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Informal Opinion 08-06

Duty to Disclose Client's Threat

On the facts set forth below you have requested an opinion from this committee on what your disclosure obligations are under Rule 1.6 of the Connecticut Rules of Professional Conduct.

The facts that you have reported to us are as follows: your client previously had a relationship with a woman and they had a child. The relationship between your client and the mother deteriorated and the mother began a relationship with another man. The other man and the mother lived together, and the other man treated your client's child as his own daughter.

Your client, the child's father, had been approved as guardian of the child, but the other man petitioned the court to remove your client as the child's guardian. The Probate Court removed your client as guardian, but due to irregularities in the removal proceedings, you, the requester of this opinion, were appointed by the Probate Court to represent him. Following a hearing on your client's removal as guardian, he encountered the other man in the town hall parking lot and threatened him. The police were called and your client was arrested.

Your client was later convicted of a crime (apparently unrelated to the parking lot incident) and is in prison with about three years remaining in his sentence. In the course of your representation, you sent your client a copy of a probate court order permitting him to write letters to his child, but no more than one letter a week, with any letters to the child to be sent to her via the child's court appointed attorney. Your client then sent the following letter to the child's attorney, a copy of which the attorney sent to you:

> I got a letter from [the attorney requesting this opinion] concerning letter writing to my daughter. First I want in writting [sic] on office court documents the bullshit guidelines that are mentioned in your letterhead. I want to see the judge's guidelines

not some made up nonsense. Who the hell are you to say what is to be written by me to my daughter? I hope death by accident visits all of you screwing up my father daughter relationship. You pieces of excrement are all a waste of oxygen and space on earth. Besides being good for nothing you should not intervene in other peoples matters that do not concern you. Why you do is beyond me and only makes all matters at hand worse for all.

Die all of you.

[signed]

I don't need you for anything because I am not here for life but only 3 more years.

Shortly after you received a copy of the above letter you met with the client in prison, discussed the letter with him, and said that his letter could be interpreted as a threat. He said that he was glad that he had people associated with the case "shaking in their boots," that he hated the other man for taking his child away from him, that he has "nothing to live for," and doesn't "care what happens" to him. He added that on release from prison he wants to "smoke everyone" associated with the case, including the probate judge. You no longer represent the client, the representation having ended soon after your meeting with him in prison.

At some point after the arrival of the letter and before you asked your client about it, the probate judge, understandably concerned by the anger and implicit threats in the letter, asked you if "there is anything I need to worry about" and "I trust you will be doing the right thing in this case." This communication took place *ex parte* and in camera outside any court proceedings.

Based on the above facts, you ask if Rule 1.6(b) of the Connecticut Rules of Professional Conduct requires you to reveal to third persons that your former client may commit a criminal act likely to result in death or substantial bodily harm to others. You also are concerned that if your former client becomes aware that you disclosed his threatening remarks, your own life could be at risk from retaliatory action. Therefore, you ask, can any disclosure you are required to make be made in a way that would not put you in jeopardy of retaliatory life-threatening action by your former client?

Rule 1.6(a) and (b) provides as follows:

(a) A lawyer shall not reveal information relating to representation of a client unless the client gives informed consent, the disclosure is impliedly

> authorized in order to carry out the representation, or the disclosure is permitted by subsection (b), (c), or (d).
>
> (b) A lawyer shall reveal such information to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal or fraudulent act that the lawyer believes is likely to result in death or substantial bodily harm.

Also relevant to this opinion is Rule 1.9(c) of the Connecticut Rules of Professional Conduct. That rule provides that a lawyer's confidentiality obligation relating to representation of a client continues after the representation has terminated, but with a qualification that includes the disclosure obligation of Rule 1.6(b). Rule 1.9(c) provides as follows:

> (c) A lawyer who has formerly represented a client in a matter or whose present or former firm has formerly represented a client in a matter shall not thereafter:
>
> (1) use information relating to the representation to the disadvantage of the former client except as these rules would permit or require with respect to a client, or when the information has become generally known; or
>
> (2) reveal information relating to the representation except as these rules would permit or require with respect to a client.

Rule 1.0(a) and (j) are also relevant and provide as follows:

> (a) "Belief" or "believes" denotes that the person involved actually supposed the fact in question to be true....
>
> (j) "Reasonable belief" or "reasonably believes," when used in reference to a lawyer, denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable.

The exception to the general rule of confidentiality, as embodied in Rule 1.6(b), "is based on the overriding value of life and physical integrity. Threats to life or body...suffice[] to warrant a lawyer's taking corrective steps to prevent the threatened death or serious bodily harm." *Restatement of the Law Governing*

Lawyers (2000) § 66, comment b. Connecticut's version of Rule 1.6(b), unlike the ABA Model Rule, makes disclosure mandatory where the lawyer believes death or substantial bodily injury may occur. Under the model rules' version of Rule 1.6, such disclosure is merely discretionary. In addition, the mandatory disclosure obligation of Connecticut's Rule 1.6(b) is not limited to situations in which a threat is imminent or reasonably certain. *Compare* ABA Model Rule 1.6(b)(1) (disclosure authorized "to prevent *reasonably certain* death or serious bodily harm" (emphasis added)). The broader scope of Connecticut's exception to the general rule of confidentiality results from the perception that the public good is better served by a rule that allows more disclosure in discrete circumstances of potential harm to third parties and that the legitimate interests that underlie the command of confidentiality will not be compromised by the limited disclosure the Connecticut Rule permits.

That broader scope suggests that an attorney faced with a question of disclosure under Rule 1.6(b) should err on the side of disclosure rather than run the risk that the threatened action will occur. *See Restatement of the Law Governing Lawyers* (2000) § 66, comment b ("it seems highly unlikely that a court would impose discipline or other liability on a lawyer in an instance within [the subsection permitting disclosure] should the lawyer act reasonably, even in a way that prejudices the client, to remove the threat to life or body"). *See also State v. Hansen*, 862 P.2d 117, 122 (Wash. 1993) ("attorneys, as officers of the court, have a duty to warn of true threats to harm a judge made by a client or third party when the lawyer has a reasonable belief that such threats are real"); R.I. Ethics Opinion 98-12 (lawyer may notify Parole Board and Attorney General that imprisoned client made a threat against him).

Rule 1.6(b) places the burden on the practitioner to make the necessary judgment calls based on his or her knowledge of the facts and observations of the client. A lawyer faced with the question of whether the Rule requires disclosure must first determine whether he or she believes the client will commit a crime likely to result in death or serious bodily harm. If the lawyer does not believe that the client will commit a crime likely to result in death or serious bodily harm, there is no disclosure obligation.

If, however, the lawyer does believe that the client is likely to commit the threatened criminal act, disclosure is mandatory. Any such disclosure must, however, be limited to whatever information necessary to prevent the client from committing the criminal act. In addition, nothing in Rule 1 .6(b) suggests that a lawyer is relieved of his or her disclosure obligation because of concerns for his or her own safety. In fact, if the lawyer does not believe such a crime is likely, the confidentiality obligations of Rule 1.6 remain in place and would prohibit disclosure.

Only you can decide, on the basis of all the facts known to you, whether you believe the threat of harm is sufficient to trigger the mandatory disclosure obligation of Rule 1.6(b). You note that your former client has made empty threats in the past

and that it is your opinion that he will not follow-up on his threat. But you also have doubts on that point, doubts sufficient to have prompted your inquiry. Your client's criminal conviction; the implied threats in his letter to the child's attorney; the more direct and unguarded threat the client made during your prison visit; and your concern about your own safety should the client learn of any disclosure, all combine to support a reasonable belief that at least three people—the other man, the child's attorney, and the Probate Judge—are at risk of harm when the client is released from prison. These facts appear to be sufficient to support a belief that your former client is likely to commit a criminal act resulting in death or substantial bodily harm to others. That determination is, however, for you to make, not this Committee.

If you conclude that disclosure must be made, it may be made to the state's attorney or such other persons who can take appropriate action to prevent the former client's possible wrongful action. However, any disclosure you make should be no more extensive than is reasonably necessary to prevent the former client from committing a criminal act likely to result in death or serious bodily injury to others.

Given the risk to you if your former client becomes aware that you made the disclosure, you can seek assurances from anyone to whom you reveal the risk of his future criminal conduct that the person so informed will not inform your former client of your disclosure or take other action that could result in him becoming aware of your disclosure.

THE COMMITTEE ON PROFESSIONAL ETHICS

By Wick R. Chambers

Wick R. Chambers, Chair