

speaking of ethics

By Saul Jay Singer

When *Tarasoff* Meets Rule 1.6



Prosenjit Poddar comes to the University of California at Berkeley from India as a graduate student, where he meets Tatiana Tarasoff. She kisses him on New Year's eve; he thinks they have a serious relationship, she doesn't; she tells him she's not interested. He becomes depressed, thinks revenge, sustains an emotional crisis, and seeks professional help.

Poddar sees Dr. Lawrence Moore, a psychologist at Berkeley, to whom he confides his intention to murder Ms. Tarasoff. Moore contacts the police and, characterizing Poddar as a paranoid schizophrenic, opines that his client should be committed as a dangerous person. Poddar is temporarily detained, but he is released shortly thereafter.

Though Doc Moore did report Poddar to the police, he never warned Tarasoff or her family of the threat from his client. As a result of this failure to warn, Poddar was able to befriend Tarasoff's brother and use that friendship to put himself in position to stab Tarasoff to death—which he does, exactly as he told Moore he would. Tarasoff's parents sue Moore and other employees of the university.

In this landmark case, *Tarasoff v. Regents of the University of California*,¹ the Supreme Court of California found that a mental health professional has a duty not only to the patient, but also to individuals who are specifically threatened by the patient. This case, which has become synonymous with the duty of a therapist to warn, has been broadly adopted across the United States. In perhaps its most important and striking holding, the court ruled that:

The public policy favoring protection of the confidential character of patient-psychotherapist communications must yield to the extent to which disclosure is essential to avert danger to others. The protective privilege ends where the public peril begins.

But, consider: what if Moore were an

attorney? That is, assume that Lawrence Moore, Esquire, is a District of Columbia lawyer retained by student Prosenjit Poddar to represent him in a personal injury case in Superior Court. What if, during the course of Moore's initial meeting with his client, Poddar says that he needs to win as large a recovery as possible because he needs funds to hire a hit man to murder Tatiana Tarasoff, the "girlfriend" who jilted him and publicly embarrassed him?

As a preliminary matter, there can be no question that this information received by Attorney Moore is a confidence or secret under Rule 1.6 (Confidentiality of Information). The question, however, is whether there exist any Rule 1.6 exceptions that would require or permit Moore to warn the appropriate authorities (and/or Ms. Tarasoff and her family) of his client's threat.

This question squarely presents a dramatic clash of conflicting ethical imperatives.

On one hand, "the observance of the ethical obligation of a lawyer to hold inviolate confidential information of the client not only facilitates the full development of facts essential to proper representation of the client but also encourages people to seek early legal assistance."² Moreover, "a fundamental principle in the client-lawyer relationship is that the lawyer holds inviolate the client's secrets and confidences. The client is thereby encouraged to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter."³ Thus, requiring, or even permitting, Moore to disclose Poddar's confidence would not only grievously harm the client but, perhaps more importantly, undercut an essential and fundamental feature of the attorney-client relationship: open communication between attorney and client and facilitating the trust that clients repose in their lawyers.

On the other hand, "although the public interest is usually best served by a strict

rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients . . . [the rule recognizes] the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm."⁴ In addition, "the Rules do not exhaust the moral and ethical considerations that should inform a lawyer, for no worthwhile human activity can be completely defined by legal rules."⁵ Thus, while Moore certainly owes a duty of confidentiality to his client, that ethical duty may yield to other "moral and ethical considerations," including societal obligations such as taking reasonable steps to protect the public from grievous harm.

Some states, including Arizona, Connecticut, Florida, Illinois, New Jersey, Vermont, and Wisconsin, come down strongly in favor of the broader public interest in preventing grievous harm and impose a *Tarasoff*-like mandatory reporting obligation on lawyers. For example, Arizona Rule 1.6(b) provides that "a lawyer *shall* reveal such [confidential] information to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal act that the lawyer believes is likely to result in death or substantial bodily harm" (emphasis added). Connecticut goes even further, making it mandatory for a lawyer to report even *fraudulent* acts that are likely to result in death/substantial bodily harm. Florida goes further still, requiring the lawyer to report confidential information "to the extent the lawyer reasonably believes necessary to prevent a client *from committing a crime*" (emphasis added)—i.e., even where the crime committed by the client will not likely result in death or substantial bodily harm.

The D.C. rules, however, are renowned for the heightened emphasis they place upon the duty to maintain client confidentiality. D.C. Rule 1.6 is, to coin a phrase, "the mother of all ethics rules;" it is broader than in most other jurisdic-

tions and generally it will trump other ethical imperatives.⁶ The duty to maintain client confidentiality under our rules extends to any information gained through or in the course of the representation—whether from the client or even from some third party—the disclosure of which likely would be embarrassing or detrimental to the client. Thus, in the rare instances where disclosure of an otherwise protected client secret is permitted under our rules, the case must fall *squarely* within one of the Rule 1.6 exceptions.

D.C. Rule 1.6(c)(1) takes a middle-of-the-road approach to the *Tarasoff* conundrum, carefully walking the line between a rigid, unconditional approach to the enforcement of Rule 1.6 and an absolute mandate requiring Moore to report his client's threat, by enacting a voluntary standard that vests the disclosure question within the lawyer's considered discretion:

A lawyer *may* reveal client confidences and secrets, to the extent reasonably necessary to prevent a criminal act that the lawyer reasonably believes is likely to result in death or substantial bodily harm absent disclosure of the client's secrets or confidences by the lawyer. (Emphasis added).⁷

But this begs a number of questions: When does the lawyer's belief rise to the level of the requisite "reasonable belief" so as to permit the lawyer to breach Rule 1.6? How "likely" must it be that the threat will lead to harm? What level of due diligence must Moore undertake to ascertain the seriousness of Poddar's threat before exercising his option to report his client? Jilted young men, and other unhappy clients, sometimes say things and make idle threats as a way to express anger and let off steam, and few lawyers are trained or otherwise qualified to make these determinations—and even experienced mental health care professionals often struggle with these decisions.⁸

When these very difficult questions are presented to me on the Legal Ethics Helpline, I generally respond by walking the caller through the rule and comments, but ultimately confirming that I cannot make a decision that is inherently fact-specific, and which the rules leave to the sound discretion of the caller. Of course, a lawyer should always "counsel a client [not] to engage . . . in conduct that the lawyer knows is criminal or fraudulent,"⁹ but the fact remains: while I understand very well the importance of preserving

client confidences, if faced with a client's credible threat to kill or substantially harm another . . . I would disclose.

Legal Ethics counsel Hope C. Todd and Saul Jay Singer are available for telephone inquiries at 202-737-4700, ext. 231 and 232, respectively, or by e-mail at ethics@dcbbar.org.

Notes

1 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (Cal. 1976).

2 D.C. Rule 1.6, comment [2].

3 *Id.*, comment [4].

4 American Bar Association Model Rule 1.6, comment [6].

5 See Comment [2] to the "Scope" section introducing the D.C. Rules.

6 For one conspicuous exception, where the D.C. rules actually *command* the disclosure of a client secret in some situations where the lawyer has actual knowledge that a fraud has been perpetrated upon the tribunal, see Rule 3.3(d) (Candor to Tribunal).

7 A very important point: the mere fact that Moore is a D.C. lawyer does not mean that the D.C. rules will apply to his conduct in this case. See generally Rule 8.5 (Disciplinary Authority; Choice of Law). However, as it turns out, the D.C. rules will apply here because the matter is pending before a D.C. tribunal. See Rule 8.5(b)(1).

8 Thus, it is interesting to note that the California court, while imposing a mandatory disclosure requirement for psychologists, has—much as our Court of Appeals—adopted a *voluntary* disclosure rule for lawyers. See California Rule 3-100(B). This may be because trained mental health professionals are, indeed, in a much stronger position to assess the seriousness, *vel non*, of a client threat than we are as lawyers.

9 See Rule 1.2(c).

Disciplinary Actions Taken by the Board on Professional Responsibility

Original Matters

IN RE HOWARD D. DEINER. Bar No. 377347. February 25, 2011. The Board on Professional Responsibility recommends that the D.C. Court of Appeals disbar Deiner. Deiner was convicted in the Circuit Court of Arlington County, Virginia, of four felony counts of obtaining money by false pretenses in violation of Va. Code Ann. § 18.2-178, and one misdemeanor count of practicing law without a license in violation of Va. Code Ann. § 54.1-3904. Since the four felony convictions were crimes involving moral turpitude *per se*, disbarment is mandatory under D.C. Code § 11-2503(a)(2001).

Disciplinary Actions Taken by the District of Columbia Court of Appeals

Reciprocal Matters

IN RE DORIS K. NAGEL. Bar No. 419899. February 10, 2011. In a reciprocal matter from Illinois, the D.C. Court of Appeals imposed identical reciprocal discipline and suspended Nagel for one year with fitness, with the suspen-

sion stayed pending Nagel's successful completion of the probationary period imposed by Illinois.

IN RE RICHARD G. SOLOMON. Bar No. 414054. February 10, 2011. In a reciprocal matter from Maryland, the D.C. Court of appeals imposed identical reciprocal discipline and disbarred Solomon.

Interim Suspensions Issued by the District of Columbia Court of Appeals

IN RE JOHN A. ELMENDORF. Bar No. 454508. February 9, 2011. Elmendorf was suspended on an interim basis based upon discipline imposed in Maryland.

IN RE JASON M. HEAD. Bar No. 479171. February 9, 2011. Head was suspended on an interim basis based upon discipline imposed in Virginia.

Disciplinary Actions Taken by Other Jurisdictions

In accordance with D.C. Bar Rule XI, § 11(c), the D.C. Court of Appeals has ordered public notice of the following nonsuspensory and nonprobationary disciplinary sanctions imposed on D.C. attorneys by other jurisdictions. To obtain copies of these decisions, visit www.dcbbar.org/discipline and search by individual names.

IN RE THOMAS EDWARD FRANKOVICH. Bar No. 314385. On June 25, 2009, the State Bar Court of California Hearing Department—San Francisco publicly reproved Frankovich.

Informal Admonitions Issued by the Office of Bar Counsel

IN RE GRANT E. MORRIS. Bar No. 926253. January 26, 2011. Bar Counsel issued Morris an informal admonition for failing to communicate and monitor a U.S. Equal Employment Opportunity Commission complaint he filed on his client's behalf while retained to represent a client in an employment discrimination matter. Rules 1.3(a) and 1.4(a).

IN RE GRANT E. MORRIS. Bar No. 926253. January 26, 2011. Bar Counsel issued Morris an informal admonition for failing to consult with his client about the objectives of the representation while retained to represent a client in an employment discrimination administrative claim. Rules 1.2(a), 1.4(b), and 1.5(e).

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The Office of Bar Counsel compiled the foregoing summaries of disciplinary actions. Informal Admonitions issued by Bar Counsel and Reports and Recommendations issued by the Board on Professional Responsibility are posted on the D.C. Bar Web site at www.dcbar.org/discipline. Most board recommendations as to discipline are not final until considered by the court. Court opinions are printed in the Atlantic Reporter and also are available online for decisions issued since August 1998. To obtain a copy of a recent slip opinion, visit www.dcappeals.gov/dccourts/appeals/opinions_mojs.jsp.

Elections

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Environment, Energy and Natural Resources (Three Vacancies): Charles L. Franklin, Akin Gump Strauss Hauer & Feld LLP; Laura R. Goldin, U.S. Nuclear Regulatory Commission; Rachel Jacobson, U.S. Department of the Interior; Kelly A. Johnson, Holland & Hart LLP; Emily M. Lamond, Orrick, Herrington & Sutcliffe LLP; Benjamin S. Lippard, Vinson & Elkins L.L.P.; Peter H. Oppenheimer, NOAA Office of the General Counsel.

Estates, Trusts and Probate Law (Three Vacancies): James L. Frazier, Law Offices of James Larry Frazier; Valerie B. Geiger, The Elder & Disability Law Center; Christopher M. Guest, Law Office of Christopher Guest; L. Laurel Lea, Furey, Doolan & Abell, LLP; Giannina "Gina" Lynn, Attorney-at-Law; M. Cecelia Steiner-Smith, D.C. Office of the Attorney General; Nicole D. Stevens, Register of Wills, D.C. Superior Court.

Family Law (Three Vacancies): Aaron J. Christoff, Nugent Christoff, PLLC; Lisa A. Freiman Fishberg, Schertler & Onorato, LLP; Christopher M. Locey, Kuder, Smollar & Friedman, P.C.; Sara S. Scott, Zamani & Scott, LLP; Avrom D. Sickel, Family Court Self-Help Center, D.C. Superior Court; Robert D. Weinberg, Delaney McKinney LLP.

Government Contracts and Litigation (Two Vacancies): Daniel E. Chudd, Jenner & Block LLP; Adelia R. Cliffe, Crowell & Moring LLP; Jonathan L. Kang, U.S. Government Accountability Office; Lartease M. Tiffith, U.S. Department of Justice.

Health Law (Two Vacancies): Jennifer A. Cromwell, Groom Law Group, Chartered; Phillip Lyle Husband, D.C. Department of Health; Nicole A. Liffbrig Molife, Arnold & Porter LLP; Steven R. Smith, Ober|Kaler; Hemi D. Tewarson, U.S. Government Accountability Office.

Intellectual Property Law (Two Vacancies): Suzanne Balsam, U.S. Department of Agriculture; Ryan C. Compton, DLA Piper US LLP; Joyce Craig, Finnegan, Henderson, Farabow, Garrett & Dunner, LLP; Robert J. Kimmer, Rader, Fishman & Grauer PLLC; Sean A. O'Donnell, Finnegan, Henderson, Farabow, Garrett & Dunner, LLP; Sidney A. Rosenzweig, U.S. International Trade Commission; Kelu L. Sullivan, Baker & Hostetler LLP.

International Law (Two Vacancies): Alden L. Atkins, Vinson & Elkins L.L.P.; John C. Floyd III, John C. Floyd III & Associates; Mary O. McCarthy, The Law Office of Michael R. McCarthy; Brian A. Pomper, Akin Gump Strauss Hauer & Feld LLP; Michael S. Snarr, Baker & Hostetler LLP; Reid S. Whitten, Fulbright & Jaworski LLP.

Labor and Employment Law (Three Vacancies): Jonathan L. Gould, Jonathan L. Gould, Employment Law; Marlon C. Griffith, Griffith & Wheat PLLC; Emily B. Read, Washington Lawyers' Committee for Civil Rights and Urban Affairs; Christal Mims Williams, Executive Office of the Mayor, D.C. Government; Christine C. Zebrowski, Overbrook Law LLC; Adria S. Zeldin, Attorney-at-Law.

Law Practice Management (Three Vacancies): Robert C. Fisher, Fisher Collaborative Services LC; Elaine L. Fitch, Kalijarvi, Chuzi & Newman, P.C.; Arden B. Levy, Bailey Gary, PC; William C. Paxton, Attorney-at-Law; Robert P. Scanlon, Anderson & Quinn, LLC; Evan P. Schultz, Constantine Cannon LLP; Joanne W. Young, Kirstein & Young, PLLC.

Litigation (Three Vacancies): Vanessa Buchko, AARP Legal Counsel for the Elderly; Lara Degenhart Cassidy, Law Office of Lara Degenhart Cassidy; Elizabeth D. Curtis, U.S. Social Security Administration; Russell D. Duncan, Orrick, Herrington & Sutcliffe LLP; Robert N. Kelly, Jackson & Campbell, P.C.; W. Brad Nes, Morgan, Lewis & Bockius LLP; John E. Reid, Tobin, O'Connor & Ewing; Keiko K. Takagi, Sughrue Mion, PLLC; Karen R. Turner, Hamilton Altman Canale & Dillon, LLC.

Real Estate, Housing and Land Use (Two Vacancies): Peter D. Antonoplos, JD Katz: Attorney-at-Law; David H. Cox, Jackson & Campbell, P.C.; Todd Lewis, The TR Lewis Law Group, P.C.; John E. Reid, Tobin, O'Connor & Ewing; David J. Walker, Saul Ewing LLP.

Taxation (Three Vacancies): Peter D. Antonoplos, JD Katz: Attorney-at-Law; George A. Hani, Miller & Chevalier Chartered; Scott M. Levine, Jones Day; Aaron P. Nocjar, Steptoe & Johnson LLP; Seth T. Perretta, Davis & Harman LLP; Alexander L. Reid, Joint Committee on Taxation, U.S. Congress; Rostyslav I. Shiller, Internal Revenue Service.

Tort Law (One Vacancy): Jordon D. Mathies, Mathies Law Offices, PLC; Thomas C. Mugavero, Whiteford, Taylor & Preston, L.L.P.

Legal Beat

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is run by the Children's Law Center (CLC) in partnership with the Children's National Medical Center. At the clinic, lawyers will participate in teen parent support groups so that teens can get comfortable and familiar with those offering legal services for anything from child support to public benefits.

"Teens are an incredibly important group to serve because if you get them early, you get them on the right track," said Judith Sandalow, CLC executive director. "Their children are at very high risk. Teen parents are at very high risk of abusing their children, of being homeless. It's a very precarious time. If we can give them the support they need to be good parents, we're winning both for the teens and their child."

The two new expansion projects are the Real Property Tax Project through the Legal Counsel for the Elderly, aimed at helping seniors stay in their homes, and the School Discipline Legal Services Project through Advocates for Justice and Education, which targets at-risk youth and tries to help keep them in school and out of the criminal justice system.

To see the complete list of grantees, visit www.dcbarfoundation.org; for more information about the grants, contact Katherine L. Garrett at 202-467-3750, ext. 12, or garrett@dcbarfoundation.org.—T.L.

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