

MCLE ON THE WEB

(\$20 PER CREDIT HOUR)

TEST # 59

1 HOUR CREDIT

LEGAL ETHICS

To earn one hour of MCLE credit in the special category of Legal Ethics, read the substantive material, then download the test, answer the questions and follow the directions to submit for credit.

When A Client Makes A Threat *Lawyers face a confidentiality dilemma when they know of a client's ongoing or threatened criminal conduct*

By **WENDY PATRICK MAZZARELLA**

You are preparing for trial with a new client in your office one afternoon. As you discuss the anticipated testimony against her by the opposition's star witness, she pierces you with an icy stare and informs you that she has plans to "take care of" that problem. Confused, you ask her what she is talking about. With an unnerving calmness, she informs you that you need not waste any more time preparing your cross-examination of that witness. You take her statement as a threat to harm the witness. Ethically, what can you do? What must you do?

Client confidentiality is a hallmark of an attorney-client relationship. But there are exceptions to the general rule that information imparted within the context of such a relationship must always be kept confidential. There are legal and ethical rules that explain the circumstances under which California attorneys may, but are not required to, reveal confidential information imparted to them by their clients.

Business and Professions Code

California Business and Professions Code §6068 enumerates the duties of an attorney. BP 6068(e)(1) states that one of these duties is "[t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client."

BP 6068(e)(2), however, states that "[n]otwithstanding paragraph (1), an attorney may, but is not required to, reveal confidential information relating to the representation of a client to the extent that the attorney reasonably believes the disclosure is necessary to prevent a criminal act that the attorney reasonably believes is likely to result in death of, or substantial bodily harm to, an individual."

Rules of Professional Conduct

This important exception is further developed in California Rule of Professional Conduct 3-100, which states in pertinent part that:

(A) A member shall not reveal information protected from disclosure by Business and Professions Code §6068, subdivision (e)(1) without the informed consent of the client, or as provided in paragraph (B) of this rule;

(B) A member may, but is not required to, reveal confidential information relating to the representation of a client to the extent that the member reasonably believes the disclosure is necessary to prevent a criminal act that the member reasonably believes is likely to result in death of, or substantial bodily harm to, an individual.

(C) Before revealing confidential information to prevent a criminal act as provided in paragraph (B), a member shall, if reasonable under the circumstances: (1) make a good faith effort to persuade the client not to commit or to continue the criminal act and/or to pursue a course of conduct that will prevent the threatened death or substantial bodily harm, and (2) inform the client at an appropriate time of the ability or decision to reveal confidential information per subsection (B).

Subsection (D) warns that a lawyer's disclosure under (B) must be no greater than necessary to prevent the criminal act, given the information the lawyer knows about at the time of the disclosure.

Is a lawyer in trouble with the California State Bar if despite her client's threats to kill a witness, she does nothing? The answer is no. Rule 3-100(E) provides that if an attorney decides not to reveal information that would have been permitted under (B), there is nonetheless no violation of this rule.

Discussion Section [2] points out that a lawyer's duty of confidentiality is broader than the often-cited work product and attorney-client privileges.

Discussion Section [9] analyzes the factors to be considered before advising a client per subsection (C)(2) of the lawyer's ability to reveal confidential information, recognizing that in some circumstances this revelation could increase the risk of harm not only to the intended victim but also to the client and his or her family, and to the lawyer and his or her family or associates.

Discussion Section [11] recognizes that after disclosure has been made pursuant to this section, withdrawal will likely be required per CRPC 3-700(B), unless the lawyer can obtain consent to continued representation. The lawyer must tell the client about having disclosed confidential information "unless the member has a compelling interest in not informing the client, such as to protect the member, the member's family or a third person from the risk of death or substantial bodily harm."

Evidence Code Section 956.5

The California Evidence Code includes similar language. Regarding the attorney-client privilege, Section 956.5 states that: “[t]here is no privilege under this article if the lawyer reasonably believes that disclosure of any confidential communication relating to representation of a client is necessary to prevent a criminal act that the lawyer reasonably believes is likely to result in death of, or substantial bodily harm to, an individual.”

Section 956.5 is expressly mentioned as an analogous code section in Discussion Section [3] of CRPC 3-100. Discussion Section [3], however, distinguishes the situation of future criminality from past crimes, with a reminder that 956.5 does not permit a member to reveal confidential information relating to a client’s past completed criminal acts.

So if during a client meeting in your office, your client said something that caused you to fear that she intended to seriously harm or kill one of the witnesses against her, you would have the option of revealing your client’s plan under this Code Section as an exception to the attorney-client privilege.

On the other hand, if your client sought your legal assistance in facilitating her access to a witness to carry out her criminal intentions, the attorney-client privilege would be lost under Evidence Code Section 956 which states that: “There is no privilege under this article if the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit a crime or a fraud.”

How does this come up?

Consider the family law client who loses his temper in an office meeting with his lawyer and announces that he is driving directly over to his ex-wife’s house in violation of the restraining order to “take care of this problem once and for all.” Is the lawyer justified in calling the client’s ex-wife to warn her of the client’s arrival? What if the lawyer decides to call the police instead? Would either course of action be justified under these facts? In this scenario, the attorney might feel that the urgency of the situation did not afford the time necessary to talk to the client about the decision to reveal confidential information.

Whether this decision was reasonable would depend on a multitude of factors including whether the client had a history of violence toward his ex-wife and how far away she lived.

There are a variety of other scenarios that have spurred lively discussion among ethicists. One of these is the client who brags about the fancy new sports car he just purchased and tells his lawyer he intends to “find out what she can do” on the way home from your office. As the lawyer, should you call the Highway Patrol to warn them about the safety risk your client presents? What if you knew your client was already a terribly reckless driver even when obeying the speed limit? What if your client tells you this after the two of you have just finished having a couple of cocktails at the local pub?

Or consider the suicidal client. What do you do when your severely depressed client tells you one day that she “just can’t take any more” and plans to end her misery. If your client is to be taken seriously, the result of her act is “likely to result in death of, or substantial bodily harm to, an individual.”

But you still would not be able to disclose the information because suicide is not a “criminal act” in California or any other state. (*In re Joseph G.* (1983) 34 Cal. 3d 429, 433; *Donaldson v. Lungren* (1992) 2 Cal. App. 4th 1614, 1624. Note that deliberately aiding or encouraging another person to commit suicide is a crime in California. California Penal Code § 401; *In re Ryan N.* (2003) 92 Cal. App. 4th 1359.)

Other scenarios have been proposed that are very difficult to analyze under existing ethics rules. These range from the dilemma of knowing the “wrong guy” is sitting on death row after your client confessed to you that he actually committed the crime, to your concern over your client’s putting herself in danger of her life by going back to a partner who has explicitly threatened to kill her. We look forward to future case law that will hopefully address some of these issues.

Serious or just venting?

The rules permitting disclosure of client confidential information require the lawyer to make a judgment call regarding the seriousness of a client’s expressed or implied intentions. Unless the lawyer has a significant or longstanding relationship with the client, this judgment call may be difficult.

Obviously, if you reasonably believe your client is going to seriously harm or kill the main witness against her, you have the option of revealing her plan. In most cases, however, the threat will not be clear. If your client merely informs you that you need not waste your time preparing your cross-examination of a witness, several things must factor into your threat analysis.

Your perception of the seriousness of your client’s statements will be affected by her demeanor, the context of the statement, whether she had ever made similar statements, and your prior knowledge and relationship with her.

If a client calmly tells you “not to worry any more” about a particular witness or “not to be surprised” if a witness fails to show up in court, many defense attorneys in a family violence case would tell you such statements might indicate the client knew that the victim had a change of heart and was planning to recant their testimony or fail to show up in court. But in a case where your client makes the statements in anger or with an eerie calmness and the star witness is a stranger to your client, such statements take on new meaning.

In assisting you in making this determination, 3-110 Discussion Section [6] contains a list of factors to be considered in deciding whether or not to reveal confidential information. These include the amount of time that the member has to make a decision about

disclosure, whether the client has made similar threats before and whether they have ever acted or attempted to act upon them, and the nature and extent of information that must be disclosed to prevent the criminal act or threatened harm.

‘Mirandizing’ your client

The permissible exceptions to the attorney-client privilege have prompted spirited debate regarding what, if any, warnings or disclosures should be given to a client at the beginning of the representation. Should the lawyer tell the client at the inception of the representation that should the client reveal the intent to commit certain criminal acts, the lawyer has the option of revealing the client’s statements to others, including law enforcement?

Perhaps have the warning mounted on a sign to hang in the lawyer’s office? Obviously such warnings could suppress the client’s willingness to be forthcoming with information, could seriously chill open dialogue about the case, and may cause some potential clients to decide to proceed pro per or seek another lawyer.

In fact, such warnings would likely prevent the lawyer from ever learning about the client’s criminal intentions in the first place, thereby precluding the lawyer from ever being in a position where he or she was able to take steps to avert the harm. On the other hand, if a lawyer learns that someone truly is at risk of death or great bodily injury, a prior admonition that such communications may not be kept confidential will give comfort to the lawyer who decides to reveal them.

In another interesting twist, advance warnings given by some attorneys in the legal community could provide a competitive advantage to lawyers who chose not to provide such disclosures or warnings. And can lawyers actually promise clients in advance that they will never elect to reveal their client’s confidences, even when permitted?

While this may not violate the California Rules of Professional Conduct, a lawyer would be well advised to consider potential civil liability before making such a commitment. And of course the lawyer runs into terrible trouble when he or she becomes the subject of the client’s criminal intentions.

Conclusion

All attorneys owe a duty of loyalty to their clients. They should by all means work diligently on their cases and engage in faithful advocacy. They must protect their client’s rights and keep their communications in the utmost confidence. When a client engages in ongoing criminal activity, however, the lawyer’s duties are different.

Awareness of the rules and principles cited above will permit attorneys faced with this dilemma to evaluate their options in light of applicable ethical and legal concerns, in order to make an appropriate decision about how to handle the ethical dilemmas raised by a client’s ongoing or threatened criminal conduct. Good luck!

■ This article does not constitute legal advice. Please shepardize all case law before using.

■ *Wendy Patrick Mazarella is a San Diego County Deputy District Attorney in the Sex Crimes and Stalking Division. She is in her fourth year as chair of the San Diego County Bar Association Legal Ethics Committee and is one of 16 members of the California State Bar Committee on Professional Responsibility and Conduct.*

Test — Legal Ethics
1 Hour MCLE Credit

This test will earn one hour of MCLE credit in Legal Ethics.

- 1.** In California, a lawyer who reasonably fears his or her client is going to kill someone else has a duty to either inform the authorities, or at least the court.
- 2.** The criminal act exception in BP 6068(e)(2) only covers information your client explicitly tells you about.
- 3.** A lawyer is permitted to reveal as much information relating to the representation of his or her client as he or she deems necessary in order to prevent a criminal act that will result in the requisite harm, even if the client is not expected to be the one who inflicts the harm.
- 4.** A lawyer's duty of confidentiality is broader than the often cited work product and attorney-client privileges.
- 5.** CRPC 3-100 (B) permits an attorney to disclose information that is protected by the attorney-client privilege.
- 6.** After a lawyer discloses confidential information per CRPC 3-100 (B), he or she can continue to represent the client as long as the client consents.
- 7.** A lawyer has the option of revealing any kind of confidential information received from a client that he or she believes will result in the death of, or substantial bodily harm to, an individual.
- 8.** In deciding whether or not to reveal confidential information, a lawyer can consider whether the client has made similar threats before and whether they have ever acted or attempted to act upon them.
- 9.** Once a lawyer discloses confidential information per CRPC 3-100 (B), the lawyer must, in all circumstances, tell the client about having disclosed the confidential information.
- 10.** A lawyer who finds out that a client retained him or her in order to harm a witness would be permitted to reveal this information regardless of how serious the harm to the witness might be.
- 11.** Evidence Code Section 956.5 would permit a lawyer to alert the authorities if he or she believed a client was currently engaging in embezzlement.

12. There are some cases in which a lawyer might reasonably decide not to advise his or her client of their ability to reveal confidential information per CRPC (C)(2).

13. A lawyer is not protected by CRPC 3-100 if he or she decides to simply “err on the side of caution” and disclose every statement his or her client makes that might insinuate the client is dangerous.

14. Business and Professions Code Section 6068(e) enumerates the dangerous client exception to the attorney-client privilege.

15. There may be some information that a lawyer would not be justified in revealing under BP 6068(e) or CRPC 3-100(B) even if he or she felt their client posed a risk of death or substantial bodily harm to someone else.

16. If a lawyer fears his or her client is on the way over to the home of the client’s ex-spouse to inflict substantial bodily harm or death, before revealing confidential information to prevent the criminal act, the lawyer may take it upon themselves to attempt to prevent the threatened harm.

17. If a lawyer decides he or she is going to reveal a client’s confidential information under CRPC (B), before doing so, he or she must always inform the client.

18. If a lawyer reasonably believes his or her client is about to commit a deadly crime, he or she can simply turn over the client’s file to law enforcement.

19. A lawyer has a duty to reveal his or her client’s ongoing criminality under Evidence Code Section 956.5.

20. Under Evidence Code Section 956, a lawyer may reveal a client’s confidential information relating to a crime of fraud by another person.

Certification

■ This self-study activity has been approved for Minimum Continuing Legal Education credit by the State Bar of California in the amount of one hour of legal ethics.

■ The State Bar of California certifies that this activity conforms to the standards for approved education activities prescribed by the rules and regulations of the State Bar of California governing minimum continuing legal education.

MCLE ON THE WEB

TEST # 59 – When A Client Makes A Threat

1 HOUR CREDIT
LEGAL ETHICS

- Print the answer form only and answer the test questions.
- Mail only form and check for \$20 to:

MCLE ON THE WEB – CBJ
The State Bar of California
180 Howard Street
San Francisco, CA 94105

- Make checks payable to State Bar of California.
- A CLE certificate will be mailed to you within eight weeks.

Name

Law Firm/Organization

Address

State/Zip

State Bar Number (required)

1. True___ False___
2. True___ False___
3. True___ False___
4. True___ False___
5. True___ False___
6. True___ False___
7. True___ False___
8. True___ False___
9. True___ False___
10. True___ False___

11. True___ False___
12. True___ False___
13. True___ False___
14. True___ False___
15. True___ False___
16. True___ False___
17. True___ False___
18. True___ False___
19. True___ False___
20. True___ False___