure would be contrary to professional ethics."


Alternative Courses of Action

1. Tell all without qualification. Prompt disclosure of the information to the authorities could save the life of an innocent child. The lawyer hesitates, despite the apparent urgency of the situation, because of a professional obligation to preserve the confidentiality of information supplied by a client. The Code defines the lawyer's obligation of confidentiality in Canon 4 which states: "A Lawyer Should Preserve the Confidences and Secrets of a Client." Confidence is defined to include communication protected by the attorney-client testimonial privilege, while secret is defined more broadly to include other information obtained as a result of the professional relationship not covered by the privilege.

DR 4-101 (B) requires that a lawyer must not "reveal a confidence or secret of his client," nor may the lawyer "use a confidence or secret of his client to the disadvantage of the client." The information imparted to our hypothetical lawyer seems to qualify clearly as a confidence protected by both the Code and the attorney-client testimonial privilege. There are, however, exceptions to the non-disclosure rule, two of which seem pertinent to the situation at hand. A lawyer "may" (note the permissive usage) reveal confidences or secrets: 11 when permitted by the Disciplinary
Rules or required by law or court order; and (2) when they relate to the intention of his client to commit a crime.

With regard to the first exception, no obligation exists under the Disciplinary Rules or extrinsic law that requires disclosure. There are a line of cases requiring defense attorneys to preserve and turn over to the authorities physical evidence adverse to their client, even if that evidence is obtained as a result of a confidential communication. The duty to do so typically is founded upon criminal statutes prohibiting the concealment of evidence. However, no physical evidence is involved in the situation at hand and no general legal obligation exists to prevent harm to third parties. With regard to the exception permitting a lawyer to reveal the intent of a client to commit a crime, that does not appear applicable since the information relates to a past criminal act rather than the intent to commit a future crime.

The 1983 Model Rules similarly create an expansive zone of confidentiality. Model Rule 1.6 states that a lawyer “shall not reveal information relating to the representation of a client.” Rule 1.6 (b) permits, but does not require, a lawyer to reveal confidential information “to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm.” However, as with the Code, breach of the confidentiality principle is permitted, not required, and only to prevent a future criminal act, not to mitigate the consequences of a past criminal act.

Accordingly, the Code and the Model Rules seem to counsel against, perhaps prohibit, the lawyer’s disclosing the location of the child to the police as being contrary to the obligation to maintain confidentiality of client information.

2. Remain silent. Under one interpretation of professional ethics, a lawyer should sit back and do nothing, although he or she possesses information which might save the life of a child. I am not comfortable with that resolution. It is a simplistic and mechanical response to a complex moral and professional dilemma.

The duty of lawyers to safeguard the secrets of clients is most frequently defended on the ground of social utility.

The duty of lawyers to protect innocent third parties from serious harm, even if it meant divulging confidential information. Lawyers recite the principle of attorney-client confidentiality so frequently that ritualistic incantation threatens to displace objective analysis. We come to believe that the principle is monolithic and inviolable, when it is not. For instance, under the Code and Model Rules, a lawyer is free to reveal confidential client information in order to defend against an adverse claim, to protect his or her reputation or to succeed in a fee dispute with a client. One wonders at the cost-benefit analysis that led to this result and who did the weighing.

The other objection does not call into question the assumption that clients will consult with lawyers earlier and more fully if lawyers have no duty to act to protect innocent third persons. Even granting that assumption, to risk one person’s life in order to help a client or benefit society by improving the legal system, according to this objection, reflects an erroneous weighing of conflicting values.

I don’t mean to suggest that the arguments supporting attorney confidentiality are not strong, because they are. However, the principle of confidentiality and its underlying values should not be treated as absolute or uniformly superior to other values with which they may come into conflict. What is needed is an approach that acknowledges the conflicting values and seeks to accommodate them. In that spirit, let us consider other alternatives open to our hypothetical lawyer.

3. Disclosure based on express consent of the client. Of course, if the client consents to the disclosure, there is not a problem under either the Code or the Model Rules. The moral dilemma is avoided. However, valid consent requires consultation with the client and full explanation of the probable consequences of the client’s waiver of confidentiality. The exigencies of the situation may not afford sufficient time for such consultation, and the client may withhold consent after full discussion.

4. Disclosure based on implied consent of the client. Model Rule 1.6 allows dis-
Disclosure of confidential information that is "impliedly authorized in order to carry out the representation." Saving the victim's life could be in the client's interest by avoiding a charge of homicide. However, disclosure will not always be to the client's advantage and may seriously disadvantage the client.

For instance, disclosure calculated to save the victim's life may not achieve its intended effect (the victim may already be dead) and such disclosure may provide a vital evidentiary link between the client and the crime. From the client's viewpoint, although a conviction for assault or attempted homicide is better than one for homicide, no conviction is best of all. Hence, if the lawyer is to furnish confidential client information to the prosecutor or police, on the ground that the lawyer reasonably believes that divulgence is necessary to prevent imminent danger to human life, it must be done in a manner reasonably designed to protect the client's interests.

5. Disclosure with an agreement against attribution. I suggest that the lawyer should advise the prosecuting authorities or the police that he or she possesses confidential information that may save the life of an innocent person, but that which the attorney is free to disclose only upon agreement that such information will not be attributed to either the lawyer or the lawyer's client. If such agreement is obtained, disclosure will serve the public interest and perhaps the interests of the client; at least harm to the client will be minimized.

Support for the Proposed Non-Attribution Rule

An agreement forbidding attribution to the client or the client's attorney of confidential information where divulgence was reasonably believed necessary to prevent imminent and serious danger to human life finds support in cases requiring defense counsel to turn over to the prosecutor adverse physical evidence. For instance, in People v. Meredith, a California case, the court required a lawyer, whose investigator recovered the victim's partially burned wallet from a trash can based on information supplied by the client, to turn the wallet over to the prosecutor.

The court also held that the wallet was admissible in evidence. More difficult was the admissibility of testimony concerning its location, since finding the wallet was the result of a client's confidential communication protected by the evidentiary privilege. In order to safeguard this privileged communication, the court suggested that in offering the physical evidence the defense lawyer had turned over to it, the prosecution should present it in a manner "which avoids revealing the content of attorney-client communications or the original source of information . . . When it is not possible to elicit such testimony without identifying the [source] as the defendant's attorney or investigator, the defendant may be willing to enter a stipulation which will simply inform the jury as to the relevant location or condition of the evidence. . . . [The] prosecution should not be permitted to reject the stipulation."

The Role of Prosecutors

Prosecutors should develop and publicize to the defense bar policies with respect to the receipt and non-attribution of confidential information where divulgence is reasonably believed necessary to prevent imminent danger to human life.

Additionally, if an attorney divulges confidential information for the purpose of saving human life without an agreement of non-attribution, it would be short-sighted and wrong for a prosecutor to attempt to use the communication against the accused. The predictable consequence of such action would be embarrassment of the particular defense attorney involved, and, more importantly, deterring other members of the defense bar from coming forward with confidential information in similar circumstances. Additionally, the predictable chilling effect on defense lawyers may not be offset by any evidentiary gain to the prosecutor, since such confidential information may not be usable at trial even without an agreement of non-attribution. If the information is protected by attorney-client privilege, any disclosure of that information without a valid waiver of the privilege by the client may well leave the privilege intact.

Conclusion

The arguments in support of attorney-client confidentiality are strong, but they do not always justify silence when third persons are threatened with serious and imminent harm. Creative solutions are needed to reconcile conflict between preserving client secrets and preventing harm to others.

Philip Halpem is Professor of Law at UB School. His primary teaching and research interests are in criminal law and criminal procedure. This article was delivered as a speech to our Rochester alumni, who invited him to speak at their annual luncheon.