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ETHICAL COMPASS

Up Close and Personal: Whether or Not You Decide to Report a Confidentiality Exception

By Professor Elayne E. Greenberg

Introduction

In your role as lawyer or neutral, have you ever reported an otherwise confidential communication because it was one of these permissible confidentiality exceptions? Why? This column will discuss how our ethical and personal considerations shape our decisions as advocates and dispute resolution professionals about whether to report ethically permissible exceptions to confidentiality. Readers, you are invited to rethink your ethical reporting obligations and develop more self-awareness about your personal rationales for your reporting choices.

In our roles as advocates and dispute resolution professionals, we have etched into our professional cores the importance of confidentiality. In our attorney-client relationships, confidentiality is the fulcrum of a client's right for effective counsel.¹ As arbitrators, we appreciate that confidentiality, for many, is the welcome option for those who shun the public forum of litigation.² And as mediators, we safeguard mediation's confidentiality protections as necessary to help promote the candid discourse that many believe is vital to achieving a realistic resolution.³

Confidentiality, however, is not without exceptions. Our ethical codes for lawyers and dispute resolution professionals explicitly provide that under certain circumstances, lawyers and dispute resolution professional *may* be relieved from their confidentiality obligations and *may* report what is otherwise protected conduct.⁴ Please note that the reporting obligation for lawyers is discretionary, not obligatory. Distinguishably, family mediators have a mandatory obligation to report violence.⁵ Yet, whether the reporting obligation is discretionary or mandatory, the reporter's decision about whether to report is more often about the reporter's personal values and judgment than an ethical rule.

In Part One of this discussion, I informally surveyed mandated reporters in other professions and noted how their personal values and their relationship with the person they may be reporting have influenced the reporter's decision-making process. Part Two brings the conversation back to our profession, lawyers and neutrals, and explains the confidentiality exceptions permitted in our professional ethic codes. This conversation concludes in Part Three by re-focusing on you, a potential reporter, and heightens your awareness about the considerations

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that may shape your decision about whether or not to report.

Part One: Other Professionals' Decision-Making Process to Report

This discussion was sparked by a series of informal conversations that I have had with professionals from fields other than law who are mandated reporters of specified behavior. In my conversations, I asked about whether, when the appropriate situation arises, they actually report exceptions to confidentiality when they are mandated to do so.⁶ I have found that mandated reporters who had no ongoing professional relationships with the person whose behavior they were reporting, such as emergency room doctors, had an easier time honoring their ethical obligation and reporting the misconduct. After all, the obligation to report is their ethical mandate, and for these professionals there is no ambiguity about honoring this obligation.

Those professionals such as psychologists, teachers or clergy who had an ongoing relationship with the person whose behavior they were obligated to report, however, were more deliberative about whether to report. These professionals shared how they would question themselves about whether, if in fact, the behavior was reportable. Another consideration that made these mandated reporters more unsure about reporting was their concern about how their reporting would disrupt their professional relationship with the person they were reporting. These professionals also expressed their fear that reporting would result in punishment, and cut off needed treatment and rehabilitation of the reported person. In one

such candid discussion, a teacher who was a mandated reporter, struggled with reporting child abuse that “may not be as bad” as the abuse the child would endure if the child was removed and placed in an abusive foster home. Furthermore, the abused child loved the abusive parent and did not want to be separated from his home.

Part Two: Lawyers’ and Neutrals’ Decision-Making About Whether to Report

Do we as lawyers and advocates also ruminate about whether or not to report an ethically permissible exception to confidentiality? In this section, we look at the professional ethical rules’ reporting exceptions for lawyers and family mediators. In these ethical codes, please note that the ethically permissible exceptions to confidentiality in both the ABA Model Standards of Professional Conduct and the Model Standards of Practice for Family and Divorce Mediators are actually a political memorialization of a profession’s biases that are balanced with broader public concerns. Thus, it is no surprise that lawyers’ reporting obligation is discretionary, because the legal profession has tenaciously coveted the attorney-client privilege as sacrosanct. The family mediation community, however, has made disclosure of harm mandatory. The integrity of the family mediation profession had been threatened by domestic violence advocates who feared that abusers would seek refuge under family mediation’s confidentiality cloak. To assuage these real concerns, the family mediation profession has made disclosure mandatory.

In their roles as advocates, lawyers are ethically guided about reporting permissible exceptions to confidentiality by the ABA Model Rule of Professional Conduct Rule 1.6 (b). Rule 1.6 (b) expressly provides in relevant part :

(b) A lawyer **may** (*emphasis added*) 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 interests or property of another that is reasonably certain to result or has resulted from the client’s commission of a crime

or fraud in furtherance of which the client has used the lawyer’s services;

(4) to secure legal advice about the lawyer’s compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer’s representation of the client;

(6) to comply with other law or a court order; or

(7) to detect and resolve conflicts of interest arising from the lawyer’s change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

Professor Roy D. Simon, Distinguished Professor Emeritus of Legal Ethics at Hofstra Law School, reminds lawyers that this discretionary reporting obligation immunizes lawyers from being disciplined for either reporting or deciding not to report.

In addition, lawyers have a **mandatory** reporting obligation to report the unethical behavior of colleagues so long as doing so doesn’t compromise the confidentiality protections detailed Rule 1.6. The goal of 8.3 is to maintain the integrity of the process. Curiously, when I asked a ballroom full of lawyers who were being trained as commercial mediators if they had ever reported another lawyer for lawyer misconduct as required by this Rule, the silence was deafening. Explicitly, Rule 8.3, Maintaining the Integrity of the Profession provides:

(a) A lawyer who knows that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority.

(b) A lawyer who knows that a judge has committed a violation of applicable rules of judicial conduct that raises a substantial question as to the judge’s fitness for office shall inform the appropriate authority.

For more information about the Dispute Resolution Section of NYSBA, please visit www.nysba.org/committees/dispute-resolution-section.

(c) This Rule does not require disclosure of information otherwise protected by Rule 1.6 or information gained by a lawyer or judge while participating in an approved lawyers assistance program.

Do we engage in a different decision-making process about whether or not to report if the person to be reported is a colleague?

Distinguishable from the ABA Model Rules of Professional Conduct for Lawyers, family mediators have an obligation to report “threats of suicide or violence.” The Model Standards of Practice for Family and Divorce Mediators Standard VII states in relevant part:

A family mediator shall maintain the confidentiality of all information acquired in the mediation process, unless the mediator is permitted or required to reveal the information by law or agreement of the participants.

(C.) The mediator shall disclose a participant’s threat of suicide or violence against any person to the threatened person and the appropriate authorities if the mediator believes such threat is likely to be acted upon as permitted by law.

My esteemed ethical scholar colleague, Omer Shapira, contributes to this nuanced discussion about reporting exceptions to confidentiality in his thought-provoking book *A Theory of Mediators’ Ethics*. According to Shapira, mediators have a legal, moral and personal moral obligation to disclose otherwise protected mediation communications to prevent a nonparticipant from the “serious harm” of a participant’s conduct or to protect “important public interests.” Failure to do so could harm the public trust in the mediation process. Thus, Shapira asserts that the obligation to report is driven by not only the law, but by our society’s morality and our personal values. Shapira reminds us that even when disclosure is discretionary according to the law, mediators should still consider how such disclosure might adversely impact their ethical obligation to maintain the public trust in the profession. Should Shapira’s rationales be applicable to all lawyers and neutrals?

Part Three: So?

The decision about whether you as lawyers and dispute resolution professionals will exercise your reporting authority is not just an either/or decision. Rather, it is also about the person who has reporting authority. Since the decision to report is discretionary in many cases, this discretion makes it more likely that your personal biases and preferences will shape your reporting decision. Even in those situations where reporting is mandatory, you

may still find that your decision about whether or not you will report is neither clear-cut nor easy.

When deciding whether to report, how do you personally prioritize the law, society’s morality and your personal sense of morality in your decision making? What is your relationship with the person to be reported? Do you personally agree that the reportable incident is worthy of being reported? What are the consequences of reporting? Will reporting accomplish the goals of reporting? How do you believe your decision will impact your professional role and the integrity of your profession?

I continue to ask myself so many of these questions, because like many of you, I have not found defining answers. I welcome hearing about your thoughts and experiences. Please reach out to me at greenbee@stjohns.edu.

Endnotes

1. ABA Model Rule of Professional Conduct Rule 1.6 Confidentiality of Information, Client-Lawyer Relationship provides (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation of the disclosure is permitted by (b).
2. The Code of Ethics for Arbitrators in Commercial Disputes Canon VI. An Arbitrator Should Be Faithful to the Relationship of Trust and Confidentiality Inherent In That Office (Am. Arbitration Ass’n 2004).
3. ABA Model Standards of Conduct for Mediators Standard V. Confidentiality (Am. Bar Ass’n 2005).
4. See, e.g. ABA Model Rules of Professional Conduct Rule 1.6(b); ABA Model Standards of Conduct Standard V A. Confidentiality (2005); Model Standards of Family and Divorce Mediators Standard VII C. (explaining that the mediator shall disclose a participant’s threat of suicide or violence against any person to the threatened person and the appropriate authorities if the mediator believes such treat is likely to be acted upon as permitted by law).
5. Model Standards of Practice for Family Mediators Standard VII, https://cdn.ymaws.com/acrnet.org/resource/resmgr/docs/Model_Standards_of_Practice_.pdf (last visited 6/29/19).
6. Disclaimer: the incidents described should not be misconstrued to be part of any empirical research. Rather, these series of conversations sparked a further discussion about how we, as lawyers and dispute resolution professionals, decide whether or not we will report an incident that is an ethical exception to confidentiality.
7. ABA Model Rules of Professional Conduct Rule 1.6 (b), https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_1_6_confidentiality_of_information/ (last visited on May 14, 2019).
8. *Id.*
9. Roy D. Simon, *Simon’s New York Rules of Professional Conduct Annotated* 218 (West, 2013 ed.).
10. Model Standards of Practice for Family and Divorce Standard VII (2005).
11. Omer Shapira, *A Theory of Mediators’ Ethics* (Cambridge University Press, 2018).
12. *Id.* at 288.
13. *Id.* at 289.
14. *Id.* at 291.