# PAST CRIME, CRIME FRAUD, FUTURE CRIME:

# WHERE ARE WE?

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In 2004, the Maryland Court of Appeals decided a case that received only modest attention from the bar. In 35 U.Balt.L.F. 171 (2005), the case was noted as a recent development, the supplement to Chapter 9 of the Maryland Evidence Handbook referred to the case with some question as to the "shelf life" of the court's view on the lawyer-client privilege and the law firm of Eccleston & Wolf referenced it in their August 2006 newsletter.

However, *Newman v. State* 384 Md. 285 (2004), raises interesting questions concerning the lawyer-client privilege (Rule 1.6 of the Maryland Rules of Professional Conduct), and its relationship to the privilege in the law of evidence (Section 9-108 Courts & Judicial Proceedings Maryland Code), that deserves some analysis. There are other interesting issues in *Newman* concerning criminal procedure that are beyond the scope of this article.

## FACTS

A brief recital of the *relevant* facts in *Newman* is as follows:

A lawyer represented a wife in a bitter custody dispute. The wife was distraught when conferring with the lawyer. She insisted that the only solution was killing her estranged husband, and even one of the children. Her lawyer remonstrated

with her, but then decided to bring a close friend of the client into future interviews in order to have a "cool head" present. In a subsequent interview with the "friend" in attendance, both women openly discussed how they could murder the husband. The lawyer warned that he could not continue listening to their plans for a future crime. The lawyer had other information that the client planned to murder her husband, and concerned that these threats were serious, decided he had to take some action.

Reluctant to go to law enforcement authorities, he met with the administrative judge for the circuit court for Montgomery County and informed her of his concerns. The administrative judge discussed the matter with several other colleagues. They concluded that the lawyer was obliged to make the disclosure under Rule 1.6 of the Maryland Rules of Professional Conduct.

The court removed the lawyer from the case and postponed the custody hearing. Prior to a hearing on the merits of the custody case, the wife's "friend" broke into the husband's home and shot him, wounding him in the right leg. A struggle ensued, but the "friend" managed to escape. She was later arrested, pled guilty and was sentenced to 50 years imprisonment with 30 years suspended.

The wife was later tried and convicted of conspiracy to commit murder. At trial, the state called the former lawyer of the wife to testify about her prior threats. The wife objected to the testimony and asserted her lawyer-client privilege. After a hearing on this objection, the trial judge ruled that the privilege did not apply as the lawyer had not violated Rule 1.6 of the Maryland Rules of Professional Conduct. The wife appealed this ruling (plus other alleged errors), to the Maryland Court of Special Appeals. The appellate court affirmed the conviction.

On the specific issue of lawyer-client privilege, the appellate court found that the trial court erred in ruling that Rule 1.6 of the ethical rules applied, instead of applying the *evidence rule* of lawyer-client privilege. However, the court concluded that the outcome would be the same because the crime-fraud exception to the rules of evidence applied and the lawyer's testimony was, therefore, admissible.

The Maryland Court of Appeals granted certiorari, and in a 4 to 3 decision, reversed the conviction. The Court of Appeals held (for the first time), that the crime-fraud exception was valid in Maryland, but that the lower court had misapplied that exception. Therefore, it was reversible error to permit the lawyer to testify over the client's objection.

**DISCUSSION**

The Court of Appeals noted, as all authorities do, that the evidence rule is more restrictive than the ethical rule. Indeed, where the ethical rule requires confidentiality for all information acquired by an attorney during the representation, the evidence rule is less inclusive. However, the court seems to have turned this distinction on its head . . . for if the lawyer did not violate ethical rule 1.6 by this disclosure, (which is not disputed, though the court refrained from deciding this), then surely the evidence rule was not violated. Some history of the two rules may be helpful in clarifying this "distinction" between the two.

Under the old Code of Professional Responsibility, DR 4-101 was the disciplinary rule for the lawyer-client privilege. It divided the privilege into two concepts . . . confidence and secret. A confidence coincided with the evidence rules in that lawyer-client privilege was what the client told a lawyer in private. A lawyer was never to reveal

a confidence until the highest court of the jurisdiction *ordered* the lawyer to reveal, and this would apply even after a client had died. See *Swidler & Berlin v. U.S.* 524 U.S. 399, 1998.

There was no difference between the lawyer-client privilege of the evidence rule and a confidence as defined by DR 4-101(A). A secret, however, was any information obtained by the lawyer during the representation where disclosure would be " . . . embarrassing or would be detrimental to the client . . ." Under the ethical code, a lawyer would never voluntarily reveal such information. However, the lawyer was not obliged to risk contempt when ordered to reveal, as would be the case with a "confidence."

The evidence rule never protected what was called a "secret" under DR 4-101. When such information was relevant and admissible, the lawyer would have to reveal. Therefore, while the ethical code was broader in scope than the lawyer-client privilege of the evidence rule, this was more in form than in substance.

Today, Maryland Rule 1.6 makes no distinction between "confidence" and "secret." It simply states that a "lawyer shall not reveal information relating to representation of a client . . . " However, the distinction still exists because the evidence rule protects what was called a confidence under the old code and the lawyer's duty or obligation is the same. The former code had an exception to permit revealing even a "confidence." This exception was to prevent a future crime by the client. DR 4-101(C-3) states ". . . a lawyer may reveal the intention of his client to commit a crime and information necessary to prevent the crime . . . "

The evidence rule has traditionally had an exception to the lawyer-client privilege known as the crime-fraud exception. See *U.S. v. Zolin* 491 U.S. 542 (1989)

and *Newman*, *supra*. For the exception to apply, the client must be seeking advice or assistance from the lawyer, or have received assistance to accomplish a criminal intent. The Court of Appeals, in *Newman*, held that the exception applies in Maryland, and following the definition of this exception, said the Court of Special Appeals misapplied it. In this case, the court noted, the client had not sought nor received assistance from the lawyer to further her criminal intent. The court offered no opinion as to an exception to the evidence rule based on "future crime," for there is little authority on a "future crime" exception, except under the ethical rules.

However, it is interesting to note that the client discussed with her friend, in the presence of the attorney, how to obtain an unregistered gun. Would the case be any different if they had asked the attorney for his help in getting such a weapon? The attorney would, of course, have refused to help, but would the request alone have triggered the crime-fraud exception? Simply having to ask the question indicates how tenuous is the distinction between "crime-fraud" and "future crime."

The ABA Recommended Rules of Professional Conduct (2000) and Maryland Rule l.6 have adopted three, relevant exceptions to the lawyer-client privilege. The old code permitted disclosure of *confidences* to reveal all future crime of a client. Maryland Rule 1.6 (b)(l) says a lawyer may reveal ". . . to the extent the lawyer reasonably believes necessary;

(1) to prevent reasonably certain death or substantial bodily harm . . . " This limits disclosure to the "future" crimes of murder or physical assault. Maryland Rule 1.6 (b)(2) & (3) permits disclosure for crime-fraud and defines it similarly as the evidence rule exception.

With crime-fraud under the ethical rule, the lawyer is permitted to reveal; it is discretionary. The crime-fraud exception of the evidence rule, however, is *mandatory*. Once a court finds that the exception applies, a lawyer must reveal.

To give some perspective to these rules, the following examples are offered;

**A)** A client tells his lawyer that, last month, he had dumped hazardous material into a river which is used for drinking water. He further confides that he lied on an E.P.A. report. He requests the lawyer's advice.

This is past crime, and is a confidence protected under the lawyer-client privilege of the evidence rules. It is also protected under the ethical rule 1.6. It should be noted; however, that there is some argument (not subscribed to in this article), that the above example, under Rule 1.6 (b)(1), could constitute an exception to the privilege. It may represent a "continuing crime" that could physically harm others in the future. See Rule .6, comment 8. This argument only indicates how complex the issue of privilege can be.

**B)** A client meets with his lawyer and requests assistance with filling out a complicated report for the E.P.A. on hazardous material disposal by the client's company. Later, the lawyer finds out that the report consists of false and fraudulent information.

This is "crime-fraud" as the client used the lawyer's assistance to perpetrate the fraud. However, in this scenario, the lawyer need not reveal to authorities because the exception in Rule 1.6 is discretionary. Under the evidence rules, the lawyer can be *compelled* to reveal.

**C)** A client meets with his lawyer to discuss ways of disposing of hazardous material under laws and regulations of the E.P.A. The client says "I cannot afford to

comply with these requirements. I have no choice but to dump my materials in the nearby river," and then the client leaves. The lawyer knows the river is used for drinking water. Alarmed, the lawyer notifies the relevant authorities.

This is an example of future crime and the lawyer may, by Rule 1.6 (b)(1), disclose "to prevent substantial bodily harm . . ." to others. See comment 8. A more difficult question is whether the government can use the lawyer as a witness in a subsequent criminal or civil case over the objection of the client. The *Newman* court would say the lawyer may not testify because the lawyer's assistance was not utilized or requested to commit the fraud.

*Newman* relied on the Massachusetts Supreme Judicial Court opinion *Purcell v. District Attorney*, 676 N.E.2nd 436 (1997), stating three public policy reasons for making the evidence rule, in this instance, broader than the ethical rule:

1) Lawyers will be reluctant to make disclosure under 1.6 (b)(1), if they know such disclosure may lead to adverse consequences to their client, including the lawyers testifying against a former client;

2) Permitting such disclosures in court could chill the free discourse between lawyer and client and thus actually limits the opportunity for lawyers to thwart serious threats in the future; and

3) Allowing the lawyer to testify effectively empowers the lawyer (not the client), to waive the lawyer-client privilege.

In the words of the dissent, ". . . none of these reasons can survive any critical analysis . . . " *Newman* at 325. While the dissent speaks for itself, it should be noted that the lawyer-client privilege is completely negated by a crime-fraud situation. Therefore,

in court, a lawyer must reveal information when the client has used or tried to use the lawyer's assistance to cause harm to money or property of another. Arguably, information concerning future crime that threatens death or serious bodily harm should rise to an equal status with information concerning harm to money and property. The fact that the lawyer's assistance was not involved should not justify a policy of treating a Rule 1.6(b)(1) future crime as a privileged and protected confidence.

Frank and private discourse between lawyers and their clients is essential, but should not include information that a client intends to spill anthrax in a subway or plant bombs in a building. While such conversations between lawyers and clients would be rare, the *Newman* case indicates that such revelations would be privileged and excluded from trials. More probable, however, is that knowledge of other kinds of hazards can arise in lawyer-client relationships. A lawyer could learn about faulty building construction, improper disposal of hazardous waste or other dangers that threaten serious bodily harm. Assuming the information is credible enough to permit disclosure under ethical Rule 1.6 (b)(1), then logically it should also negate the lawyer-client privilege under the rules of evidence.

There are other rules of law and ethics (involving less serious stakes than bodily injury), where the lawyer-client privilege is lost. Lawyers in civil cases (and to an extent, in criminal), must reveal client confidences, notwithstanding ethical Rule 1.6, when they cannot dissuade a client from committing perjury. See Rule 3.3 and comments, *Nix v. Whiteside* 475 U.S. 157 (1986). See also Rule 4.1 (2).

These rules are to protect the judicial and adversarial system of justice, but should not the protection of the safety of others deserve equal consideration and

protection?

The last (but not the least), privilege issue arising out of *Newman* is as follows.

During the critical conferences between the lawyer and his client in the *Newman* case, a third party was present. This third party was a friend of the client who the lawyer requested to be present at the conferences. Unfortunately, the friend only reinforced the client's rage by joining with her in discussions about how to kill the client's husband. Indeed, it was this friend who ultimately attempted to murder the husband.

It is almost hornbook law that the presence of a third party (with some exceptions), destroys the lawyer-client privilege. See *In Re Himmel* 533 N.E.2nd 790( Ill. 1988) for an extreme example of this exception. The *Newman* court noted this general exception to the privilege in the evidence rule saying that ". . . we have observed generally the presence of a third party will destroy the attorney-client privilege . . . " (at 306). The court, however, set what appears to be a new policy regarding the presence of a third party at a lawyer-client conference. Borrowing from the Supreme Court of Rhode Island in *Rosati v. Kuzzman* 660 A.2nd 263 (1999), the *Newman* court opined that when the third party is present at the request of the lawyer, the privilege has not been waived.

There has always been a debate that the "presence of a third party" rule was and is too restrictive. Opinions such as *In Re Himmel, supra,* raised questions as to the application of this exception in all circumstances. The *Newman* court observed that the privilege belongs to the client, and if a lawyer requests the third party, it is not the client who has waived the privilege. Indeed, the court said that as long as the client believed her conversations with the lawyer were confidential, then the privilege should be retained. However, as always, there are questions that will arise from this policy, no matter how

reasonable, which will require future decisions (for example, will the third party be prevented from testifying or only the lawyer?).

A final point from *Newman* is worth noting. The lawyer in this case conducted himself appropriately under Rule 1.6. There is no question the information he had was credible. He had good reason to suspect his client (and the friend), would commit a serious crime against the client's husband. Indeed, the crime actually went forward. The Court of Special Appeals and Court of Appeals made a point of <u>not</u> deciding the appropriateness of the lawyer's revelations under Rule 1.6, (though the dissent presumes it was appropriate *Newman* at 324). However, if a future crime situation such as the *Newman* case ever comes up, the court should resolve that question.

The court should give some guidance to lawyers as to when revelations under Rule 1.6 (b)(1) are appropriate as the *Newman* case opens up many questions which need to be resolved. What exactly should a lawyer do when facing circumstances similar to the *Newman* facts? In the instant case, the lawyer, reluctant to go to the police, chose to go to the administrative judge of the local circuit court. What then should the circuit court do after concluding that the threat was credible and real? Was postponing the custody hearing and removing the lawyer from the case a sufficient or appropriate response? Was the lawyer correct to have revealed to a court? Should law enforcement have been brought in by either the lawyer or the court? Rule 1.6 and its comments as to whom the lawyer should disclose is very general by using the comment "disclose to authorities." Lawyers need more guidance about where they can go to obtain authoritative advice about whether they should disclose, and to whom they should disclose.

Time and space do not permit a full discussion of the above and of other issues tangentially related to the *Newman* case, but *Newman* does raise important questions.

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