

When may — and must — confidential information [be] disclosed?

by

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Perhaps the more interesting professional responsibility questions occur at the intersection of the lawyer's duty to the client and the lawyer's broader moral or ethical obligations.

For example, think of the situation where the client is involved in a highly emotional and contentious dissolution proceeding and announces to his lawyer that he has reached the point where he wonders if life is worth living. Or, who exclaims that he is so angry with the system that sometimes he thinks about grabbing a gun and heading to the courthouse.

On one hand the lawyer has a duty to maintain client confidences. As provided for in Rule 1.6(a) of the Minnesota Rules of Professional Conduct (MRPC), except as expressly permitted, "a lawyer shall not knowingly reveal information relating to the representation of a client."

The statements made to the lawyer by the client in the examples above clearly fall within Rule 1.6. If the lawyer discloses the information to others, not only is the information no longer confidential, but there may be serious consequences to the client resulting from the disclosure (e.g., custody disputes, civil commitment or criminal prosecution). On the other hand, the lawyer may certainly feel a moral obligation to disclose the information in an effort to prevent harm to the client or to others.

In 2002, in recognition of this dilemma, Rule 1.6(b)(1) of the Model Rules of Professional Conduct was amended to provide that "a lawyer may reveal information relating to the representation of a client to the extent that lawyer reasonably believes necessary to prevent reasonably certain death or substantial bodily harm."

In 2005, Minnesota adopted almost identical language; "a lawyer may reveal information relating to the representation of a client if the lawyer reasonably believes the disclosure is necessary to prevent reasonably certain death or substantial bodily harm." Rule 1.6(b)(6) MRPC.

As explained in the scope section of the MRPC, "[s]ome of the rules are imperatives, cast in the terms 'shall' or 'shall not.' These define proper conduct for purposes of

professional discipline. Others, generally cast in the term ‘may,’ are permissive and define areas under the rules in which the lawyer has discretion to exercise professional judgment.”

In Minnesota, the Rules of Professional Conduct make disclosure of such information discretionary. In other words, even if the lawyer believes that disclosure is necessary to prevent reasonably certain death or bodily harm, but chooses not to disclose, the lawyer cannot be disciplined for that decision. The Minnesota Rules allow, to some extent, the lawyer to determine the proper balance between the lawyer’s duty to the client and the lawyer’s broader moral or ethical obligation.

Curiously, not every state takes this approach. In a number of states the disclosure of confidential information is cast as an imperative.

For example, in Wisconsin, Rule 1.6(b) states that a “lawyer shall reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm or in substantial injury to the financial interest or property of another.”

In North Dakota, a “lawyer is required to reveal information relating to the representation of a client to the extent the lawyer believes reasonably necessary to prevent reasonably certain death or substantial bodily harm.” Since the disclosure is cast as an imperative the lawyer could, presumably be disciplined for failing to disclose confidential information. Certainly, in some situations, the imperative version of the rule may put the lawyer in a difficult situation.

Again, the more interesting professional responsibility questions may well occur at the intersection of the lawyer’s duty to the client and the lawyer’s broader moral or ethical obligations. The Director’s Office never advises an attorney to not make disclosures necessary to save a life.

Nevertheless, the Minnesota Rules of Professional Conduct, in their attempt to strike a balance between sometimes conflicting obligations, permit but do not require a lawyer to disclose confidential information about a client to prevent reasonably certain death or substantial bodily harm.