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Lawyer Disclosure to Prevent Death or Bodily Injury: A New Look at *Spaulding v. Zimmerman*

Roger C. Cramton*

I. *Spaulding* Revisited

A. The Lessons of Spaulding

It is August 1957, in rural Minnesota and two cars are speeding toward one another to a fatal rendezvous at a country crossing with no stop signs. The collision resulted in one of the gems of law teaching, *Spaulding v. Zimmerman*. David Spaulding, a 20-year old minor, was seriously injured as a passenger in a car driven by John Zimmerman, which collided with one driven by Florian Ledermann. Spaulding’s father brought suit on his son’s behalf against the drivers and parent-owners of the two vehicles. The three medical experts who treated David Spaulding did not discover that Spaulding, in addition to a severe brain concussion, broken clavicles, and chest injuries, had incurred an aneurysm of the aorta, almost certainly caused by the accident, that threatened his life. The physician retained by the defense lawyers, Dr. Hannah, discovered and reported this injury and its life-threatening character to one of the defense lawyers, shortly before the parties were to meet to discuss settlement.

At the settlement conference, Spaulding’s claim was settled for $6,500. At this conference the defense lawyers, knowing that Spaulding and his lawyers were unaware of the aneurysm, did not disclose it or make representations concerning the scope of Spaulding’s injuries. Because Spaulding was a minor at the time of the settlement, his lawyer was required to petition the court to approve the settlement. The petition

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included only the injuries known to Spaulding and his lawyer. The court approved the settlement and entered judgment.

Nearly two years later, during a physical examination required by Spaulding's army reserve status, the aneurysm was discovered. Surgery was immediately performed. Spaulding, now an adult, then sought to set aside the earlier settlement, arguing mutual mistake of fact, and, after the defense lawyers revealed that they had known of the aortic aneurysm all along, fraudulent concealment from Spaulding and the court.

The trial court held that the defense lawyers had no duty under ethical or procedural rules to disclose to the adverse party the information of which they alone were aware. Nevertheless, the settlement was set aside. Under Minnesota law, the court had discretion to rescind a minor's personal injury settlement when the petition seeking its approval did not fully and accurately state the minor's injuries. Once the parties had agreed on a settlement, they were no longer in an adversary relationship with respect to the court's approval of the settlement. The defendants, when they concealed Spaulding's aortic aneurysm from the court, took a "calculated risk" that the court might subsequently exercise its discretion to set aside the settlement. On appeal, the Supreme Court of Minnesota, in a terse and legalistic opinion, upheld the trial court's exercise of discretion.

A generation of law teachers and students has discussed this rich case on the basis of the limited facts and holdings contained in the trial court's memorandum and the state supreme court's brief affirming opinion. Emphasis is usually placed on the tension between the obligations of the lawyer's adversary role and the moral obligations of an actor to protect third persons from harm: Is a lawyer acting for a client required to protect a client's confidential information, even if doing so risks the sacrifice of an innocent human life?

A careful analysis of the case in the law school classroom reaches three conclusions: First, the settlement would not have been set aside if Spaulding had reached the age of majority when it was made. Second, the rules of legal ethics or of procedural law, in effect in Minnesota in 1957, did not require and probably prohibited the defense lawyers, without their clients' consent, from disclosing Spaulding's life-threatening condition to him. And third, under the ethics and procedural rules in effect in most states today, the same conclusions would be reached.

The Spaulding case forces law students to grapple with the harsh reality that the lawyer's partisan role in the adversary system, reinforced by the narrow exceptions to the professional duty of confidentiality, prevent a lawyer, without the consent of the client, from doing the right
thing: telling Spaulding that he has a life-threatening condition that needs immediate attention. It is easy to discover or imagine other fact situations in which the lawyer's duty of confidentiality is in severe tension with ordinary morality. *Spaulding* is the classic setting for two fundamental issues of a life as a lawyer: Can a good lawyer also be a good person? And what can a good lawyer do under the lawyer codes as they are today to see that a morally decent course of action occurs?

If we look at the second question first, it leads to discussion of the duties and opportunities that a lawyer has in relating to a client. Three key principles stand out: communication, counseling, and ultimate deference to client.

Clients retain lawyers to get legal assistance. To do this, the lawyer needs to be fully informed concerning the client's situation and objectives. The first step in communication is listening to the client, the second involves inquiry by the lawyer into relevant fact and law, and the third involves informing the client of lawful courses of action that may achieve the client's objectives. These duties are succinctly stated in the American Bar Association's Model Rules of Professional Conduct, Rules 1.4 (communication), 1.1 (competence), and 1.3 (diligence).

Communication slides imperceptibly into counseling. The lawyer-client relationship is a joint endeavor that normally involves a legal and moral dialogue in which client and lawyer learn from one another. The ethics rules require the lawyer to inform the client of alternative courses of action (Model Rule 1.4) and to defer to the client's choice of a lawful objective (Model Rule 1.2(a)). The rules require the lawyer to give "candid" and independent advice, and permit the lawyer to include moral and other considerations in that advice (Model Rule 2.1).

A focus on lawyer-client interaction offers an opportunity to explore a common but erroneous assumption that lawyers often have concerning clients—that clients are ruled by selfishness and are less moral than their lawyers. It also focuses attention on a lawyer's broad discretion to use the threat or actuality of withdrawal in a last-resort effort to persuade an obdurate client to avoid repugnant conduct; Model Rule 1.16, somewhat more broadly than the corresponding Model Code provision, permits a lawyer to withdraw when "a client insists upon pursuing an objective that the lawyer considers repugnant or imprudent," even though withdrawal may have an adverse effect on client interests.

In the backdrop is a larger question, to which I will turn in the second portion of my remarks: Do the profession's confidentiality rules give lawyers sufficient discretion to disclose information to protect the
superior interests of third persons, when the client insists on an immoral course of conduct, threatening serious harm to others?

Spaulding teaches important lessons about the law and ethics of lawyering: First, the unwillingness of lawyers, judges and the organized profession to talk openly and seriously about the situations in which threats of harm to third persons justify a breach of the lawyer's most sacred duty, that of confidentiality to client. Second, the reality, again shrouded in professional and judicial silence, that the adversary role of the lawyer in litigation permits the lawyer to behave in an immoral or amoral way. Third, the importance of moral dialogue between lawyer and client about the ends and means of representation, especially when substantial interests of third persons are threatened with harm. Fourth, the ubiquity of lawyer conflicts of interest and the threat they pose to client representation and to the public interest in just outcomes. In Spaulding, for example, the reality that defense counsel is selected, directed, and paid by the liability insurer creates a risk that defense counsel may ignore the insured, deferring to the economic interest of the insurer, since the insurer controls repeat business. And finally, the truth that the duties and obligations of lawyers often find more concrete expression in procedural and other law applicable to a particular situation than they do in the profession's codes of legal ethics.

B. What Really Happened in Spaulding?

With a colleague, Lori P. Knowles, I have attempted to piece out some of the significant details of the Spaulding case from the record on appeal and conversations with surviving parties, family members and lawyers.²

The crash of the Ledermann and Zimmerman vehicles late in an August day at a rural intersection in Minnesota involved eleven members of the Ledermann, Zimmerman and Spaulding families, and one additional person. One passenger in each car was killed; most of the others were seriously injured.

The six occupants of the Ledermann family were on their way to the county fair. Florian Ledermann, age 15, was driving on a farm permit; his sister, Elaine, costumed for the 4-H dress review, was killed. The six occupants of the Zimmerman car consisted of the owner and five of the employees of a road construction company. David Spaulding and his father, as well as John Zimmerman, were co-

² Another article, co-authored with Lori P. Knowles, contains a more extensive discussion of the Spaulding case and a more elaborate treatment of current exceptions to the professional duty of confidentiality. That article will be separately published in the MINNESOTA LAW REVIEW.
employees of the business operated by John's father; the Spauldings were being driven home by their employer at the end of the workday.

The Ledermann and Zimmerman families each suffered tragic losses. The family members were in the position of being both plaintiffs and defendants; doctrines of contributory and imputed negligence impaired the monetary value of their claims against each other. Spaulding's claim was not similarly burdened since Minnesota did not have a guest statute restricting the liability of an auto owner or operator to an injured passenger.

The lawsuits arising out of this tragedy were settled at a joint settlement conference. The liability insurers paid a total of $40,000, of which Spaulding's share was $6,500. Spaulding's settlement was signed about ten days before his 21st birthday. At the time the Minnesota limit on wrongful death recovery was $15,000 and auto liability coverage limits of $50,000 per accident were common.

In the close-knit rural farming area, reminiscent of Lake Wobegon, the parties apparently did not contemplate any recovery beyond the policy limits. Attitudes toward litigation in this relatively close-knit farming community were different than they generally are today. Moreover, members of the Ledermann and Zimmerman families were in the position of being both plaintiffs and defendants. In 1957 doctrines of contributory and imputed negligence as a complete bar posed risks to the recovery of members of each family against one another. Under these circumstances, the parents in each family may have been reluctant to make claims against the personal assets of the other for social, cultural and economic reasons (i.e., fear of reciprocal exposure). The claim of David Spaulding was less problematic on the merits: he could not be charged with contributory or imputed negligence, and Minnesota did not have a guest statute restricting the liability of a passenger to an auto host.

The individual defendants did not participate in the settlement conference or approve the settlements, which were agreed to by their liability insurers. In a situation where the settlement was within policy limits, the defense lawyers viewed the insurers as the only real parties in interest.

Nor were the individual defendants informed by their lawyers of Spaulding's life-threatening condition. Dr. Hannah's report was mentioned to at least one of the insurers, but the record is unclear as to whether the defense lawyers meaningfully consulted the insurance representatives as to whether Spaulding's condition should be disclosed to him prior to settlement. The defense lawyers probably made the decision not to disclose on their own.
Upon remand to the trial court from the Minnesota Supreme Court, David Spaulding, now an adult, settled his claim of additional damages for an unknown amount.

The implications of these additional facts are: (1) the moral obligations of a driver whose conduct has physically caused a friend’s injury and threatened death are strengthened by the employment relationship between David Spaulding and the Zimmermans. In addition, (2) the defense lawyers, under the circumstances, were led to view the insurers as their sole or primary client, failing to inform their individual clients of the risk to David Spaulding’s life.

C. The Professional Failures in Spaulding

*Spaulding* is a case of multiple professional failures:

Spaulding’s inexperienced lawyer, Roberts, was incompetent in failing to request Dr. Hannah’s report or, at a minimum, question the defense lawyers about its content prior to settlement. Roberts’ failure risked Spaulding’s life and, even if Spaulding or his successors discovered the lawyer’s omission, he probably lacked malpractice coverage or personal assets sufficient to pay an award, even if a lawyer could be found who would take the case.

Dr. Hannah was an “examining physician” rather than a “treating physician” and did not have a full doctor-patient relationship with Spaulding. Nevertheless, Dr. Hannah had a moral obligation at the time to inform Spaulding of the dangerous condition he had discovered. Under today’s law, this moral obligation has ripened into a professional and legal duty exposing Dr. Hannah to professional liability.

The defense lawyers, Arveson and Rosengren, when their conduct is viewed in hindsight and on the assumption that they decided against disclosure without consulting either the individual defendants or the insurers, behaved monstrously in violating fundamental legal and moral obligations they owed to their clients: (1) the duty to inform them of an important matter so that they could exercise the decision-making authority that the law of lawyering vests in clients; and (2) the moral obligation to provide their clients with sound advice as to what they should do under the circumstances.

Professional failure, because it occurs quite frequently and is both a personal and an institutional problem, deserves more attention than it gets. Some years ago Charles Bosk wrote a fine book on professional failure as encountered by surgeons.3 Bosk recognized that we all make

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mistakes, some of which may cause serious harm, and that these instances of departure from professional standards of due care are enlarged by practice structures and professional ideologies, such as the built-in conflict of interest of insurance defense counsel or the professional attitude that clients are only interested in winning (so why consult them about disclosing Spaulding's condition to him?). Bosk's thesis is suggested by his title "Forgive and Remember": an ability to forgive ourselves and our professional colleagues for their and our inevitable perfections, while striving to correct through memory, the circumstances, conditions and inattentions that lead to professional failure.

In the Spaulding case, I believe the defense lawyers were influenced by the authoritarian and paternalistic pattern of practice that was much more common in the 1950s than it is today. This professional attitude was combined with a common practice of viewing the insurers as essentially the sole client and by another attitude of assuming that insurers were only interested in saving money, even at the cost of a human life. Therefore, it was convenient and efficient for the defense lawyers, without consulting either the individual defendants or the insurers, to decide the question on their own.

Lawyers have a terrible habit of fitting client objectives into a simplified framework—assuming that clients are governed only by selfish concerns—and then deciding matters for them as if the clients were moral ciphers. An interesting study by Marvin Mindes provides empirical support for the view that clients and lawyers have quite different views concerning what clients want from lawyers. Clients want a caring and helping lawyer, but lawyers commonly believe that clients want a trickster who is more likely to win.

The first and most important lesson of Spaulding, then, is one of counseling: taking the client seriously as a person, communicating with and advising the real client, not a client stereotype, and engaging in a moral dialogue in which lawyer and client can learn from each other how to act decently in an unredeemed world.

A second lesson emerges from what has just been said. It is fashionable today to lament the decline of professional standards over time and to mourn the passing of a golden age of lawyering in which lawyers were more civil to each other and more public-spirited than in today's era


of "commercialism." The facts of Spaulding suggest that in a number of important ways things have gotten better rather than worse: Procedural rules in some state and many federal courts require disclosure to the opposing party of basic litigation documents and witnesses. Today's better trained and more competent trial bar would ask for Dr. Hannah's report or, more informally, pin the defense lawyers down on its content. Furthermore, today's professional rules as well as evolving practice require defense lawyers retained by a liability insurer to consult with the insured, even when the insurer controls the defense and may settle without the insured's consent. The lawyer-client relationship today, even in the individual-client sector of the profession, is more participatory and less authoritarian than it was forty years ago. Every era has its problems and some evils are perennial, but some solace can be derived from recognizing that institutional and other changes have improved many aspects of client representation.

But clients, as well as lawyers, can sometimes be moral monsters. Perhaps in the Spaulding case itself or another one like it, the moral delinquency flows from clients who spurn their lawyers' advice and refuse to do the right thing. What should a good lawyer do when that situation arises: (1) participate in immoral conduct by doing the client's bidding; (2) withdraw from the representation if that is possible, but without preventing the client, perhaps with another lawyer, from harming third party interests; or (3) engage in conscientious disobedience of the profession's rules? If the threatened harm was as serious and as likely to occur as that in Spaulding, I would like to think that most any lawyer, including myself, would take the path of conscientious disobedience.

But ordinary human beings, including lawyers, should not be put in the position of risking their livelihood or careers by doing the right thing. Professional rules should not require that lawyers be heroes. Exceptions to the professional duty of confidentiality should be broad enough to permit the lawyer to take action necessary to prevent serious and usually irreparable harm in situations when failure to do so is clearly condemned by ordinary morality.

II. Reforming the Law of Professional Secrecy

A. The Social Purposes of Professional Secrecy

Two bodies of law confer a large degree of justifiable secrecy on information acquired by lawyers in the representation of clients: the attorney-client privilege and the professional duty of confidentiality.
The attorney-client privilege of evidence law, the oldest of the privileges recognized by the common law, prevents the admission into evidence of a communication between a client and a lawyer made for the purposes of legal advice. By encouraging the client to communicate all relevant information—even facts that are intimate, unpleasant or embarrassing—the privilege puts lawyers in a position to offer the client sound legal advice in counseling and effective advocacy in litigation. Clients, it is assumed, will choose among lawful alternative courses of action advised by the lawyer. Conduct will be channeled along law-abiding lines and the goals of the adversary system will be advanced by sound representation of all parties.

The functions and purposes of the attorney-client privilege also determine its limits. The privilege is intended to further lawful advice and conduct. When the client, concealing his illegal intent and objective, consults a lawyer to commit or continue a crime or fraud, the privilege evaporates. The crime-fraud exception to the attorney-client privilege, recognized in all jurisdictions, is supported by two fundamental propositions of the profession's historic traditions and of state ethics codes: first, in all jurisdictions a lawyer is prohibited from counseling or assisting a client in unlawful conduct; and second, in the vast majority of jurisdictions, a lawyer is permitted to disclose confidential information to prevent the client from committing or continuing a crime or fraud.

The professional duty of confidentiality is broader in scope and application than the attorney-client privilege. The duty applies in all times and places, not only when a tribunal seeks to compel testimony. A lawyer, as an agent of the client, may not disclose or use information gained in the agency relationship, to the disadvantage of the client. Agency law combines this broad prohibition, applicable in all settings and times, with a general exception that permits disclosure when the superior interest of another exists. Because the lawyer-client relationship deals with client interests of great sensitivity and importance, such as reputation, property and freedom, the profession has justifiably concluded that a greater degree of confidentiality is required than in other agency relationships. But the central moral tradition of the profession has always included a permission on the part of the lawyer to disclose confidential information in order to prevent a client from committing a crime or fraud. In addition, the dominant tradition, until recently, has required the lawyer to disclose confidential client information to rectify a client fraud on a third person or a tribunal when the lawyer's services were used to perpetrate the fraud.
In another article, I and a co-author chronicle this central tradition and the partial abandonment of it by the ABA in 1974 and more extensively in 1983 when the House of Delegates performed its hatchet work on Model Rule 1.6(b). At that time, the ABA limited the opportunity of a lawyer to disclose confidential client information to self-defense situations and when 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." Fortunately, all but a small number of state high courts have substantially broadened the disclosure obligations or permissions well beyond the ABA's narrow recommendation. At least 40 of the 51 U.S. jurisdictions require, or permit a lawyer to disclose confidential client information to prevent a client criminal fraud likely to result in financial injury to another.

Once a fraud exception to the professional duty of confidentiality is recognized, reinforcing the policies and purposes that justify lawyer secrecy, the remaining task is to determine whether there are other third-party interests that justify a sacrifice of confidentiality. Four situations provide vehicles for considering this question:

* The facts of the Spaulding case (on the assumption that the defense lawyers informed their clients of Spaulding's aneurysm and the clients instructed them not to disclose).

* The death row scenario: A client accused of an unrelated charge informs his lawyer in plausible detail that he was responsible for a murder for which an innocent person is awaiting execution on death row.

* The threatened collapse of a building: The client, an owner of a large commercial office building located on an earthquake fault line in a major city receives a detailed report of an architectural engineer to the effect that the building structure is inadequate to withstand even a modest earthquake. An event of this character in the location involved, occurs approximately every six years. When the quake occurs, it is extremely likely that the building will collapse with substantial loss of life. The client asks the lawyer for advice about his options. The lawyer, after advising that no current law requires the owner to report the danger to public authorities, recommends that the client take prompt steps to inform tenants and reconstruct the building.

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The client, concluding that the costs of rebuilding are too great, decides to do nothing and directs the lawyer to remain silent.

* The client’s violent spouse: The lawyer is defending a client whose business is at risk in commercial litigation. The client tells the lawyer that her husband, enraged at the tactics of the opposing party, plans to kill the opposing party’s lawyer. The client is unwilling to consent to disclosure to the potential victim or the police.

These situations have two common features: human life is at risk in each of them and current ethics codes generally do not permit disclosure in any of them. Should ethics rules permit disclosure in these and kindred situations?

B. Disclosure to Protect Human Life from Threatened Harm

The lawyer codes of virtually all states recognize that protecting a human life from a severe risk of harm is a harmful consequence that warrants a lawyer’s disclosure of confidential client information under some circumstances. The problem is one of defining those circumstances. There is also agreement that disclosure should not occur unless certain predicate conditions are met: (1) The facts known to the lawyer, after adequate inquiry and investigation, must give rise to a reasonable belief that disclosure is necessary to prevent someone’s death or serious bodily injury; (2) The lawyer should consult with the client about the intent to disclose, unless it is not feasible under the circumstances, such as when the client’s plausible threat to kill himself or a third person may be triggered, rather than avoided, by consultation; (3) No other available action is reasonably likely to prevent the threatened harm; and (4) The disclosure is limited to what is necessary to prevent the threatened consequence. Although these qualifications will not be repeated, as I discuss the situations in which disclosure should be permitted, the reader should assume they have been satisfied in each instance.

The confidentiality provisions of existing ethics codes impose a number of limiting conditions that make them inapplicable to situations of the type aforementioned. Existing rules generally limit disclosure to situations in which an act of the client is involved. The requirement of a client act excludes situations in which the threatened act is that of a third person, such as a spouse or associate of the client, and does not cover harm resulting from a natural event of which the client has special knowledge, as in the building-collapse scenario. The requirement may

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8. A few exceptions to this statement may be found. See, e.g., the Massachusetts version of Rule 1.6(b), which permits disclosure “to prevent the wrongful execution or incarceration of another.”
also exclude situations in which there is no affirmative client act more generally, but only a failure to act (an omission). Moreover, under most ethics codes, the client's act must be criminal in character.

In the scenario based on Spaulding, the client's refusal to consent to disclosure fails to meet these requirements. Even if the failure to disclose qualifies as a "client act," it does not constitute a prospective or ongoing crime or fraud. Yet the moral considerations that justify disclosure have great force in this situation. Moreover, the rarity of situations of this sort poses little risk to the overall preservation of confidentiality.

Similarly, the client's refusal to permit disclosure to save the life of an innocent person from execution does not involve a prospective client crime. Although the moral dilemma of conflicting obligations to a client and a third person is a difficult one, ethics rules should provide discretion to disclose when the harm to an innocent person outweighs the potential harm to the client.

In the building-collapse situation, disclosure would be prohibited under current rules because there is no client criminal act that threatens deadly harm. Indeed, there is no client act at all, only the client's special knowledge that a natural event that will cause death is foreseeable and probable. The requirement in Model Rule 1.6(b)(2) that the threat be "imminent" is also not satisfied. Protection of innocent life again justifies disclosure.

Finally, in the scenario where the client's spouse plans a criminal act threatening life, existing exceptions do not apply because the client is not the actor. Yet the situation is morally identical to those in which the client is the actor, in which current ethics rules permit disclosure.

The rules governing exceptions to confidentiality should be broadened to permit disclosure in all of these situations. First, the preservation of human life clearly has as high a priority in the hierarchy of values as any other threatened consequence. Existing lawyer codes recognize the high priority of human life.9 But their application is unduly limited because of preconditions that are overly broad. Second, a profession that justifiably asks for and receives permission to disclose confidential client information when its own economic interests are at stake (e.g., to collect a fee from a client) cannot take the position that the threatened death or serious injury of another does not justify an occasional sacrifice of confidentiality.

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9. All states, with the possible exception of California, permit or require a lawyer to reveal confidential client information to prevent a client criminal act likely to result in death or substantial bodily harm. See ALAS Table, supra note 7.
The proposed Restatement of the Law Governing Lawyers provides guidance to rule makers in the reconsideration of exceptions to the professional duty of confidentiality.10 The largely uncontroversial exceptions to confidentiality are spelled out: using or disclosing information (1) to advance client interests (sec. 113); (2) when the client consents (sec. 114); (3) when required by law or court order (sec. 115); and (4) in the lawyer's self-defense (sec. 116). Disagreement about these exceptions is largely confined to the fine details of drafting.

On the controversial subjects, Section 117B recognizes discretion in a lawyer to prevent, mitigate or rectify financial loss resulting from a client's crime or fraud in which the lawyer's services are or were employed. Insofar as this client fraud exception deals with prevention, it is consistent with the majority of state ethics codes, but it adopts the minority position in extending disclosure to the rectification of past fraud in which the lawyer's services have been used.

In situations in which death or personal injury is threatened, the Restatement pioneers by casting aside the narrow conditions of Model Rule 1.6(b)(1) that limit disclosure to protect human life or substantial bodily harm. Hofstra's Monroe Freedman played a large role in broadening the vision of the ALI on this issue. His cogent persistence eventually persuaded the ALI membership.

Section 117A provides that a lawyer, after attempting to persuade the client to do the right thing, "may use or disclose confidential client information when and to the extent that the lawyer reasonably believes such use or disclosure is necessary to prevent reasonably certain death or serious bodily injury to a person." The exception "is based on the overriding value of life and physical integrity" and extends to acts of a non-client, such as a spouse's plausible threat to kill an opposing party, or to knowledge of natural causal events, as in the building-collapse situation. The ALI proposal also would permit the defense lawyers in the Spaulding scenario to disclose Spaulding's life-threatening condition to him.

10. American Law Institute, Restatement of the Law Governing Lawyers, Proposed Final Draft No. 2 (April 6, 1998). The confidentiality provisions of the newly-adopted Massachusetts Rules of Professional Conduct (1998) also contain broader exceptions than those of most states. Rule 1.6(b) provides that "A lawyer may reveal [confidential information] . . . (1) to prevent commission of 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 interests or property of another, or to prevent the wrongful execution or incarceration of another."
C. Underlying Policy Issues

The central issues in drafting exceptions to confidentiality involve, first, defining the interests that justify a possible sacrifice of the client's interest in secrecy; second, determining whether the opportunity to disclose should be permissive or mandatory; third, determining whether limiting language concerning the actor, the victim, or the harm should be included; and fourth, deciding, in connection with client fraud, whether disclosure should be limited to prospective fraud only and, if rectification is included, whether a duty or permission to disclose should exist only when the lawyer's services are or have been involved.11

The major argument against broadening the exceptions to confidentiality is that clients will be deterred from confiding information to their lawyers.12 The lack of candor on the part of clients, it is said, will make it difficult or impossible for a lawyer to give informed advice. The "sound advice" and "sound administration of justice" thought to result from this highly confidential relationship will not be achieved. Moreover, the ability of the lawyer to disclose client information may diminish client trust and adversely affect the quality of the relationship and the single-mindedness with which the lawyer pursues the client's interests. If and when the lawyer informs the client that disclosure is desirable or contemplated, a serious conflict arises between the lawyer and the client. The relationship ends in bitterness and a sense of betrayal.

The response to these arguments is several-fold. First, some exceptions to both the professional duty and to the attorney-client privilege are longstanding and have not had the consequences that are feared. The self-defense and client-fraud exceptions involve situations that arise quite frequently and have limited lawyer secrecy from the very beginning. There is no evidence that those broad exceptions have had undesirable effects on the candor with which clients communicate to lawyers. It is not clear that a slight broadening of the exceptions in situations that arise less frequently will have any discernible effect.

A great deal of romanticism often surrounds the discussion of "trust" and "candor" in the lawyer-client relationship. Studies indicate that mistrust and suspicion are frequently encountered in the relationship;

11. For discussion of the competing policies governing exceptions to lawyer confidentiality, see DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 177-233 (1984); SISSELA BOK, SECRETS, passim (1982), and Deborah L. Rhode, Ethical Perspectives on Legal Practice, 37 STAN. L. REV. 589, 612-17 (1985).

lawyers frequently state that clients are unwilling to reveal embarrassing or sensitive facts, which need to be dynamited out of them; factors that restrict candor operate in various practice contexts in powerful ways. In the criminal defense field, for example, both lawyer and client may be reluctant to discuss candidly facts relating directing to guilt.

Second, arguments that candor will be discouraged by modest rule changes, ignore the fact that both lawyers and clients appear to be relatively uninformed concerning the details of exceptions to either the attorney-client privilege or the professional duty of confidentiality and the relationship of the two doctrines to one another. The available empirical evidence, albeit very limited, suggests that most lawyers and clients expect that confidentiality will be breached when extremely important interests of third persons or courts would be impaired. In addition, there is no indication that clients are more candid with their lawyers in jurisdictions that have fewer exceptions to confidentiality than they are in jurisdictions with broader exceptions. I concede that there is insufficient solid empirical evidence to support firm conclusions in either direction. My position is that, when severe harm is threatened that can be prevented by disclosure, the reality of the more certain interest should be preferred to dubious assumptions about effects on client candor.

What types of clients are likely to be informed enough about the details of exceptions to the attorney-client privilege, the work-product immunity and the professional duty of confidentiality so that this knowledge will influence their willingness to confide in a lawyer? My suspicion is that this group of informed clients is largely confined to sophisticated repeat-players, usually substantial corporations, who want to use lawyer secrecy to conceal ongoing regulatory violations. This group of clients has many advantages in litigation over those with less resources, experience and staying power. The social value of secrecy versus disclosure is less when one is dealing, not with individual citizens encountering law for the first time, but with repeat-players, profit-making organizations that are concealing ongoing regulatory violations.

Third, there is no evidence that exceptions to confidentiality have led or will lead to frequent whistle-blowing on the part of lawyers. American lawyers are imbued with a professional ideology that gives dominant place to loyalty to the client, treats confidentiality as a sacred trust, and abhors lawyer conduct that constitutes a betrayal of the client. Lawyers know that harming a client to protect the superior interest of a

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third party will lead to the end of the lawyer-client relationship, probable non-payment of fees, client bitterness, recrimination, possible litigation, and perhaps loss of repute with other lawyers and clients. Experience shows that lawyers are extraordinarily reluctant to risk these consequences. The rules should not be drafted so that rule prohibition reinforces this natural risk averseness, with the result that loyalty to client, even a client who is abusing the lawyer's services to cause serious harm to third persons, always prevails over the superior interests of others.

The arguments for and against discretion are familiar. A blanket command provides more explicit guidance and, if followed by those to whom it is directed, will lead to more uniform and predictable responses. A clear duty helps avoid the problem of a client being subjected, without advance disclosure, to differing responses and risks dependent upon the judgment or conscience of individual lawyers. On the other hand, the situations that arise are often morally complex ones, in which practical judgment is influenced by a variety of factors relating to context, personalities, circumstances and relationships. The clarity of the lawyer's knowledge concerning the likelihood of client's proposed conduct and of its threatened consequences varies enormously from case to case. Wholly apart from the merits, discretionary proposals are more likely to commend themselves to lawyers who fear that mandatory disclosure will lead to civil liability for failure to disclose. For these policy and tactical reasons, I prefer a discretionary approach but recognize that a strong case can be made for mandating disclosure in some situations.

D. Effect of Permissible Disclosure on Client's Attorney-Client Privilege

It should be kept in mind that the ethical propriety of a lawyer disclosing information without the client's consent "tells us nothing about the admissibility of the information disclosed." The professional duty of confidentiality and the attorney-client privilege are separate doctrines, although they have overlapping objectives. Disclosure by a lawyer in a situation permitted by the ethics rule, but without the client's consent, does not waive the client's attorney-client privilege in the communication which is privileged. Although the information becomes known to those to whom it is revealed and may result in harm to the client, the client retains the right to assert the privilege in any subsequent proceeding, whether or not the client is a party. In *Macumber v. State*, a law-

16. State v. Macumber, 544 P.2d 1084 (Ariz. 1976) (reversing conviction and remanding for a new trial; and holding that lawyer's permissible disclosure to authorities of client's information that
yer reported to public officials that his client had committed a crime for which another person had been convicted. The disclosure was viewed as ethically permissible (i.e., not in violation of the lawyer's duty of confidentiality). Nevertheless, the lawyer's testimony concerning the client's communication was not admissible in a subsequent hearing challenging the allegedly wrongful conviction.

In *Purcell v. District Attorney* the Massachusetts Supreme Judicial Court held that a lawyer's permissible disclosure of information that his client planned to set fire to an apartment building did not lead to the conclusion that the lawyer could be required to testify as to the client's expression of this intent in a subsequent arson trial. The client, a maintenance man with an apartment in the building, had consulted the lawyer about matters relating to loss of his job and housing. Those communications were privileged and the privilege was not waived by the lawyer's permitted disclosure under the ethics code of the intended arson. The harder question was whether the communication concerning the threatened arson was admissible because of the crime-fraud exception to the privilege, a determination that rested on whether the client informed the lawyer of the intention to commit arson "for the purpose of receiving legal advice" concerning the unlawful conduct.

As Susan Martyn has stated:

> [A] lawyer's discretion to disclose a client intention to commit a serious future crime [gives] lawyers an added incentive to do so when efforts to dissuade the client prove unsuccessful. Lawyers who disclose this confidential information need not worry that it can be used directly against the client in a subsequent proceeding, as long as the client sought legal advice about lawful matters. A lawyer can act to save lives, and at the same time avoid being the instrument of the client's conviction.

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Supra note 15.

17. On remand in *Purcell*, the defense lawyer was not required to testify against his client. The client's communication of the proposed arson was not one made for purposes of legal advice, unlike those relating to the client's job and housing.


CONCLUSION

Spaulding v. Zimmerman is a ghostly metaphor for the silence of lawyers, judges and the organized bar on the moral issues presented by lawyer secrecy. The most extreme case of silence and denial is in California, where leaders of the bar often take pride in the erroneous statement that California’s professional duty of confidentiality is an absolute one, not qualified by any exceptions. The reluctance of lawyers and judges in and out of the courtroom to talk forthrightly about the morality of lawyer behavior is illustrated by the unwillingness of the trial judge in Spaulding to discuss ethics rules or moral principles while stating that the defense lawyers acted in “good faith,” presumably meaning that they were not morally accountable because they were only doing their job under the adversary system. The Minnesota Supreme Court stated no view on the law and ethics of the lawyering involved other than the ambiguous statement that “no canon of ethics or legal obligation may have required [defense counsel] to inform plaintiff or his counsel” of the life-threatening condition (emphasis added).

Lawyer participants in Spaulding report a macabre dance in which the reality the case involved—how human beings should behave toward one another when human life is at stake—was skirted by technical legal arguments of a trial court’s discretion to reopen a minor’s settlement and whether a petition to approve a settlement was a joint petition or merely that of the party submitting it. Richard Pemberton, who was new to practice at the time, believes he was asked to brief and argue the case in the Minnesota Supreme Court because his senior partner found the task a distasteful one, as did Pemberton.

[When I briefed and argued the Spaulding case in the Supreme Court, I was within the first few months of legal practice and was attempting to defend a senior partner’s handling of the matter in the trial court. After 20 years of practice, I would like to think that I would have disclosed the aneurysm of the aorta as an act of humanity and without regard to the legalities involved, just as I surely would now. You might suggest to your students in the course on professional responsibility that a pretty good rule for them to practice respecting professional conduct is to do the decent thing.]

As it turned out, David Spaulding, present whereabouts unknown, did not die of a massive coronary hemorrhage. Almost two years after the settlement, during a military reserve examination, Spaulding’s long-
time physician discovered the aortic aneurysm and corrective treatment was immediately begun. However, David Spaulding suffered a further injury for which an additional insurance payment is an inadequate measure of compensation. He forever lost most of his voice as a consequence of the delayed treatment of his aneurysm.

Why do lawyers and judges lose their voice when it comes to speaking about moral conduct and exceptions to confidentiality? Why does professional silence greet moral arguments that a good person, including a lawyer, should take reasonable steps to prevent death or substantial injury to third persons? Recent developments suggest that the silence may be lifting. I sincerely hope so.