

THE DUTY TO WARN: WHEN AND TO WHAT EXTENT DOES IT APPLY TO CALIFORNIA CRIMINAL DEFENSE ATTORNEYS?

By Lori A. Quick

As criminal defense attorneys, it is sometimes our experience that a client tells us more than we want to know. Rarely, he or she will convey to us an explicit or veiled threat directed at us or at a third party. When this happens, do you have a duty to disclose it? Trained as we are to protect our clients' confidences and to guard them through use of the attorney-client privilege, how do we know when disclosure is warranted, if ever? The answer is basically reached through a combination of statutory law, case law, and common sense.

FACTUAL SCENARIO #1

You are appointed to represent a client who was convicted of several crimes of violence against a single victim and making criminal threats. He was sentenced to a determinate term in state prison. He is extremely angry and emotional, and writes numerous letters to you. He also places telephone calls to you when he can. He truly believes that he was "railroaded" at trial by a lying victim and crooked district attorney who together conspired to hoodwink the jury. The tone of his letters and phone calls increases in emotional pitch over time.

After reading the record, you are forced to conclude that while there are a few relatively minor issues to raise, the evidence was overwhelming and the appeal will almost certainly amount to nothing. A couple of days after you complete your legal research, the client calls and asks for a progress report. You deliver the unfortunate news. The client explodes, spews expletives directed at the victim, the district attorney, and trial counsel, and says, "When I get out of here, they're all going to pay!"

What, if any, action should you take?

FACTUAL SCENARIO #2

You are representing a client who has a relatively violent past, and who is absolutely livid over the sentence he just received. In particular, he blames the trial judge who he believes had it in for him. While speaking to him on the telephone during a pre-arranged confidential telephone call, the client says to you “That judge is dead. I’m going to see to that - soon.” Do you have a duty to inform the judge of the threat?

The Relevant Rules

A. Business & Professions Code section 6068

Pursuant to Business & Professions Code section 6068, subdivision (e)(1) it is the duty of an attorney “[t]o maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.” This would seem to indicate that the client’s statement cannot be disclosed. However, in 2003, the Legislature added subdivision (e)(2), which states “[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 or, or substantial bodily harm to, an individual.” This provision became effective on July 1, 2004. Its recency means there is virtually no case law discussing it.

B. Evidence Code section 956.5

This section states that there is no attorney-client privilege “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 the death of, or substantial bodily harm to, an individual.” This is an evidentiary rule, while Business & Professions

Code section 6068 is a codified rule of conduct. However, in determining whether statements containing threats which were made within the attorney-client relationship are admissible, it has been noted that “[m]atters involving the commission of a crime or a fraud, or circumstances in which the attorney reasonably believes that disclosure is necessary to prevent the commission of a criminal act likely to result in death or substantial bodily harm, are statutory and well-recognized exceptions to the attorney-client privilege. [Citations.]”¹

Because the focus of this article is on whether disclosures should be made in settings other than in court, the application and reach of section 956.5 is beyond its scope. Attorneys should, however, be aware that they may be required to testify to attorney-client communications which they have or could have disclosed under Business & Professions Code section 6068.

C. American Bar Association Model Rules of Professional Conduct

Rule 1.6 governs confidentiality of information. Subdivision (b) states in relevant part that “a lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary: (1) to prevent reasonably certain death or substantial bodily harm; (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer’s services; (3) to prevent, mitigate or rectify substantial injury to the financial interest or property of another that is reasonably certain to result or has resulted from the client’s commission of a crime or fraud and in furtherance of which the client has used the lawyer’s services.”

1. *People v. Dang* (2001) 93 Cal.App.4th 1293, 1298-1299, citing *General Dynamics Corp. v. Superior Court* (1994) 7 Cal.4th 1164, 1191

D. California State Bar Rules of Professional Conduct

Rule 3-100 states that (A) A member shall not reveal information protected from disclosure by Business & Professions Code section 6068, subdivision (e)(1) without the informed consent of the client, or as provided in paragraph (B) . . . (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 or substantial bodily harm to, an individual. (C) Before revealing confidential information to prevent a criminal act . . . a member shall, if reasonable under the circumstances: (1) make a good faith effort to persuade the client: (i) not to commit or to continue the criminal act or (ii) to pursue a course of conduct that will prevent the threatened death or substantial bodily harm; or do both . . . and (2) inform the client, at an appropriate time, of the member's ability or decision to reveal information as provided in paragraph (B).”

Discussion

Traditionally, an attorney had no duty to anyone other than the client, first because of the contractual nature of the relationship, and second, because the underlying theoretical basis of the role of the lawyer as advocate precludes a concern for others, including third parties. Despite a great deal of debate over whether a lawyer should be required to give a warning when a client threatens serious harm to a third party, the ethical rules in most jurisdictions do not require such a warning. As of 2000, only eleven jurisdictions - Arizona, Connecticut, Florida, Illinois, Nevada, New Jersey, New Mexico, North Dakota, Texas, Virginia, and Wisconsin - *required* a lawyer to reveal client confidential information to prevent the client from inflicting serious bodily harm or death upon a

third party.²

With the addition of Business & Professions Code section 6068, subdivision (e)(2), it appears that California has declined to join those jurisdictions. Rather, the subsection is modeled on the ABA Model Rules of Professional Conduct, Rule 1.6, *supra*, which requires that a lawyer “not reveal information relating to representation of a client unless the client gives informed consent” except that “a lawyer may reveal such information to the extent the lawyer reasonably believes necessary . . . (1) to prevent reasonably certain death or substantial bodily harm . . . “

In practice, when faced with a situation like the hypothetical presented above, how does one apply these rules? In order to determine this, it is necessary to understand what they do and do not require.

1. Disclosure is Permissive, Not Mandatory

By its own terms, section 6068, subdivision (e)(2) states that an attorney “may, but is not required to” reveal confidential information regardless of whether the client has threatened physical harm. Rule 3-100(E) expressly states “A member who does not reveal information permitted by [this rule] does not violate this rule.” Given California’s expressed strong interest in confidentiality and protecting the client, disclosures are not mandatory, and any such disclosures should be made only to the extent reasonably necessary to prevent the foreseen harm.³ Thus, no matter what the client tells the attorney, the attorney is *under no obligation* to reveal the confidential communication

2. Cooper, The Ethical Rules Lack Ethics: Tort Liability When A Lawyer Fails To Warn A Third Party Of A Client’s Threat To Cause Serious Physical Harm Or Death (2000) 36 Idaho L. Rev. 479

3. Mohr, California’s Duty of Confidentiality: Is It Time For a Life-Threatening Criminal Act Exception? (2002) 39 San Diego L. Rev. 307, 351.

unless he or she wishes to do so. Among the factors to be considered in determining whether to disclose confidential information are the following:

- a. the amount of time that the attorney has to make a decision about disclosure;
- b. whether the client has made similar threats before, and whether they have ever acted or attempted to act upon them;
- c. whether the attorney believes his or her efforts to persuade the client not to engage in criminal conduct have or have not been successful;
- d. the extent of adverse effect to the client's rights under the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution and analogous rights and privacy rights under Article One of the Constitution of the State of California that may result from disclosure contemplated by the member;
- e. the extent of other adverse effects to the client that may result from disclosure contemplated by the member; and
- f. the nature and extent of information that must be disclosed to prevent the criminal act or threatened harm.⁴

When considering these factors, it is important to keep in mind that criminal appellants are often under an extreme amount of stress. To assess the seriousness of a threatening statement, it is helpful to consult some of the jurisprudence which has evolved from Penal Code section 422.

Section 422 requires that a threat have unequivocal, unconditionality, immediacy and specificity sufficient to convey gravity of purpose and immediate prospect of execution to the victim. The four qualities are simply the factors to be considered in determining whether a threat,

4. Comment [6] to Rules of Professional Conduct, rule 3-100

considered together with its surrounding circumstances, conveys those impressions . . . “⁵ A purported threat must be examined on its face and under all of the circumstances in which it was made in order to assess if it conveyed the required gravity of purpose and immediate prospect of execution.⁶ “Threats are judged in their context.”⁷ “The surrounding circumstances must be examined to determine if the threat is real and genuine, a true threat.”⁸ Those circumstances include the prior history of disagreements between the perpetrator of the threat and the victim and conduct of the defendant subsequent to making the threat.⁹ Simply because the perpetrator does not communicate a precise time or manner of executing his threat does not render it insufficient. (People v. Butler (2000) 85 Cal.App.4th 745, 752.) “Thus, it is the circumstances under which the threat is made that give meaning to the actual words used. Even an ambiguous statement may be a basis for a violation of section 422.”¹⁰

It is very important to be able to distinguish between the venting of a frustrated client and one who truly poses a danger to you or to others. This is one of the reasons why it is extremely important to forge and maintain a good working relationship with your clients. It is only in this way that you will have the ability to determine whether a threat needs to be taken seriously and perhaps acted upon.

5. *People v. Stanfield* (1995) 32 Cal.App.4th 1152, 1157-1158

6. *In re Ricky T.* (2001) 87 Cal.App.4th 1132, 1137.

7. *Ibid.*

8. *Ibid.*

9. *People v. Solis* (2001) 90 Cal.App.4th 1002, 1014.

10. *People v. Butler* (2000) 85 Cal.App.4th 745, 752

2. The Threatened Harm Need Not Be Imminent

None of the rules set forth above requires that the threatened harm be imminent. The Model Rule requires that the harm be “reasonably certain” to occur, while section 6068 and rule 3-100 require that the harm be, in the lawyer’s estimation, “likely to result in death or substantial bodily harm.” The use of these standards permits an attorney to disclose information even though the impact of the client’s intended actions may not be apparent until far into the future. Although this is probably a scenario more likely to occur in the corporate context, for example where there are toxic waste emissions or defective product designs at issue, it can also occur in situations such as the hypothetical above, where the client is currently incarcerated but is serving a determinate term and vows to injure someone when he or she is released. Despite the fact that imminence of harm is not a prerequisite to disclosure under any of the rules discussed, it is certainly a consideration in deciding whether to disclose the confidential information.

3. Must The Action Threatened By The Client Be A Criminal Act?

Model Rule 1.6(b) does not require that the act be criminal unless the injury will be to the *financial interests or property* of another. Business & Professions Code section 6068, subdivision (e)(2) and rule 3-100, on the other hand, specifically state that disclosure may be made when an attorney reasonably believes it 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.”

California’s approach seems preferable. An effective attorney-client relationship depends on candor and openness in communications. It would be extremely counter-productive if an attorney were permitted to reveal confidential information about an action the client might take which could result in harm, but is not criminal. The attorney is of course free to choose to reveal such

information when the client intends to engage in a criminal act that will result in death or serious bodily harm, in order to prevent that harm from occurring. No client should expect that he or she can rely on an attorney to assist in a course of criminal conduct that threatens human life.¹¹

It should also be noted that the language of Business & Professions Code section 6068, subdivision (e)(2) - “the disclosure is necessary to prevent *a criminal act* . . . “ - would allow disclosure even if it is not the client himself or herself who intends to commit the act. Thus, if the attorney reasonably believes, in the hypothetical above, that the incarcerated client has the wherewithal to have someone on the outside do the deed, he or she would be justified in making the necessary disclosure.

4. What Is “Confidential Information”?

Neither the Model Rules, the California Rules of Professional Conduct, nor Business & Professions Code section 6068, subdivision (e)(2) contains a clear definition of “confidential information.” Rule 1.6 refers to it only as “information relating to the representation of the client.” Rules of Professional Conduct, rule 3-100 defines it as “information protected from disclosure by Business & Professions Code section 6068, subdivision (e)(1)”, which in turn refers to it only as “confidence” and “secrets.” “Maintaining confidence” has been defined in a California State Bar ethics opinion as not doing anything that would “breach the trust reposed in [the attorney] by the client.”¹² A secret has been defined as “other information gained in the professional relationship

11. See, e.g., United States v. Cueto (7th Cir. 1998) 151 F.3d 620, 634 [“We refuse to accept the notion that lawyers may do anything, including violating the law, to zealously advocate their clients’ interests and then avoid criminal prosecution by claiming that they were ‘just doing their job.’”]; United States v. Morris (4th Cir. 1993) 988 F.2d 1335, 1336

12. State Bar of California Compendium on Professional Responsibility, Formal Op. 1988-1996 (Mar. 1989); State Bar of California Compendium on Professional Responsibility, Formal Op. 1986-87 (June 1987).

that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.”¹³ Because these terms are so loosely defined, it has been suggested by one commentator that a lawyer’s authority to disclose confidential information should be limited to the client’s prospective criminal acts.¹⁴

5. Informing The Client That Disclosure Will Be Made

Rule 3-100(C)(2) requires attorneys to inform the client, at an appropriate time, of the decision to reveal confidential information, *if reasonable under the circumstances*. Obviously this is not necessary if doing so would likely increase the risk of death or substantial bodily harm, not only to the originally intended victim of the criminal act, but also to the attorney or members of the attorneys’ family. Among the factors to be considered in determining an appropriate time, if there is one, to inform a client are as follows:

- a. whether the client is an experienced user of legal services;
- b. the frequency of the attorney’s contact with the client;
- c. the nature and length of the professional relationship with the client;
- d. whether the attorney and client have discussed the attorney’s duty of confidentiality or any exceptions to that duty;
- e. the likelihood that the client’s matter will involve information which will be disclosed;
- f. the attorney’s belief, if applicable, that so informing the client is likely to increase the likelihood that a criminal act likely to result in the death of, or substantial bodily harm to, an

13. Ibid.

14. Mohr, California’s Duty of Confidentiality: Is It Time For A Life-Threatening Criminal Act Exception? (2002) 39 San Diego L. Rev. 307, 364.

individual; and

g. the attorney's belief, if applicable, that good faith efforts to persuade a client not to act on a threat have failed.¹⁵

Can An Attorney Be Liable In Tort For Failing To Disclose A Confidential Communication About A Crime Which Does In Fact Occur, Resulting In Death Or Serious Bodily Injury?

Traditionally, in order to establish a prima facie case for the tort of negligence, a plaintiff must establish each of four elements: (1) a duty to conform one's conduct to a standard of reasonable care; (2) breach of that duty; (3) causal connection or proximate cause; and (4) actual damages.¹⁶ The common law generally recognized no duty to act; however, the existence of certain special relationships gives rise to a duty: "There is no duty to control the conduct of a third person as to prevent him from causing physical harm to another unless: (a) a special relation exists between the actor and the third person which imposes a duty upon the actor to control the third person's conduct, or (b) a special relation exists between the actor and the other which give the other a right of protection."¹⁷

When considering whether there could be tort liability for a failure to disclose, the case of *Tarasoff v. The Regents of the University of California* (1976) 17 Cal.3d 425 inevitably comes to mind. There, it was held essentially that a cause of action did lie against therapists who had in fact determined that a homicide suspect presented a serious danger of violence to the victim, but nevertheless failed to exercise reasonable care to protect her from that danger. Thus, when a

15. Comment [9] to California State Bar Rules of Professional Conduct, rule 3-100

16. W. Page, Keeton, et. al., Prosser And Keeton On The Law Of Torts, section 30 (5th ed. 1984)

17. Restatement (Second) of Torts, section 314 (1965)

therapist determines, or pursuant to the standards of his profession should determine, that his patient presents a serious danger of violence to another, he incurs an obligation to use reasonable care to protect the intended victim against the danger. Does the reasoning of *Tarasoff* apply to lawyers? Have we a duty to protect our client's intended victims?

In California, the answer so far seems to be a resounding "no." As stated above, Rule 3-100(E) specifically states that a lawyer who does not reveal information permitted by the rule does not violate it. Business & Profession Code section 6068 expressly states that an attorney "may, but is not required to" reveal confidential information in this context. Model Rule 1.6 leaves a lot of "wriggle room", stating in subdivision (b) "A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary: (1) to prevent reasonably certain death or substantial bodily harm . . . "

There are, however, two Washington state cases which have begun what may be a trend toward holding lawyers liable in tort for the actions of their clients. (*Hawkins v. King County* (1979) 24 Wn.App.338 [holding "the obligation to warn, when confidentiality would be compromised to the client's detriment, must be permissive at most, unless it appears beyond a reasonable doubt that the client has formed a firm intention to inflict serious personal injuries on an unknowing third person"]; *State v. Hansen* (1993) 122 Wn.2d 712 [holding that "attorneys, as officers of the court, have a duty to warn of true threats to harm a judge made by a client . . . when the attorney has a reasonable belief that such threats are real."].) Thus, at least in Washington state, courts are engaging in a balancing of interests, and finding that it weighs in favor of a lawyer's duty to the court and to society.¹⁸

18. Sears, Blood On Our Hands: The Failure of Rule 1.6 to Protect Third Parties from Violent Clients, and the Movement Toward a Common-Law Solution (2003) 39 Idaho L. Rev. 451,

No California authority could be found espousing these same principles, and as stated above, so far in California it does not appear that a lawyer is liable in tort for injuries inflicted by his or her client. However, as the status of victim becomes ever more popular in our society, it is likely that a duty to reveal their clients' confidences in certain situations will eventually be imposed upon attorneys.

Conclusion

It seems clear that if a client makes a threat of death or serious bodily injury to another, attorneys in California so far have no duty to disclose that communication. The decision to do so is totally discretionary. However, should an attorney decide that he or she must make such disclosure, no more may be revealed that is necessary to prevent the criminal act.¹⁹ In addition, before doing so, that attorney must, *if reasonable under the circumstances*, make a good faith effort to persuade the client not to commit the act or to pursue a course of conduct that will prevent the threatened death or substantial bodily harm, or both.²⁰

THE MISSING CLIENT: WHAT ARE AN ATTORNEY'S RESPONSIBILITIES?

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19. Rules of Professional Conduct, rule 3-100(D)

20. Rules of Professional Conduct, rule 3-100(C)(1)

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FACTUAL SCENARIO

You have been appointed to represent a state prison inmate on appeal. He has been more or less communicative while in custody. Then, your reply brief is returned to you in an envelope marked “Paroled.” What are the possible consequences to the client? What should you do?

Relevant Case Law

1. Escape From Custody

Although there is no statutory law in California for the proposition, it is a long-standing common-law rule that the court has the power to dismiss the appeal of an appellant who escapes from custody. (People v. Clark (1927) 201 Cal. 474, 477; Molinaro v. New Jersey (1970) 396 U.S. 365, 366 [authorizing dismissal of federal appeal when defendant escapes while appeal is pending].) This rule is equally applicable to felons and misdemeanants who become fugitives of justice to escape having to serve a jail term imposed as a condition of probation or as a sentence. (People v. Kubby (2002) 97 Cal.App.4th 619.)

The appeal will not necessarily be dismissed. In a case where the defendant has escaped from custody, but is apprehended and returned to custody at the time the appeal is actually before the reviewing court, the above rule of dismissal may be inapplicable. (People v. Mutch (1971) 4 Cal.3d 389, 399.) Also, the Court of Appeal may condition the dismissal on the appellant’s failure to return to custody. (See People v. Buffalo (1975) 49 Cal.App.3d 838, 839 [appellant given specific amount of time to return to custody, or suffer dismissal of the appeal].) In any event, this is solely a state court decision, since federal due process does not require the appellate court to reinstate the appeal of a fugitive, even if he or she has been recaptured at the time the appeal is actually

reviewed. (Goeke v. Branch (1995) 514 U.S. 115 [due process does not require states to provide appellate process at all; a federal court rule not allowing dismissal if a fugitive is returned to custody before filing notice of appeal is one of federal procedure only].)

2. Absconding Before Sentencing

If the defendant absconds before sentencing and is sentenced in absentia, the Court of Appeal may well dismiss a notice of appeal filed by trial counsel. However, if the defendant is later returned to custody, the appeal may be reinstated. (People v. Kang (2003) 107 Cal.App.4th 43.) A somewhat different rule applies if the defendant absconds before or during trial, the trial is held in his absence, and sentencing is delayed until he returns voluntarily or otherwise. Here, the defendant may appeal, but will not receive the benefit of any court decision that is otherwise being applied retroactively to cases not yet final, if that decision was rendered at a time after which an appeal would otherwise have been final in his case if he had not absconded and been timely sentenced. (People v. Robinson (1991) 229 Cal.App.3d 1620, 1624-1625.)

3. Severance of Contact With Attorney

When a defendant voluntarily leaves the jurisdiction of California courts and severs all contact with his or her attorney, the appeal may be dismissed, because the appellant cannot be brought before the court for enforcement of its decision. Although an attorney is presumed to be authorized to represent his or her client, when the client refuses to communicate with the attorney, he or she strips the attorney of that authority. In addition, a defendant's unilateral power to decide whether or not to return to the jurisdiction in the event of reversal and retrial has been held to be an abuse of the judicial process. (People v. Brych (1988) 203 Cal.App.3d 1068, 1076-1077.)

What Should An Attorney Do?

Obviously, your goal is to keep your client's appeal from being dismissed. At the same time, attorneys have an obligation to refrain from knowingly making false statements of fact or law to a court. (Model Rules of Professional Conduct, rule 3.3(a)(1).) Therefore, while you certainly do not have to volunteer unsolicited information to the court regarding your client's departure for parts unknown, you must answer truthfully if asked directly whether you know your client's whereabouts. Thus, if your client disappears, you should do all you can to locate him or her before the court ever finds out, without alerting the authorities that he or she has in fact absconded. This can include:

- a. trying to locate the client at the address on the probation report;
- b. contacting any emergency contact person that may be listed in the probation report;
- c. looking up your client's name in the telephone book;
- d. calling trial counsel - he or she may have the telephone number or address of a friend or relative through whom you may be able to reach the client.

In the event your client's appeal is dismissed, keep in mind that the Court of Appeal has the discretion to recall the remittitur and reinstate the appeal. If your client reappears, you should immediately prepare a motion to recall the remittitur. Keep in mind also that it has been held that the court's power to reinstate an appeal "should only be exercised in those cases where it is plainly made to appear that a denial of its exercise would work a palpable injustice or wrong upon the appellant." [Citation]." (Kang, supra, 107 Cal.App.4th at p. 52.) Clearly, you need to argue that dismissing your client's appeal would work just such an injustice.