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Carol M. Langford

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REFLECTIONS ON CONFIDENTIALITY—
A PRACTITIONER'S RESPONSE TO
SPAULDING v. ZIMMERMAN

Carol M. Langford*

I would like to thank Roy Simon for giving me the opportunity to respond to Roger Cramton's paper on the confidentiality issues raised by *Spaulding v. Zimmerman*¹, particularly in light of the fact that Roger Cramton and I met two years ago when I was chairwoman of the California State Bar Ethics Committee and asked him to speak at a symposium panel on confidentiality. You must understand that California has an absolute rule of confidentiality—there are no exceptions to the rule. Because Roger was leading the charge to create exceptions, he was alternatively hailed both as a visionary and a carpetbagger from New York. I'm pleased to say that he was ultimately judged to be one of the most interesting speakers at the conference.

Which is why I read with great interest his paper on confidentiality and *Spaulding v. Zimmerman*². Hailing from a state where absolute confidentiality is the rule, I tend to be wary of exceptions. Why? Because I believe that once you let the camel's nose under the tent, pretty soon he's sleeping in the tent. When I say no exceptions, I am not referring to those allowed in civil actions. Certainly lawyers can reveal confidences when they are sued for malpractice or where a former client files a disciplinary complaint. I am referring to the Rules of Professional Conduct, the only standards for discipline.

First, if you seek to establish exceptions, Roger, I believe that disclosure should be as narrow as possible to prevent the danger. In the *Tarasoff*³ case, you call the victim, not a press conference. The least onerous warning is the best.

Second, I believe you should obtain current statistics, or at least research to see if any legitimate anecdotal evidence exists on how often

* Partner in Langford & Taylor, LLP in California.

1. 116 N.W.2d 704 (Minn. 1962).

2. *Id.*

3. See discussion in RICHARD ZITRIN & CAROL M. LANGFORD, LEGAL ETHICS IN THE PRACTICE OF LAW 95 (1995).

the Spaulding issue comes up in practice. While *Spaulding*⁴ presents a particularly appealing case, my guess is that it's somewhat rare. In my state, I've heard of one case where imminent death or bodily harm arose. A lawyer in Marin County was sure a client was going to barge into a courtroom and kill Judge Beverly Savitt. Absolute confidentiality or not, the lawyer warned the court. In the spirit of "no good deed goes unpunished" this lawyer was sued civilly by a much calmer client who later claimed the lawyer had misjudged his intentions. He showed he never intended to kill the judge, and was just shooting off his mouth. That lawyer was simply incorrect. There is ample anecdotal evidence for these false alarm situations. The Bar declined to prosecute.

Third, I believe it is important to analyze the issue from more than a linear perspective. Roger's paradigm of confidentiality posits absolute confidentiality on one end of a spectrum, and no confidentiality on the other. He then creates an exception to prevent death or bodily harm; one to prevent wrongful conviction, imprisonment or execution; one for financial frauds and an act injuring the property of another. But that paradigm assumes that the model for attorney-client confidentiality should be the same no matter who holds the confidence. In the case of David Spaulding, it may be appropriate to reveal the potential aneurysm rupture. But if we're only looking at a potential injury to someone's financial interests, the argument is stronger to allow disclosure where, for example, Lincoln Savings & Loan is stealing pensions from old ladies rather than where a single client reveals in a criminal case that he's involved in a pyramid scheme.

So I would take Roger's continuum and consider drawing some vertical lines instead. The first line I would draw would be a civil/criminal distinction. I do not believe that the criminal defense lawyer should be able to acquit a client of a charge and then turn around and say "Look, I had to point the finger at someone, but the guy who went to jail is really not the guilty party, my guy is." The constitutional implications are enormous, and, I believe, outweigh the benefits of disclosure.

The second distinction I would examine is between individuals and corporations. Ralph Nader was right when he stated yesterday at the conference that corporations are "different from individuals." He paraphrased Justice John Marshall in *Dartmouth College v. Woodward* when he said that corporations are "artificial beings, invisible, intangible and

4. *Supra* note 1, at 704.

existing only in law.”⁵ While Roger’s rule would assume they are the same, traditionally they have not been treated that way.

Attorney-client confidentiality can be traced back to ancient Rome where slaves doing their master’s bidding were prohibited by law from disclosing their master’s secrets. In Elizabethan England, the concept was refined to apply to clients and to matters disclosed to their attorneys. Until the turn of the last century, no one questioned that this “privilege” was personal to an individual. I use the term “privilege” broadly because confidentiality was not always seen as distinct. American corporations came to enjoy this right almost by accident. Railroads played a powerful role in establishing the right to invoke the privilege, even though the Supreme Court had said corporations and individuals are different. Decades later, in the *Radiant Burners*⁶ case, Judge John Hastings of the Federal Appeals Court said in effect, “we’ll allow corporations to be treated like individuals but that’s only because the privilege would never be available to allow a corporation to funnel its papers and documents into the hands of lawyers to avoid disclosure.”

And yet you heard Ralph Nader say yesterday at the conference that counsel for the tobacco companies did exactly that. Moreover, they put lawyers in charge of scientific protocols to avail themselves of the privilege if science didn’t give them the results they wanted with regards to the addictive properties of nicotine. Corporate privilege and confidentiality is a self-created, self-perpetuated and self-interested rule. By depersonalizing an individual right, courts have jammed a square peg into a round hole.

It’s interesting to note that in many European countries, there is no such concept as “corporate confidentiality.” In-house lawyers are considered different from outside lawyers because 1) they have little independence of judgment when they represent only one client; 2) their offices are in the same building as the corporation; and 3) many in-house counsel receive bonuses and stock options based on corporate profits.

In my view, cutting out the heart of confidentiality in the disciplinary rules may be too hasty. We must examine the issue from a linear *and* a vertical perspective as well as examine the civil liability implications. Let’s see if the analysis is the same. The role of politics in the rule-making process must also be considered. Having assisted in the drafting of some of the California Rules of Professional Conduct, I know that once a proposed rule goes out for public comment, the finalized

5. See RICHARD ZITRIN & CAROL M. LANGFORD, *THE MORAL COMPASS OF THE AMERICAN LAWYER* (Random House, pub. pending)

6. *Radiant Burners, Inc. v. American Gas Association*, 209 F.Supp. 321 (N.D. Ill. 1962).

version will often look very different from the proposed draft. And don't forget the role of the court—my guess is judges will inadvertently muddy the standard. Creative plaintiffs' lawyers will file civil malpractice actions saying the lawyer in the underlying case improperly violated a client's right to confidentiality because the lawyer acted rashly. I can also see defrauded investors asking "if disclosure is allowable, why didn't you disclose?" Finally, the role of the State Bar must be considered. There are definite enforcement problems where a client can allege that a lawyer "simply guessed wrong."

My comments do nothing to dispel the hard work by Mr. Crampton in this area. We should all keep in mind Oliver Wendell Holmes' quote—which is a tribute to Roger and his role in shaping confidentiality. I paraphrase—"A smart man thinks of rules, and a brilliant one thinks of exceptions." Thank you, Roger, for all your efforts in my state.