The Preservation of a Client's Confidences: One Value among Many or a Categorical Imperative?

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THE PRESERVATION OF A CLIENT'S CONFIDENCES: ONE VALUE AMONG MANY OR A CATEGORICAL IMPERATIVE?*

BY ALBERT W. ALSCHULER

I take as my text the following passage from Judge Marvin E. Frankel's masterful critique of the adversary system, *Partisan Justice*:

The theory of the [attorney-client] privilege is powerful: the client can be effectively represented only if the lawyer has an accurate account of what the client knows, believes, and has done. Accordingly, to obtain effective representation, the client must feel free and safe in making full and frank disclosures to counsel . . . .

It will be seen without surprise that a privilege fashioned by lawyers has substantial benefits for lawyers . . . . It is difficult enough to extract information from a client in the best of circumstances; a wary and mistrustful client would be unmanageable.

For these benefits, to attorney and client and the public interest in effective legal service, there is, as for everything, a price. The effect of every evidentiary privilege, every grant in the law of a right to withhold information, is an added barrier to the search for truth. The lawyer is authorized and required by the privilege to cover up what may be evil and needed facts. The interests injured by the cover-up may be precious ones.¹

This passage poses the issue of delimiting the attorney-client privilege as a straightforward problem of balancing two obviously opposing values. Once this balancing formulation is accepted, it is not difficult to conclude, as Judge Frankel does, that a lawyer should be permitted and indeed required to reveal a client's confidences in a number of situations — for example, that in which the client has

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¹ The author gratefully acknowledges the extremely valuable suggestions of William T. Pizzi and Clifford J. Calhoun.

presented perjured testimony,\(^2\) that in which he has disclosed to the lawyer the place where the bodies of some murder victims lie mouldering,\(^3\) and even that in which the client has disclosed information that "would probably have a substantial effect on the determination of a material issue."\(^4\) This paper contends, however, that Judge Frankel's conventional formulation of the problem as one of choosing between effective legal representation and effective truth determination is oversimplified and misleading. For one thing, the choice posed by Judge Frankel often may be illusory. The privilege may not seriously impair the search for truth. For another, the value served by the preservation of a client's confidences is not merely the promotion of effective representation. Apart from this instrumental value, fundamental ethical values of loyalty, honesty and fair treatment are at stake — values that cannot properly be "balanced" against truth determination on an unweighted utilitarian scale.

Consider initially the "price" that, in Judge Frankel's view, the attorney-client privilege exacts. His analysis assumes an affirmative answer to an unresolved empirical question: does the privilege pose a significant barrier to the search for truth? As Judge Frankel recognizes, the privilege is grounded on the view that it promotes a client's frank disclosures to his lawyer, something that Judge Frankel says is difficult enough to secure even with the privilege intact. To the extent that the privilege truly is necessary to insure a client's frank disclosures, it does not impede the search for truth. A lawyer cannot reveal to a tribunal (or to the family of a murder victim or to anyone else) information that his client has successfully hidden from him; and if the effect of withdrawing or limiting the privilege were merely to cause a client to withhold his confidences, the effectiveness of the lawyer's representation might be impaired while the search for truth would not be advanced in the slightest.\(^5\) Judge Frankel has apparently assessed the costs of the attorney-client privilege at the time at which a lawyer has secured his client's confidences so that the issue

2. *Id.* at 79. *Accord, ABA Model Rules of Professional Conduct* § 3.1 (a) (3) (1980 discussion draft) [hereinafter cited as *Model Rules*].
4. *Id.* at 83. Judge Frankel indicates that a substantial minority of the Kutak Commission, including Judge Frankel himself, favored this sweeping requirement of disclosure.
5. In some situations, however, the search for truth might be advanced because dishonest clients would lie to their lawyers in ways that could be exposed with devastating effect at trial. Still, in other instances, a lawyer who had been told the full truth might have found legitimate ways to minimize the impact of embarrassing facts so that the privilege would have furthered the search for truth.
CLIENT’S CONFIDENCES

is merely whether he should reveal them. At this point, with the relevant information already within the lawyer’s control, the privilege does seem to impair the search for truth, but this view of the problem disregards the very stage of the process that the privilege is designed to influence.

Of course one may imagine that even without the privilege some clients would “level” with their lawyers, revealing not only facts that they wish their lawyers to present in courts and other forums but facts that they wish to keep hidden. On this assumption, the privilege often would seem both unnecessary and a barrier to the search for truth. It plainly would shield information that could have been secured in its absence. To resolve the empirical issue in the manner that Judge Frankel’s analysis suggests, however, would bring a much more basic ethical issue into focus. When a client’s disclosures to his lawyer are, in effect, disclosures to others and when the client makes these disclosures to the lawyer despite the fact that he is unwilling to make them to others, he apparently does not “know the score.” He may well have been “snookered” by the lawyer’s explicit and implicit assurances of loyalty into parting with information that he did not expect the lawyer to divulge. The central question is not whether this means of gathering information to promote accurate adjudication might sometimes be effective — whether it might sometimes aid the search for truth — but whether it is fair to induce a person to part with information in this fashion. To obtain information by implicit or explicit deception ordinarily cannot be justified simply by showing that the information is useful. Not only does deception in any form pose a clear ethical issue, but an attorney’s representation serves important functions that make it especially inappropriate for him to serve as a governmental information-gathering agent.

Judge Frankel seems to view the attorney-client privilege solely as a means of promoting effective legal service after a client’s disclosures have been made; but apart from this objective, the privilege plays a central role in promoting a sense that our legal system is fair. People with legal problems need help; they often do not understand the complicated legal system in which they are enmeshed. Their sense of fairness (as well as ours) is enhanced when they need not fend for themselves — when they are entitled to the services of other

6. Most discussions of evidentiary privileges do proceed from this fallacious premise and suggest without evidence or analysis that all privileges necessarily impair the search for truth. See, e.g., 8 Wigmore on Evidence § 2192 (3) (McNaughton rev. 1961); C. McCormick, Handbook of the Law of Evidence § 77 (2d ed. 1972).
people who understand the system and whose function within the system is to be on their side. This simple and powerful ideal of legal representation is obviously sacrificed when a client senses that his attorney’s loyalties are divided.

Without a broad attorney-client privilege, a client must consider what disclosures to make to his attorney, and no expert can guide him in making this early, important decision. The client must view his attorney as another part of the legal establishment, and he must remain unrepresented before his representative. The system becomes substantially more just when a client can rely on his attorney without question or doubt — when he can know as well as he is likely ever to know the future that giving the truth to his attorney will not hurt him. Accordingly, a relationship of confidence between attorneys and their clients is essential to a sense of fair treatment on the part of the clients themselves.

In the world of Judge Frankel, it is unclear whether an attorney would promise to preserve a client’s confidences and then violate this pledge if the client revealed where the bodies were buried or, indeed, if the client provided any information “that would probably have a substantial effect on the determination of a material issue.” Rather than betray his client in this fashion, the attorney might describe the Frankelian limits of confidentiality before asking for information.\(^7\) Both of these alternatives, however, would be unsatisfactory.\(^8\)

When a client has relied on an attorney’s pledge of confidentiality, violation of that pledge is no trivial thing. The inherent dishonesty of this course of conduct may be aggravated by the attorney’s special authority in what is likely to be a psychologically troublesome situation; by the fact that both the attorney’s license to dispense legal advice and (under Judge Frankel’s proposals) the requirement of disclosure would proceed from the state; by the fact that the lawyer’s basic function is to serve his client’s interests, not retard them; and by the fact that the lawyer customarily accepts his client’s money for providing his services. As this paper will indicate, rare and extreme situations may arise in which even the deliberate betrayal of a client’s confidences may be justified. Nevertheless, a lawyer’s betrayal of his client cannot simply be “balanced” against whatever utilitarian gains this betrayal might provide.\(^9\)

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7. Compare Model Rules, supra note 2, at § 1.4 (b).
The second alternative—that of giving each client Judge Frankel's list of exceptions to the obligation of confidentiality before asking for his story—would almost certainly destroy any significant sense of confidentiality within the attorney-client relationship. Indeed, it might be viewed by many clients as a veiled invitation to perjury. Among other things, the attorney would say in effect, "I am about to ask you for the facts, and basically I am required by law and by the ethics of my profession not to reveal what you tell me. Nevertheless, if you reveal adverse facts that probably would have a substantial effect on the determination of a material issue, I will be bound to disclose them. Now please tell me the whole truth. In particular, do not omit adverse, material facts merely because, as an officer of the court as well as your loyal confidant, I will insure that those facts are used against you."

Judge Frankel, like the Kutak Commission of which he is a member, emphatically condemns the client interviewing technique illustrated in *Anatomy of a Murder*—that of "telling the client 'the law' before eliciting the facts," so that the client, if he likes, can present facts that will match the legal requirements for a successful claim or defense. A "truth in interviewing" disclaimer of the sort suggested above, however, would be similar in effect. Many clients surely would view it as a lawyer's strange and guarded way of saying, "Now is the time to make up a good story, and for heaven's sake do not tell me too much."

10. In addition, this approach is likely to prove ineffective, for many clients might be unable to understand all of the limitations on the obligation of confidentiality that the lawyer's disclaimer would present. What, for example, is a "material issue," and what information is likely to have a "substantial effect"?

11. M. Frankel, supra note 1, at 15. See Model Rules, supra note 2, at § 2.3 (a).

12. Similarly, it might be difficult for a lawyer to comply with both section 2.3 (a) (2) of the proposed Model Rules and with section 1.4 (b). The former provision forbids a lawyer from giving advice that he "can reasonably foresee will . . . aid the client in contriving false testimony," while the latter declares, "A lawyer shall advise a client of the relevant legal and ethical limitations to which the lawyer is subject if the lawyer has reason to believe that the client may expect assistance not permitted by law or the rules of professional conduct."

In a case in which a lawyer sensed that a criminal defendant might be tempted to commit perjury, the lawyer might attempt to comply with both section 2.3 (a) (2) of the proposed Model Rules and section 1.4 (b) by saying, "I am about to ask for your story, but if you tell me story A, you should know that I cannot ethically permit you to take the witness stand to tell story B. For example, if you tell me that you are guilty of the crime charged, I cannot permit you to tell a jury that you are innocent. Now, my friend, what really happened?" One wonders whether this advice concerning "relevant legal and ethical limitations" is not also advice that the lawyer "can reasonably foresee will . . . aid the client in contriving false testimony."

To be sure, a narrow construction of the two provisions would avoid this possible conflict. Perhaps the lawyer's advice does not aid the client in contriving false testimony; perhaps it
nesses that Judge Frankel mentions with distaste and indeed of subornation. The alternative both to this "horseshedding" and to the betrayal of one's clients is, of course, for a lawyer to assure his clients of confidentiality and then to keep his promise.

Elsewhere in this journal, Professor William T. Pizzi suggests that Judge Frankel's criticisms of the adversary system are powerful but that Partisan Justice usually presses for the wrong solution. Rather than modify the ethical obligations of lawyers in the manner that Judge Frankel suggests, Professor Pizzi proposes that we modify our adversary trial procedures, most notably by giving trial judges a greater affirmative responsibility for truth-seeking. Revised ethical rules cannot answer the problems that Judge Frankel eloquently describes, both because their standards will prove inherently ambiguous and because the pressures of an essentially unchanged adversary system will lead partisan advocates to subvert them. My cursory paper can be viewed as adding a second string to Professor Pizzi's bow, for it suggests that many of Judge Frankel's proposed revisions of ethical standards are not merely unworkable but wrong in principle.

An appropriate cure for the defects of our adversary system does not lie in an attempt to induce advocates to serve their clients less vigorously. For, with the exception of government lawyers whose clients are the public, "partisan justice" is the mission of anyone who calls himself a lawyer; service to the client should remain his basic task even if courtroom procedures should be modified to remedy the excesses of a lawyer-dominated approach to truth-seeking. Although the adversary system may need a watchman, the task need not be assigned to the watched. Lawyers simply are not appropriate figures to correct the defects of our adversary system. Their hearts will never be in it, and more importantly, it is unfair to both their clients and themselves to require them to serve two masters.

Of course the principles advanced in this paper can be strained

merely encourages the client to contrive the false testimony on his own. Moreover, the proposed Model Rules may not require an attorney to advise a client of relevant legal and ethical limitations in the absence of a specific reason to believe that the client expects improper assistance from his lawyer; in all other situations, the lawyer may be expected to make an unqualified pledge of confidentiality and then to violate this pledge when relevant legal and ethical limitations do require disclosure. Nevertheless, these limitations merely emphasize the extent to which the Model Rules' authors have attempted to crowd between the horns of an essentially inescapable dilemma.

15. See also L. Weinreb, Denial of Justice: Criminal Process in the United States (1977).
by extreme cases. Perhaps a lawyer should not violate a client's confidences by revealing the location of his victims' dead bodies; but the obligation of confidentiality might well yield if, as the lawyer viewed the bodies, one of them moved a bit and moaned. Certainly the lawyer ought to secure medical assistance for this victim even at the cost of betrayal of his client's secrets. Similarly, when a client has confessed that he is guilty of a crime and has given his lawyer information that he would not have known unless he were guilty in fact, the lawyer ought at least attempt to prevent the imprisonment or execution of another person for this crime. And one cannot reasonably deny that similar exceptions might be warranted for other very extreme cases.

In short, and in answer to the question posed in the title to this paper, the obligation of confidentiality is not a categorical imperative. Hardly anything is. Nevertheless, it comes close, and to view it merely as an "interest" to be balanced against all other interests seems too easily to countenance dishonesty and the betrayal of clients by members of the legal profession. The customary formulation of the issue to be resolved in determining the scope of the attorney-client privilege cheapens what is probably the most basic obligation of any lawyer, an obligation that gives his work great dignity and purpose — the obligation to serve his clients rather than to become part of the official machinery that judges them.


17. One proposal of the American Lawyer's Code of Conduct is in accord with this suggestion when the danger is that an innocent person will be executed but not when the danger is that he will be imprisoned. Id. at §1.2 Alternative A. An alternative proposal of the same code would not permit disclosure even to prevent a wrongful execution. Id. at § 1.2 Alternative B.

18. In performing his service function, a lawyer may counsel a client to consider whether he should follow the higher course of full disclosure even at great cost to the client himself. If the client refuses to do so, however — if, for example, he insists on his privilege not to incriminate himself and therefore refuses to reveal the location of his victims' bodies — the lawyer cannot properly take the client's decision from him and thereby defeat his exercise of a constitutional right. Even when the client rejects the higher course, the attorney certainly does not do so. To the contrary, the attorney serves the high purpose of his profession by remaining loyal to his client.