Lawyer-Client Privilege — Exceptions Swallowing the Principle?

By Abraham Dash

It is usually easy to criticize the work of committees, as the results of their work are usually a compromise between many philosophical and practical differences of opinions. The American Bar Committee and the various state bar committees that fashioned the Rules of Professional Conduct dealt with complex ethical issues that are difficult to find practical answers for, under the many different factual situations that can arise, are no exceptions. Therefore, the purpose of this article is not to criticize, but simply to note the questions and confusion that arise in one of the legal profession's most sacred principles: The Lawyer-Client Privilege.

The privilege has an ancient history, and was recognized in the Common Law of England by the time of Elizabeth I in the 16th century. The Common Law had as the basis for the privilege the quaint idea that the Lawyer as a "Gentleman" should not reveal any secrets of his client – it was called "The Point of Honor." (*Harrison v. State*, 226 Md. 122 (1975); S.J. Wigmore, Evidence, § 2290, 3rd ed. (1940)). The modern view, of course, is that the privilege belongs to the client.

The current basis for the privilege is that, when providing legal services, the lawyer must have a complete understanding of all the facts of the case, particularly all the information known by the client. To acquire this information, the lawyer must be able to assure this client that their private conversations will always be confidential (*Upjohn v. U.S.*, 449 U.S. 383, 389 (1981)). This reads like a comparatively simple principle that any lawyer should understand, and should follow. However, the Rules of Ethics, statutes, and court decisions have created exceptions and raised questions that have few simple answers.

Maryland Rules of Professional Conduct, Rule 1.6, is the current rule on the Lawyer-Client Privilege. It states a ". . . lawyer shall not reveal information relative to representation of a client . . . ." There are, also, the rules of evidence, which only permit a lawyer to exercise the privilege for the private conversations with his client. The former "Code of Professional Responsibility" did separate private conversations of the client, called confidences, from any other information obtained by the lawyer called "Secrets." Rule 1.6 does not separate these two sources of information, but the evidence rules make this distinction.

Secrets are not protected under the evidence rules. Therefore, a lawyer should risk contempt, if ordered to reveal a confidence, by a lower court; but must reveal a secret if ordered by that court. However, under Rule 1.6, a lawyer should not voluntarily reveal a secret. Lawyers are expected to appeal, if necessary, to the U.S. Supreme Court, before revealing a "confidence," (see *Swidler and Berlin v. U.S.*, 524 U.S. 399 (1998)).

Rule 1.6 also has a series of exceptions, three of which raise questions. Rule 1.6 (b)(1) says a lawyer may reveal ". . . to the extent the lawyer reasonably believes necessary; (1) to prevent reasonably certain death or substantial bodily harm . . . ." Exception (b)(1) is, of course, permissive, but what does it really mean for the practicing lawyer? For example, was the lawyer right and ethical, in *Newman v. State*, (384 Md. 285 (2004)), when he revealed that his client, in his presence, threatened to shoot her husband? The husband was subsequently shot and injured by a friend of the client. The Maryland Court of Appeals made a point of not deciding the appropriateness of the lawyer's revelation under Rule 1.6, though the dissent presumed it was, (*Newman* at 324).

What standard should control revelations under (b)(1)? An authority (that the author questions) rejects Rule 1.6 (b)(1), stating that if a lawyer is told by his client where the body of the victim lies, and the lawyer goes there, and finds the victim still alive, he is unethical if he even anonymously reveals this information. (Roscoe Pound-American Trial Lawyers Foundation American Lawyers Code of Conduct).

Regardless of the "Extreme" view of the Roscoe Pound-American Trial Lawyers, Rule 1.6 (b)(1) raises several questions, one after another. "May" is, of course, permissive, so is a lawyer, in the "*Newman*" situation, still "ethical" if he does not reveal and a victim subsequently dies? Should a lawyer who reveals under Rule 1.6 (b)(1) be forced to testify in a subsequent trial against the client? In *Newman* (*supra*), the Court of Appeals reversed the conviction of the client because the lawyer, (who had revealed under Rule 1.6 (b)(1)), had testified against the client over her objections. However, one member of the Court, in his dissent, noted that if the lawyer is authorized, under the rule, to reveal, he could be used by the government, as the privilege is precluded by the exception, (*Newman* at 318-328).

Aside from the exceptions found in Rule 1.6, which also include "crime-fraud," (see b2 and b3), other rules raise confusing exceptions. Rule 3.4 (fairness to the opposing party and counsel) raises, among other problems, the issue of a defense counsel in a criminal case receiving or finding evidence of crime detrimental to his client. Several cases have developed interesting precedents in this complex area. *In Re Ryder*, (263 F. Supp. 360 E.D. VA. (1967)), and *People v. Meredith*, (631 P. 2nd 46 Cal. (1981)), are two of the leading cases. [The Maryland Court of Appeals adopted the *Meredith* holding in *Rubin v. State*, (325 Md. 552 (1992)).]

The principles behind these cases simply stated are as follows: When a lawyer receives evidence directly from his client, he must give it to the government, but need not reveal the source. When he receives information from his client as to where evidence can be found, and the lawyer goes there and obtains it, he not only must give it to the government, but he must also reveal where he found it.

However, if he goes to the evidence, but does not disturb it or obstruct the government's ability to obtain it, then the lawyer has no duty to say or do

anything. In *Meredith* for example, the client tells his lawyer where the wallet, of the murdered victim of an armed robbery, is located. The location is in a trashcan behind the client's residence. The lawyer uses a private investigator to find it and bring it to him.

The wallet with the identification of the victim is only useful evidence if it can be connected to the client defendant. The California Appellate Court decided, that since the defense had obstructed the government's ability to locate this vital evidence, the lawyer not only had to give the evidence to the government, but he had to reveal where and how it was located. The court left unclear if the lawyer or the detective had to testify, or if a stipulation of fact could be used. The court further opined that if the defense team had simply gone to the location and viewed the evidence without disturbing or removing it, there would be no duty to reveal anything.

A series of almost absurd questions and issues arise from these cases. A client, prior to arrest, gives defense attorney a murder weapon, which is a gun registered in the client's name. This would be useable and excellent evidence for the government. However, if the gun is unregistered, would it then be good evidence to the government if there were no other way to connect it to the defendant?

What about a knife given to the lawyer as the murder weapon? The lawyer must give it to the government, but does not have to say how he got it. How can the government use a simple knife if they cannot connect it with the defendant? Can or should the lawyer attempt to protect any possible fingerprints on the unregistered gun or knife? Probably to ask such a question is to answer it.

Morrell v. State, (575 P. 2d 1200, Alaska (1978)), is another interesting (and often cited) case that highlights this problem. Lawyer represents a client, charged with kidnapping and rape. The lawyer receives a call from a friend of the defendant. The friend said that at request of defendant, he cleaned defendant's car and found an incriminating kidnapping plan written by the defendant. The lawyer took possession of it and, after receiving conflicting advice from experts and other bar members, returned it to the friend and helped him_turn it over to the police. The lawyer then withdrew from the case.

The Alaska Supreme Court found no violation of the lawyer's duty to his client. Assuming he had kept the evidence, he would have had the duty to turn it over to the government, and, as he had received it from a non-client, he would have to reveal the source. His returning it to the friend and assisting the friend to turn it over to the police was therefore no violation of his duty to his client. Would the lawyer have had any duty if he had refused to accept the evidence from the friend? Could he have simply told the "friend" he did not want it and that the friend could do what he wanted with it?

The lawyer certainly could not tell the friend to destroy the evidence, as that could be an obstruction of justice. However, did the lawyer have a duty to tell the friend to turn it over to the government or if he did not, he be guilty of obstruction of justice? In other words, it is one thing to opine the duty of the lawyer when he took possession of the evidence, but what duty, if any, does the lawyer has if he refuses to take the evidence?

Rule 3.4 prohibits the destruction of anything that may have potential evidentiary value. Comment 2 states that it is an offense to do so in a pending proceeding or one whose commencement can be foreseen.

Again, we have an exception to a lawyer's duty to his client, and maybe to the privilege of confidentiality. What does ". . . commencement can be foreseen . . ." mean? When a lawyer finds in his client's papers incriminating evidence either for civil or criminal liability, when, if ever, can he suggest destruction or do it himself? Obviously, if a case has been filed, such action is a violation of many rules and could even be criminal.

The question, however, is what is the ethical duty of the lawyer when there is no existing litigation? Can he then give such advice or must he try and "foresee" possible future commencement of a proceeding? What is the duty of the lawyer if his client informs him of such evidence destruction before a proceeding commences, or during a proceeding? Must the lawyer reveal, and, if so, when? During the "Watergate" scandal, this issue came up with the famous president's tapes. Many argued the tapes should have been destroyed; others disagreed.

These questions bring up another rule that creates exceptions to the Privilege. Rule 3.3 (candor toward the tribunal) deals with, among other things, perjury of the client known to the lawyer. Before we enter into another bewildering area of ethics and the privilege, there are some_established ethical certainties. In a civil case, a lawyer cannot, repeat cannot, permit perjury by a witness or a client. When it occurs, the lawyer must take remedial measures, which can include informing the court, (Rule 3.3 Comments 5 & 6; see also *Jones v. Clinton*, 36 F. Supp. 2d 1118 E. D. Ark. (1999)). While ethical problems of perjury in a civil case should not be belittled, the serious problem is perjury in a criminal case.

Perjury in a criminal case raises the Sixth Amendment Right to Counsel, which includes competent counsel; (see Rule 3.3, Comments 7-11). Prior to 1986, there was a history of courts and ethics committees struggling how to resolve the duty of a defense lawyer under the Sixth Amendment, with the legal and ethical duty not to suborn perjury. Various approaches were advocated, from letting the defendant perjure himself, and the lawyer uses it (Monroe H. Freedman, Perjury . . . I Litigation 26 Winter (1975)). to demanding that the lawyer corrects the record.

What was known as the Narrative Approach (*Lowery v. Cardwell* 575 F 2d 727 9th Cir. (1978)), became an accepted solution by many jurisdictions. The lawyer would not ask the defendant questions; he would simply tell his "story." The lawyer would then not use the perjury in his summation. (See *Lowery* and Rule 3.3, Comment 10).

In 1986, the United States Supreme Court, in *Nix v. Whiteside*, (475 U.S. 157), decided with the constitutional issue. In *Nix*, defense counsel threatened to tell the court and possibly testify against his client if the defendant perjured himself. The Eighth Circuit reversed,the conviction, finding a violation of the Sixth Amendment. The Supreme Court, with no dissent (but several concurring opinions rebuking Chief Justice Burger's opinion), held there was no violation of the Sixth Amendment right to effective assistance of counsel. Chief Justice Burger opined that defense counsel need not and indeed should not cooperate with the defendant in presenting perjury even in a criminal trial.

The result of *Nix* was that the American Bar Association amended their Rule 3.3. Many jurisdictions including Maryland have accepted the American Bar Association's recommendation. Maryland's Rule 3.3- Comments 10-13 prohibits the narrative method. Instead, the lawyer is required to remonstrate with the client, seek to withdraw, and finally disclose to the court. It is then up to the court to tell the fact finder, to order a mis-trial, or do nothing. (See Rule 3.3, Comment 12). This duty of the lawyer exists to the conclusion of the proceedings, which is defined as when all appeals are over, including right to petition for certiorari (Rule 3.3b; *Holden v. BLCVINS*, 154 Md. App. 1, (2003)).

Does *Nix* and the amended Rule 3.3 resolve this rather significant exception to Lawyer-Client confidentiality? Of course not; questions for the lawyer are even more difficult to resolve. To start with, Rule 3.3 (e) states that notwithstanding the requirements of the rule to prevent perjury, ". . . a lawyer for an accused in a criminal case need not disclose that the accuse intends to testify falsely or has testified falsely if the lawyer reasonably believes that the disclosures would jeopardize any constitutional rights of the accused . . . ." Comment 13 "Constitutional requirements" specifically protects a lawyer from punishment if he violates Rule 3.3, if the lawyer acts under a "reasonable belief" that such disclosure would violate his client's due process and Sixth Amendment rights.

How does a lawyer, who wishes to preserve the lawyer-client privilege, handle this exception to the exception to the privilege? What is a "reasonable belief?" Rule 1.0 defines "reasonable belief" in a circular manner ending up saying is the belief reasonable?

In a capital case, for example, where it may be important (to save his life) for the defendant to take the stand and deny his guilt, should the lawyer reveal his perjury? While he may not have a constitutional right to commit perjury, a defendant does have a right to testify in his defense, (see *Rock v. Arkansas*, 483 U.S. 44, (1987)). Can the lawyer rationalize that his client's Fifth and Sixth Amendment rights would be jeopardized if the lawyer told the court of the perjury? Assuming the lawyer's belief is considered reasonable, he is protected from discipline, Rule 3.3 Comment 13, but would he be protected from the criminal charge of suborning perjury if he assisted the defendant in his perjurious denials?

Lawyers involved, particularly, in criminal cases can be enmeshed in difficult ethical questions that involve their duty to the client as opposed to their duty as "officer of the court."

Consequences to a wrong decision can be more than discipline by an attorney grievance commission, which is bad enough, but it could also include criminal prosecution. (See *Commonwealth v. Stenbach* 514 A. 2d 114 Pa. (1987)).

In conclusion, this is not a question of the ethical rules being wrong, unfair, or poorly drafted. However, ethical rules written by committees (as noted *supra*) will often be ambiguous and unclear. They deal with issues that are complex and can factually be varied and murky. The overwhelming majority of lawyers want to be "ethical", but they also want to give the client the most competent representation that is possible. Indeed, the Sixth Amendment requires it in criminal cases. They need some help and guidance to walk through the "minefields" of the many exceptions to the principle of "Lawyer-Client Confidences."

Mr. Dash is a Professor Emeritus of Law at the University of Maryland School of Law. He may be reached at adash@law.umaryland.edu