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## ERRONEOUS DISCLOSURE OF DAMAGING INFORMATION: A RESPONSE TO PROFESSOR ANDREW PERLMAN

*Monroe H. Freedman\**

Let's be clear what we are talking about. A lawyer's erroneous disclosure of damaging information to an adversary is a variation on the broader question of whether a lawyer should ever take advantage of an adversary lawyer's blunder.<sup>1</sup> And the principal concern that lawyers have with taking advantage of an adversary's error is that the lawyer who has committed the error may be subject to a malpractice action by his client should the client find out.<sup>2</sup> All of the other purported justifications for covering up for an adversary lawyer, to the prejudice of one's own client, are simply excuses for what George Bernard Shaw would call a conspiracy of professionals against the laity.<sup>3</sup>

One of the clearest expressions of this collegial conspiracy is in an article by Lawrence Fox titled, "Take Care of Each Other," in which Fox argues that a lawyer receiving a misdirected fax should not read it, much less use it for the benefit of her own client.<sup>4</sup> The admonition in the title comes from the cautionary announcement of the Chief Steward to race-car drivers at the beginning of the Indianapolis 500. The inaptness of the analogy of a lawyer to a race-car driver makes the point. Unlike a lawyer, a race-car driver is the only person in the car. By contrast, the lawyer has, in

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<sup>1</sup> The issue of taking advantage of an adversary's mistake was the subject of an extremely interesting online discussion/debate by Professor Stephen Gillers, three practicing lawyers, and the author. It can be found in *MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS' ETHICS*, app. C (3d ed. 2004).

<sup>2</sup> This is recognized by implication in the comment by Barry F. McNeal, Co-Chair of the ABA Section of Litigation's Task Force on the Attorney-Client Privilege. It is, he says, "the old 'there but for the grace of God go I.'" Katerina Eftimoff Milenkovski, *Not for Your Eyes Only: Ethics Opinion Addresses Inadvertent Disclosure*, *LITIG. NEWS*, May 2006, at 14.

<sup>3</sup> *GEORGE BERNARD SHAW, THE DOCTOR'S DILEMMA* act I (1908), reprinted in 1 *COMPLETE PLAYS WITH PREFACES*, 110 (Dodd, Mead & Company 1963); see also *GEORGE BERNARD SHAW, Preface on Doctors*, in 1 *COMPLETE PLAYS WITH PREFACES*, 9 (Dodd, Mead & Company 1963).

<sup>4</sup> Lawrence J. Fox, *Opening Statement: Take Care of Each Other*, *LITIG.*, Fall 1995, at 1-2. This is an unusual position for Fox to take, because his ethical positions in general are strongly client-centered. In the same article, for example, Fox writes that zealous advocacy on behalf of one's client is "the very mark of our professional ethic," and that civility codes are of dubious merit. *Id.* at 2.

effect, a passenger—the client—to whom the lawyer has voluntarily assumed fiduciary obligations. These obligations include undivided loyalty and entail “the punctilio of an honor the most sensitive.”<sup>5</sup>

The lawyer’s fiduciary obligation to her own client is one of several ethical duties that are often ignored or minimized in discussions of erroneous disclosure of damaging information. Indeed, some discussions of civility and professionalism seem to suggest that the lawyer’s fiduciary duty runs not to her client but to her “brother lawyers.”<sup>6</sup> I have on occasion suggested that lawyers who adopt this notion should include, and bring to their clients’ attention, the following clause in their retainer agreements:

In the course of representing you, I might realize that the lawyer representing your adversary has made a mistake that might help you to achieve your lawful goal. If that should happen, I might decide to correct or not to take advantage of the adversary lawyer’s mistake. I will do that even if (a) it would be lawful for me to take advantage of the mistake; (b) it would materially prejudice your interests if I correct the mistake; and (c) you told me that I should take advantage of the mistake. I might also decide simply to keep you in ignorance of the other lawyer’s mistake.<sup>7</sup>

This clause (which no one to my knowledge has been willing to adopt) suggests two other values that are commonly ignored in these discussions. One is the client’s autonomy: here, the client’s right to elect a course of action that is permitted by law, or a course that the lawyer may be able to persuade a court is permitted by law.<sup>8</sup> The other value that is commonly ignored is honesty with our clients, who can be expected to assume that their lawyers will afford them every right to which they are lawfully entitled.<sup>9</sup>

The traditional ethic of zeal is another casualty of this insistence on an overriding obligation of “professional courtesy,” or of taking care of each other to our clients’ detriment.<sup>10</sup> In the words of one judge, enforcement of

<sup>5</sup> FREEDMAN & SMITH, *supra* note 1, at 274 (quoting Judge Cardozo in *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928)).

<sup>6</sup> See FREEDMAN & SMITH, *supra* note 1, at 126 & n.355 (quoting *Sprung v. Negwer Materials, Inc.*, 727 S.W.2d 883, 894 (Mo. 1987) (en banc)).

<sup>7</sup> FREEDMAN & SMITH, *supra* note 1, at 402-03.

<sup>8</sup> See *id.* at 45-69, ch. 3 (“The Lawyer’s Virtue and the Client’s Autonomy”); *id.* at 393-414, app. C (“Taking Advantage of an Adversary’s Mistake”).

<sup>9</sup> See MODEL RULES OF PROF’L CONDUCT R. 1.4 (1983) (requiring communication to the client of material information); see also *id.* R. 8.4(c) (forbidding conduct involving “dishonesty, fraud, deceit or misrepresentation”). See also FREEDMAN & SMITH, *supra* note 1, at 71-137, ch. 4 (“Zealous Representation: The Pervasive Ethic”); *id.* at app. C (“Taking Advantage of an Adversary’s Mistake”).

<sup>10</sup> Paraphrasing the 1908 Canons of Professional Ethics 15, I define zeal as the obligation to give entire devotion to the interest of the client, warm dedication in the maintenance and defense of his

ethical rules requiring zealous advocacy could leave the professionalism movement "dead in the water."<sup>11</sup>

Yet another concern that is frequently neglected in discussions of erroneous disclosure is the idea of the trial as a search for truth (something that I hear a good deal about when the issue is whether to betray one's client's confidences in cases of client perjury). Of course, if the lawyer who receives the erroneous disclosure declines to read it, she will never know whether it does, in fact, contain crucial information bearing on the truth of her adversary's case, such as false claims, fraud in discovery, or subornation of perjury.

Finally, an issue that is commonly distorted by those who favor ignoring the erroneous disclosure is confidentiality, or lawyer-client trust and confidence.<sup>12</sup> Although confidentiality is sometimes cited as a reason to ignore an erroneous disclosure of privileged information,<sup>13</sup> the obligation does not run from the lawyer to her adversary or to her adversary's client. On the contrary, the obligation to protect all information relating to the representation is between the lawyer and her own client. This means the lawyer violates confidentiality as soon as (without the client's consent) she informs the other lawyer of the erroneous disclosure.

These widely-recognized, weighty reasons strongly support the use of an erroneous disclosure for the benefit of one's client: the lawyer's fiduciary duty to her client, including the obligation of undivided loyalty; the lawyer's duty of client confidentiality; the lawyer's duty to honestly communicate all material information to the client; respect for the client's autonomy; and the disclosed information's contribution to the search for truth.

These reasons persuade me that a lawyer who receives an erroneous disclosure should read it and make her own determination of whether the information would be useful in furthering her client's case. If, in her judgment, it is, then the lawyer should inform the client about the erroneously disclosed information. If the lawyer believes that it would be morally right and/or tactically desirable to tell the other lawyer about the error and to return the communication, she should so advise the client. However, if the

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rights, and the exertion of the lawyer's utmost learning and ability. FREEDMAN & SMITH, *supra* note 1, at 71.

<sup>11</sup> FREEDMAN & SMITH, *supra* note 1, at 127 n.364 (quoting *Allen v. Lefkoff, Duncan, Grimes & Demer, P.C.*, 453 S.E.2d 719, 725 (Ga. 1995)).

<sup>12</sup> FREEDMAN & SMITH, *supra* note 1, at 129 (describing lawyer-client trust and confidence as the "cornerstone of the adversary system and effective assistance of counsel" (quoting *Morris v. Slappy*, 461 U.S. 1, 21 n.4 (1983) (Brennan, J., concurring) (quoting *Linton v. Perrini*, 656 F.2d 207, 212 (6th Cir. 1981))).

<sup>13</sup> See, e.g., ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 92-368 (1992) *withdrawn* by ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 05-437 (2005).

client's decision is to use the information to its greatest effect, the lawyer should not say anything about the information to the other side until it is tactically desirable to do so (e.g., at a deposition or on cross-examination). This is particularly so in a jurisdiction where erroneous disclosure constitutes a waiver of privilege, and the client has a legal right to use the evidence.<sup>14</sup> Even in jurisdictions in which there are judicial decisions holding that erroneously disclosed evidence cannot be used, counsel should at least consider submitting the evidence to the court, under seal, accompanied by a memorandum of law supporting its admissibility.<sup>15</sup>

In a prior issue of this Review, Professor Andrew Perlman wrote an original and thoughtful article regarding the erroneous disclosure of what might be claimed to be privileged information.<sup>16</sup> In the course of the article, however, he erroneously attributed to me and my co-author, Abbe Smith, a "monistic" concern with zealous advocacy, to the exclusion of other values,<sup>17</sup> and said that in dealing with the erroneous disclosure issue, I fail to draw on a "range of values" wider than zeal.<sup>18</sup> "The problem," Professor Perlman wrote, "is that Freedman and Smith do not explain [in UNDERSTANDING LAWYERS' ETHICS] why the rules should reflect a nearly exclusive concern for zealous advocacy."<sup>19</sup>

The answer is that no such explanation is necessary because that is not our position. As indicated above, with multiple citations to UNDERSTANDING LAWYERS' ETHICS, Smith and I rely on a multiplicity of values.<sup>20</sup> Moreover, as explained in the Preface to our book, the principal premise of our systemic view of lawyers' ethics is that "lawyers' ethics is rooted in the Bill of Rights and in the autonomy and the dignity of the individual."<sup>21</sup> It is "[f]rom this perspective, [that] we analyze the fundamental issues of lawyers' ethics."<sup>22</sup> Accordingly, our treatment of ethical issues

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<sup>14</sup> See, e.g., *In re Sealed Case*, 877 F.2d 976 (D.C. Cir. 1989).

<sup>15</sup> See Model Rules of Prof'l Conduct R. 3.1 (2002).

<sup>16</sup> Andrew M. Perlman, *Untangling Ethics Theory from Attorney Conduct Rules: The Case of Inadvertent Disclosures*, 13 GEO. MASON L. REV. 767 (2005).

<sup>17</sup> *Id.* at 769, 772.

<sup>18</sup> *Id.* at 770.

<sup>19</sup> *Id.* at 789.

<sup>20</sup> Far from being the only value we recognize, zeal is characterized as pervading all the others. See FREEDMAN & SMITH, at 71-137, ch. 4 ("Zealous Representation: The Pervasive Ethic"). See also Monroe Freedman, *The Errant Fax*, LEGAL TIMES, Jan. 23, 1995, at 26 (relying expressly on the search for truth, confidentiality, and client autonomy, as well as zealous advocacy in a critique of ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 92-368 (1992) (dealing with erroneous disclosure), *withdrawn by* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 05-437 (2005)).

<sup>21</sup> FREEDMAN & SMITH, *supra* note 1, at vii.

<sup>22</sup> *Id.*

proceeds from that essential premise, which itself is far broader than zeal, and includes all of the values Perlman cited.

Finally, although Perlman's proposed Rule 4.4(b)<sup>23</sup> is a thoughtful one, I disagree with its reliance on what is, in effect, an honor code in a context in which policing violations is virtually impossible.

The most important part of Perlman's proposal is 4.4(b)(2). It provides that if a lawyer knows from examining a document that it contains inadvertently sent privileged information or work product, the lawyer (a) must immediately stop reading the document, and (b) shall make her own decision whether to notify the sender about the mistake.<sup>24</sup>

First, a drafting concern. The Model Rules define "knows" as having "actual knowledge."<sup>25</sup> It is therefore questionable whether, without reading the full document, a lawyer can make a competent decision that the document does indeed contain privileged information or work product and, if so, that no exception (such as crime/fraud) applies.<sup>26</sup>

More important, I disagree with Perlman's proposal for the same reason that I tend to disapprove of honor codes, particularly in a context (like most erroneous disclosure situations) where the likelihood of detection and discipline is extremely low.

There are those of us (a minority) who will always ignore the rules if they think they can get away with it. There are those of us (a minority) who will never break the rules. And there are those of us (a very large majority in the middle) who would like to be honest, but who do not need any more temptation in our lives than we are already coping with. A rule that turns on whether a lawyer has stopped reading an erroneous disclosure, after knowing that it contains privileged information that is material to her case, is a rule that is destined to be obeyed only by my second category and by an indeterminable number of the third category. In short, under the proposed redraft, only good guys (and their clients) will lose out.

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<sup>23</sup> Perlman, *supra* note 16, at 814.

<sup>24</sup> *Id.* Subsection (b)(1) deals with the case where the sender notifies the receiving lawyer that the document was inadvertently sent and the notification occurs before the lawyer has read the document. *Id.* In that event, the lawyer is forbidden to read the document and must comply with the sender's instructions about it. *Id.* This is likely to be an extremely unlikely situation, and will almost always be subject to the same honor-code problem, discussed in the text, *infra*.

<sup>25</sup> MODEL RULES OF PROF'L CONDUCT R. 1.0(f) (2002).

<sup>26</sup> The fact that the document claims on its face to be privileged is hardly controlling. I have received, literally, dozens of faxed invitations to lunch, in which the cover sheet states that the document is privileged and contains work product. See *Overuse of Disclaimers May Dilute Their Effectiveness*, LITIG. NEWS, May 2003, at 3.

