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THE EMOTIONALLY LABILE CLIENT: ATTORNEY DUTIES  
WHEN A CLIENT THREATENS VIOLENCE

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What happens when a client threatens violence? The pressure of litigation can push a defendant over the edge. Even professionals who are calm under pressure may lose their cool. Once an attorney believes his client might embrace violence as a means to an end what obligations, if any, are triggered? May the attorney be liable for his client's violence?

Imagine this scenario: A seasoned medical malpractice plaintiff's attorney accepts a client presenting a marginal professional liability case. This attorney generally screens cases carefully. This case is attractive because he calculates significant damages. Paltry evidence of a breach of standard of care or causation tempers his enthusiasm. On balance, it is a weak case. The plaintiff's expert has shaky credentials, but is ready to make the case for liability.

The defendant is a talented doctor but emotionally volatile. He reacts to the summons with rage. He cannot believe anyone would have the nerve to sue him. The case against him starts percolating through the legal system. The defendant's rage builds. The plaintiff's attorney picks up on this volatility. He believes a jury might punish the doctor for his demeanor. His weak case just got stronger – a lot stronger.

The doctor defendant sends his defense attorney an email. He cannot believe his evolving litigation. The doctor sprinkles in words such as “travesty,” “nightmare,” “horror,” and “injustice.” He suggests that if he had a gun (which he does not) he might even kill the plain-

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tiff's attorney. The defense attorney is concerned, but does not believe anyone is in imminent danger. Yet.

A few months later, the plaintiff's expert is deposed. The defendant takes his seat at the table, listening in silence for three hours. As the expert leaves, the defendant directs a verbal rant at the expert. The defendant then pushes him. No one is injured. Nevertheless, the expert is shaken up. The defense attorney continues to have nagging doubts about the defendant's emotional state. He questions the safety of the plaintiff's attorney and/or expert. The defense attorney urges his client to see a psychiatrist. This request falls on deaf ears.

This article considers three primary topics. First, does a defense attorney owe a duty to disclose concerns about the defendant's emotional state and the plaintiff attorney's/expert's safety? If so, to whom must he disclose? Second, if a defense attorney expresses legitimate concerns to the adverse side does this set the stage for a charge of witness tampering or intimidation? The implied subtext would be that his client might take matters into his hands. Wouldn't it be better to just drop this marginal case and avoid a meltdown? It makes no sense for someone to get hurt. Third, the plaintiff's attorney can clearly see the defendant is volatile and a jury will likely punish him for his demeanor. A lawyer is obligated to be a zealous advocate for one's client. Does zealous advocacy include pushing a defendant in a marginal case to an emotional state increasing the risk of violence to other parties – including the expert, the client, or even himself?

In most jurisdictions, under the ethics rules, disclosure of a client's threats against third parties is wholly discretionary and must be based upon an assessment that violence is likely imminent. A few states make this duty mandatory if violence is imminent, but the ethics rules do not supply a civil cause of action in tort against non-compliant attorneys.

Legal authority has little to say on the question of whether an attorney, representing a volatile client, owes a legal duty to report threats of violence made by his client. Even more confusing is who should receive this report—the intended victim, his attorney, a judge, or law enforcement personnel? A useful starting point, addressing the scope and details of duty, is each state's enactment of the American Bar Association's Model Rules of Professional Conduct. Many states have modified the default model rule, adjusting the rule to be more or less demanding regarding threats of violence.

*The ABA Model Rules of Professional Conduct*

The relevant ABA model rule demonstrates consensus-based resolution of the innate tension between: (1) the rigors of attorney-client confidentiality, wherein the attorney must keep client confidences so as to foster a candid relationship between lawyer and client, against (2) the duty to act to prevent avoidable violence, and protect public safety.<sup>1</sup>

The relevant rule reads in part:

(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 or the disclosure is permitted by paragraph (b).

(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;<sup>2</sup>

. . . .

Here the Model Rules make disclosure of client information *discretionary* (“[a] lawyer *may* reveal . . . ”), based upon his “reasonabl[e] belie[f]” that disclosure is necessary.<sup>3</sup> This qualified wording is no accident. The ABA hotly debated the disclosure of client threats of violence.<sup>4</sup> Some factions wished to impose a mandatory reporting duty allowing attorneys little discretion to avoid the duty; other factions wanted the disclosure analysis to be wholly driven by an attorney’s good faith determination of the seriousness and imminence of the threat, so as to preserve—so much as possible—the sacrosanct attorney-client privilege.<sup>5</sup>

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<sup>1</sup> For instance, a recent opinion from California highlights the apparent conflict between strict client confidentiality under the rules of professional conduct and the duty to disclose a client’s future violent crime. *People v. Dang*, 93 Cal. App. 4th 1293, 1298-99 (2001) (“We note a possible conflict between Evidence Code section 956.5 and Business and Professions Code section 6068, subdivision (e), which requires an attorney to ‘maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.’ . . . We note that the State Bar Court has held the duty of confidentiality under Business and Professions Code section 6068, subdivision (e) is modified by the exceptions to the attorney-client privilege codified in the Evidence Code.”).

<sup>2</sup> MODEL RULES OF PROF’L CONDUCT R. 1.6 (2010) (emphasis added).

<sup>3</sup> *Id.*

<sup>4</sup> Davalene 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*, 36 IDAHO L. REV. 479, 491-92 (2000).

<sup>5</sup> *Id.*

An early draft of this model rule made warning of third parties a mandatory duty if necessary to avert death or serious injury. However, vocal critics managed to revise this rule to permit merely notice on a discretionary basis.<sup>6</sup> In the end, the ABA drafting committee landed on the side of broad attorney discretion.

The official comment to Model Rule 1.6 better clarifies the scope of applying this discretion. First, the comment sets the stage that attorney disclosure of client information is strongly discouraged, because the attorney-client relationship is grounded upon the client's ability to communicate freely, frankly, and openly. A lawyer can only be effective if the client is comfortable communicating candidly - including embarrassing matters and even potential client crimes. This candor empowers the lawyer to advise the client regarding what conduct is illegal, allowing the client to determine what conduct to avoid.

A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. . . . This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, *to advise the client to refrain from wrongful conduct*. Almost without exception, *clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct*. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.<sup>7</sup>

From this presumption of attorney-client confidentiality, limited exceptions have been carved out, so as to protect important public policy concerns. One exception exists regarding threats of violence or death. The exception allows, but does not mandate, attorneys to disclose client threats of violence the lawyer deems "reasonably certain" to occur.

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 confidentiality rule is subject to limited exceptions. Paragraph (b)(1) *recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm*. Such harm is reasonably certain to occur *if it will be suffered imminently* or if there is a *present and substantial threat that a person will suffer such harm* at a later date if the lawyer fails to take action necessary to eliminate the threat. Thus, a lawyer who knows

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<sup>6</sup> See *id.*

<sup>7</sup> MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 2 (2010) (emphasis added).

that a client has accidentally discharged toxic waste into a town's water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.<sup>8</sup>

Importantly, Rule 1.6 treats threats of violence against persons (Rule 1.6(b)(1)) differently than the disclosure requirements regarding future crimes against property (covered under Rule 1.6(b)(2)). The future "property" crimes disclosure rule applies where (1) "the crime or fraud . . . is *reasonably certain to result in substantial injury*" to the property of another and (2) the client has engaged the lawyer's services so as to further this intended property crime.<sup>9</sup> The allowable disclosure related to threats against property is narrow. Disclosure of threats of violence against people, under the Model Rules, is broader. That rule does not mandate that the client engaged the attorney to facilitate the assault.

Another comment to Model Rule 1.6(b)(2) regarding property crimes advises that "affected persons" (i.e., intended victims) and "appropriate authorities" should receive the client information from the disclosing attorney.<sup>10</sup> The comment provides in pertinent part: "Paragraph (b)(2) is a limited exception to the rule of confidentiality that permits the lawyer to reveal information to the extent necessary to enable *affected persons* or *appropriate authorities* to prevent the client from committing a crime or fraud[.]"<sup>11</sup>

To make the conundrum more challenging, who should receive disclosed information when the intended victim is represented by legal counsel, as is the case where the client threatens the opposing party? Another universal ethics rule forbids an attorney from contacting adverse parties represented by legal counsel:

In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be repre-

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<sup>8</sup> *Id.* R. 1.6 cmt. 6 (emphasis added).

<sup>9</sup> *Id.* R. 1.6(b)(2) (emphasis added).

<sup>10</sup> *Id.* R. 1.6 cmt. 7.

<sup>11</sup> *Id.* (emphasis added); see also N.J. RULES OF PROF. CONDUCT, R. 1.6(b), (c) (1998). A hybrid between discretionary and mandatory versions of the "threats" disclosure rule indicates that an attorney *must* contact "the proper authorities" regarding the attorney's reasonable belief that a client is about to engage in a criminal act likely to result in serious bodily injury, death, or harm to property (Rule 1.6(b)), but that the attorney *may*, in his or her discretion, choose also to contact the intended victim (Rule 1.6(c)).

sented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.<sup>12</sup>

Does a threat made by an opposing party come within the strict language of the Rule embodied by “about the subject of the representation?” That would imply a broad interpretation of Model Rule of Professional Conduct Rule 4.2, which requires that a lawyer wishing to warn an opposing party do so through legal counsel.

Importantly, the comment to the ABA Model Rules expressly states that the decision to disclose is wholly discretionary.<sup>13</sup> A lawyer’s decision to avoid disclosing to potential victims or law enforcement authorities does not constitute a violation of the ethics rules:

Paragraph (b) *permits but does not require the disclosure* of information relating to a client’s representation to accomplish the purposes specified in paragraphs (b)(1) through (b)(6). In exercising the discretion conferred by this Rule, the lawyer may consider such factors as the nature of the lawyer’s relationship with the client and with those who might be injured by the client, the lawyer’s own involvement in the transaction and factors that may extenuate the conduct in question. *A lawyer’s decision not to disclose as permitted by paragraph (b) does not violate this Rule.* Disclosure may be required, however, by other Rules . . . . [The only listed mandatory disclosure is under Rule 3.3(c), mandating candid disclosure of information to a tribunal, even if otherwise in violation of Rule 1.6.]<sup>14</sup>

All fifty states and the District of Columbia have adopted some form of the ABA Model Rules; most states follow the pure “discretionary” reporting requirement regarding client threats of violence, as espoused under Model Rule 1.6(b)(1). A handful of states have opted for a stricter, mandatory version of Rule 1.6(b)(1), removing some of attorney discretion from the reporting calculus. For example, under Arizona’s enactment of the ABA Rules of Professional Conduct, a lawyer *must* reveal client information in order to prevent serious injury or death. The analysis, however, is still premised upon the lawyer’s “reasonable belief” that such disclosure is needed to prevent harm, as well as the attorney’s “reasonabl[e] belie[f]” that the contemplated crime will result in death or serious bodily harm. The Arizona rule provides in pertinent part: “A lawyer *shall* reveal such information to the extent the *lawyer reasonably believes necessary* to prevent the client from commit-

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<sup>12</sup> MODEL RULES OF PROF’L CONDUCT R. 4.2 (2010).

<sup>13</sup> *Id.* R. 1.6 cmt. 15.

<sup>14</sup> *Id.* (emphasis added).

ting a criminal act that *the lawyer* believes is likely to result in death or substantial bodily harm.”<sup>15</sup>

Substantially similar text appears in the ethics rules of Connecticut, Illinois, Iowa, Nevada, Texas, and Wisconsin.<sup>16</sup> Therefore, even under the ethics codes of the states that have adopted arguably stricter “mandatory” disclosure rules regarding client threats of violence, attorneys are afforded significant latitude to use their judgment. The decision to disclose rests upon the reporting lawyer’s discretion whether he reasonably believes (1) the disclosure is necessary and (2) the contemplated assault would result in serious injury or death. In the sparse case law addressing this topic, a “‘true threat’ is a statement that a reasonable person, considering the circumstances, would expect to be interpreted as a serious expression of intent to inflict bodily harm.”<sup>17</sup>

While these ethical dictates define how the Bar believes a lawyer should act, these rules do not create a private right of action for third party non-clients affected by an attorney’s action or inaction.<sup>18</sup>

In sum, the Model Rules generally allow an attorney to disclose confidential information to serve the important public policy of protecting against death or serious injury. A minority of state Bars mandate such disclosure – but only if the attorney reasonably believes the disclosure is necessary to prevent likely death or serious injury.

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<sup>15</sup> ARIZ. RULES OF PROF’L CONDUCT R 1.6(b) (emphasis added).

<sup>16</sup> See CONN. RULES OF PROF’L CONDUCT R. 1.6(b); ILL. RULES OF PROF’L CONDUCT R. 1.6(c); IOWA RULES OF PROF’L CONDUCT R. 32:1.6(c); NEV. RULES OF PROF’L CONDUCT, Rule 1.6(c); TEX. RULES OF PROF’L CONDUCT, Rule 1.05(e); WISC. RULES OF PROF’L CONDUCT, Rule 20:1.6(b).

<sup>17</sup> *State v. Stein*, 165 P.3d 16, 30 (Wash. Ct. App. 2007) (portion excluded from publication).

<sup>18</sup> “The clear rule is that no private cause of action in favor of a non-client can be found attributable to violations of the disciplinary rules relating to attorneys.” *Brooks v. Zebre*, 792 P.2d 196, 201 (Wyo. 1990). See also *Boccone v. Eichen Levinson LLP*, 301 F. App’x 162, 168 (3d Cir. 2008) (“Even assuming defendants did violate a Rule of Professional Conduct, that violation would ‘not give rise to a cause of action nor [would] it create any presumption that a legal duty has been breached.’”); *L & H Airco, Inc. v. Rapistan Corp.*, 446 N.W.2d 372, 380 (Minn. 1989) (“A violation of the Rules of Professional Conduct cannot give rise to a private action against an attorney.”); *Lyons, Doughty & Veldhuis, P.C. v. William M.E. Powers, Jr., Chartered*, 751 A.2d 597 (N.J. Super. Ct. App. Div. 2000) (arguing that violation of the Rules of Professional Conduct is an insufficient basis to impose tort liability upon an attorney).

*Courts are reluctant to apply any common law duty to warn to attorneys regarding client threats of violence.*

Ethics defines how an attorney should act. Analysis *vis a vis* common law follows a somewhat different path. Nationally, the seminal case addressing threats and duty to third parties is *Hawkins*, a Washington appeals court opinion from the 1970s.<sup>19</sup> In *Hawkins*, the court directly addressed the plaintiff's assertion that lawyers have a common law duty to warn potential victims of their client's threatened violence. The *Hawkins* court concluded that the duty, if present, must be balanced by the competing (and crucial) right of clients to strict confidentiality under the attorney-client privilege. The court stated:

Turning then to the *Hawkins*' theory of a common law duty to warn or disclose, we note common law support for the precept that attorneys must, upon learning that a client plans an assault or other violent crime, warn foreseeable victims. See *Tarasoff v. Regents, supra*; *State ex rel. Sowers v. Ollwell*, 64 Wash. 2d 828, 394 P.2d 681 (1964); *Dike v. Dike*, 75 Wash.2d 1, 448 P.2d 490 (1968). *Ollwell* and *Dike* make clear our Supreme Court's willingness to limit the attorney's duty of confidentiality when the values protected by that duty are outweighed by other interests necessary to the administration of justice. *The difficulty lies in framing a rule that will balance properly "the public interest in safety from violent attack" against the public interest in securing proper resolution of legal disputes without compromising a defendant's right to a loyal and zealous defense . . .*"<sup>20</sup>

The facts in *Hawkins* highlight the court's reluctance to impose a common law duty to warn when a potential victim has knowledge that an attorney's client proposes to inflict bodily harm. Kassie Hess Wiley has described:

In *Hawkins*, the defendant was booked on a drug possession charge. He told his attorney, Richard Sanders, that he wanted to be released on bail, if possible. The defendant's mother and her attorney notified Sanders that the defendant was mentally ill and requested that he be held in jail until they could secure his civil commitment. A psychiatrist also called Sanders and confirmed that the defendant was a threat to himself and others. Sanders expressed to the defendant's mother and her attorney his intent to follow his client's wishes. At the defendant's bail hearing, Sanders did not mention the alleged mental illness. The defendant was released on bail, and his mother was notified of his release. The defendant and his mother participated in two counseling sessions together a few days after his release.

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<sup>19</sup> See *Hawkins v. King County Dept. of Rehab. Servs., Div. of Involuntary Treatment Servs.*, 602 P.2d 361 (Wash. Ct. App. 1979).

<sup>20</sup> *Id.* at 365 (emphasis added).



About a week after the defendant was released, he assaulted his mother and attempted suicide by jumping off of a bridge. The defendant sustained injuries that resulted in amputation of both legs. He and his mother sued Sanders for negligently violating his common law duty to warn foreseeable victims of a potentially dangerous client. The trial court dismissed for failure to state a claim, but then amended its dismissal to a summary judgment and allowed the plaintiffs an interlocutory appeal.

The appeals court distinguished the case from [*Tarasoff v. Regents of the Univ. of Cal.*, 551 P.2d 334, 339 (Cal. 1976), *rev'd in part* *People v. Poddar*, 518 P.2d 342 (Cal. 1974)] in two ways. First, the defendant's mother was aware of the danger posed by her son, and she knew that he had been released from jail. In *Tarasoff*, the victim did not know that she was in harm's way. Second, the *Hawkins* court emphasized that the defendant himself did not make any threats of harm. Although Sanders received information from outside sources that the defendant was dangerous to himself and others, this was insufficient to invoke the duty to warn. The court concluded its opinion by stating that "(t)he common law duty to volunteer information about a client to a court considering pretrial release must be limited to situations where information gained convinces counsel that his client intends to commit a crime or inflict injury upon unknowing third persons."

Thus, the court narrowed the duty to warn to include only those victims who were ignorant of the danger. The court, however, overlooked the fact that a duty to warn may be satisfied by calling on law enforcement authorities (if reasonable in that situation) even though the police themselves are not potential victims. Further, the fact that Hawkins might have been mentally unstable and free to roam the streets could put countless unknown victims in danger, and Sanders could never warn all of them himself. The details revealed to Sanders by Hawkins' mother were unclear, but if Sanders reasonably believed that Hawkins was a threat, a better solution would have been to inform the court.<sup>21</sup>

In sum, the *Hawkins* court held that a lawyer has no common law duty to warn third persons of client threats unless "it appears beyond a reasonable doubt that [1] the client has formed a firm intention to inflict serious personal injuries on [2] an unknowing third person."<sup>22</sup> The potential victim in *Hawkins* (the mentally ill client's mother) knew of the client's violent tendencies. She also knew of his release from confinement. Accordingly, the plaintiff failed to satisfy the prongs required to prevail, and the court affirmed a summary judgment in favor of the defendant lawyer. More recent opinions from other states have

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<sup>21</sup> Kassie Hess Wiley, *To Disclose Or Not To Disclose, That Was The Question—Until Now: Tennessee's New Rule Of Professional Conduct 1.6 Mandates Disclosure Of Confidential Client Information To Prevent Physical Injury Or Death To Third Parties*, 34 U. MEM. L. REV. 941, 958-60 (2004) (footnotes omitted).

<sup>22</sup> *Hawkins*, 602 P.2d at 365 (bracketed numbering added).

declined to follow *Hawkins*.<sup>23</sup> Outside of the state of Washington, threats of violence against third parties generally do not trigger a common law duty to warn.<sup>24</sup>

Another Washington case expanded the state's common law duty of lawyers to warn potential victims of their client's planned violence. This broadened duty clarified that attorneys, as officers of the court, must warn court personnel of threats against them. Kassie Hess Wiley has noted this point as follows:

In *State v. Hansen*, a recently discharged felon (Hansen), told a lawyer of his intent to get a gun and "blow away . . . the prosecutor, the judge and the public defender." The lawyer told the prosecutor and the judge of the threat, leading to the individual's arrest and conviction for the crime of intimidating a judge. On appeal, Hansen urged reversal on the basis, *inter alia*, that the lawyer had violated the attorney-client privilege in warning the judge.

The Washington Supreme Court found that Hansen had no attorney-client relationship with the attorney who had disclosed the threat (Hansen was only a prospective client seeking legal representation), but even if there had been such a relationship, the privilege would not have applied to the threats. Further, the court found that although the Washington Rules of Professional Conduct did not require disclosure (Washington's Rule 1.6 is permissive, as is Wyoming's), a lawyer in such a situation has an affirmative legal duty to warn a judge of a threat by a client or a third party. As officers of the court, lawyers have a duty to warn a judge of threats where the lawyer has a "reasonable belief that the threat is real." The court distinguished *Hansen* from the earlier case of *Hawkins* because the judge in the former case had been unaware of the threat, while the potential victims in *Hawkins* had known of the client's dangerous tendencies.<sup>25</sup>

Not all states demand the same duty. A case from Massachusetts waters down this duty to warn court personnel.<sup>26</sup> The Massachusetts high court held that the attorney-client privilege protected a client's threats made to his attorney, expressing anger and frustration with the legal system and its officers and containing implicit threats, and should not have been disclosed by his attorney. The concerned attorney had acted - warning the judge, the judge's family, and a social worker of the threats.

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<sup>23</sup> Cooper, *supra* note 4, at 480 & n.3.

<sup>24</sup> *Id.*

<sup>25</sup> Wiley, *supra* note 21, at 960-61.

<sup>26</sup> See *In re Grand Jury Investigation*, 902 N.E.2d 929 (Mass. 2009).

Attorney John Doe was representing Michael Moe, a father, in a care and protection proceeding in the Juvenile Court. On November 8, 2007, two days after an adverse ruling by a Juvenile Court judge, Moe left six messages on Attorney Doe's answering machine . . . indicat[ing] that he knew where the judge lived and that she had two children. In the fourth message, a voice that Attorney Doe recognized as Moe's wife stated that she and Moe were going to "raise some hell." In the fifth message, Moe stated that "some people need to be exterminated with prejudice." Attorney Doe subsequently erased the messages from the answering machine.

During the following week, Attorney Doe observed that Moe had become "more and more angry," and on November 13, 2007, he filed a motion to withdraw as Moe's counsel, which was subsequently allowed. *Concerned for the safety of the judge and her family, he disclosed the substance of the messages to the judge.*

On November 21, 2007, Attorney Doe was interviewed by a State trooper regarding the substance of the messages, but declined to sign a written statement.<sup>27</sup>

The *Grand Jury Investigation* court held that the communications between the client and his attorney were privileged, unless the government could prevail in asserting the "crime-fraud exception." In justifying its decision, the *Grand Jury Investigation* court raised important policy concerns that arise when an attorney is deciding whether to disclose client threats of violence.<sup>28</sup> If a client is aware that his attorney will reveal his threats against third parties, the trust imbued within the attorney-client relationship is shattered. Absent trust, an attorney cannot be a zealous advocate for his client. This breakdown impairs the attorney's ability to dissuade the client from acting on such threats, an important role the lawyer could play in steering client conduct into legally acceptable channels:

We . . . hold that Moe's communications were made in furtherance of the rendition of legal services and thus protected by the attorney-client privilege . . . . The expression of [frustration and dissatisfaction with the legal system] is a not uncommon incident of the attorney-client relationship, particularly in an adversarial context, and may serve as a springboard for further discussion regarding a client's legal options. *If a lawyer suspects that the client intends to act on an expressed intent to commit a crime, the lawyer may attempt to dissuade the client from such action, and failing that, may make a limited disclosure to protect the likely targets.* Requiring the privilege to yield for purposes of a criminal prosecution not only would hamper attorney-client discourse, but also would discourage lawyers from exercising their discretion to make such disclosures, as occurred here, and thereby frustrate the beneficial public purpose underpinning the discretionary disclosure provision of rule 1.6 . . . . Warning clients that communications

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<sup>27</sup> *Id.* at 930 (emphasis added) (footnote omitted).

<sup>28</sup> *See id.* at 934.

deemed irrelevant to the matter for which they have retained counsel will not be protected not only may discourage clients from disclosing germane information, but also may *disincline clients to share their intentions to engage in criminal behavior*. In the latter circumstance, a lawyer's ability to aid in the administration of justice by dissuading a client from engaging in such behavior is impaired. The lawyer also may never receive the very information necessary for him or her to determine whether to make a limited disclosure to prevent the harm contemplated by the client.<sup>29</sup>

The "crime-fraud exception" for allowing disclosure of attorney-client communications requires that the specific communications must have "sought assistance in or furtherance of future criminal conduct."<sup>30</sup> A client's verbal threats, communicated to his lawyer, are not in furtherance of such assaults. Hence, the attorney-client privilege presumably protects such threats.

[T]he crime-fraud exception requires that the communications be in furtherance of criminal activity rather than merely "related" to it. Several other states addressing the issue have held that the client must seek the attorney's advice or assistance in furtherance of his criminal conduct for the crime-fraud exception to apply. Based upon the above discussion, we cannot conclude that the crime-fraud exception can be satisfied by the . . . mere threat of future activity. The attorney's services must be sought or used to further the activity in question.<sup>31</sup>

Thus, the fact that the "crime-fraud exception" treats threats as privileged dilutes the aspirational goal of protecting unaware third parties from the violent threats of clients. These threats, communicated to the attorney, do not "further" these impending assaults. Under this analysis, a disclosing attorney could be liable to his client for revealing his threats to others, as this disclosure would constitute a violation of the attorney-client privilege.

Under our initial hypothetical scenario, the defense attorney would likely conform to ethical standards if he chose not to disclose the defendant-physician's vague threats to either law enforcement or opposing counsel. The threat, namely "if I had a gun," is far from an imminent threat of actual violence (unless the attorney learns, for example, that the doctor just applied for a handgun license), and seems more in line with the common sense of anger and frustration many defendants feel when they are fighting a frivolous lawsuit. Once his client pushed the expert, he raised the ante. Here, the lawyer would

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<sup>29</sup> *Id.* at 933-34 (emphasis added).

<sup>30</sup> *Id.* at 932.

<sup>31</sup> *Henderson v. State*, 962 S.W.2d 544, 552-53 (Tex. Crim. App. 1997) (citations omitted).

be well served by counseling his client that such violence could be damaging to his legal case, his professional reputation, and his credibility in and out of the courtroom. If the attorney decides the threat is more imminent, then counsel should strongly consider contacting law enforcement personnel. He should be cautious about contacting the threatened adverse client, as this might breach the attorney-client privilege. The “crime-fraud exception” allowing disclosure generally applies only to attorney-client communications made in furtherance of the contemplated crime, a threshold not satisfied. Ethics and common law liability do not always track in parallel.

*An attorney’s good faith attempt to warn the opposing side of possible safety concerns regarding a client does not create a viable witness-tampering claim.*

The question of whether an attorney warning opposing counsel (or an opposing client) constitutes witness tampering or intimidation is easily resolved. As a criminal offense, obstruction of justice through witness tampering requires the mental intention (*mens rea*) to cause the result (i.e., using threats and intimidation to prevent a witness from testifying openly and frankly). The United States Supreme Court clarified that, under federal law, witness tampering requires proof of the wrongdoer’s *mens rea*.<sup>32</sup> State courts have also found that *mens rea* is an essential element of a witness tampering or intimidation claim.<sup>33</sup> Dissecting the legal elements required to prove witness tampering, the defendant must have an unequivocal intention to prevent the witness from testifying through use of threats (and the like).<sup>34</sup>

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<sup>32</sup> Arthur Andersen LLP v. United States, 544 U.S. 696, 704-05 (2005) (a claim of witness tampering requires proof of consciousness of wrongdoing; the term “knowingly” modifies “corruptly persuades,” and thus the statute imposes a *mens rea* requirement).

<sup>33</sup> “The crime [of witness intimidation] is committed if one, with the necessary *mens rea*, “attempts” to intimidate a witness or victim.” Commonwealth v. Collington, 615 A.2d 769, 770 (Pa. Super. Ct. 1992); see also United States v. Irving, 682 F. Supp. 2d 243, 265 (E.D.N.Y. 2010) (in order to prove elements of offense of attempting to tamper with witnesses, government must show that (1) defendant attempted to threaten, use intimidation on, or corruptly persuade witnesses, and (2) defendant acted with intent to influence or prevent testimony of witnesses).

<sup>34</sup> Pinkley v. State, 49 P.3d 756, 758 (Okla. Crim. App. 2002) (“Following the statutory language, the elements of this crime are: (1) *willfully* (2) causing or threatening or procuring, or harassing (3) physical or mental harm (4) to a person (5) with the intent to prevent the person from appearing in court to testify OR with the intent to make the person alter his testimony . . . .”) (emphasis added).

In the vignette, if the defense attorney chose to communicate the threats made against any of the adverse parties, the desire to prevent violent crime solely motivates this warning. The attorney's disclosure would not be motivated by any intention to intimidate the witnesses or experts from testifying (or changing their testimony). As a result, no claim of witness tampering or intimidation could be successfully asserted against an attorney, who in good faith warns the opposing side of real threats against them made by the disclosing attorney's client.

*An attorney may zealously advocate for his client. Goading an opposing party into potential violence does not support an action for discipline or a lawsuit in tort. The fault would lie with the violent client, and not opposing counsel.*

A search of national case law, as well as the major secondary authorities, failed to reveal any opinions wherein an attorney was held liable for goading or inciting the opposing party into a violent rage, thereby endangering his own client. However, well-established policies do suggest such actions would not be viewed as inconsistent with the zealous advocacy required of attorneys on behalf of their clients, particularly because lawyers have no duty to assure or protect the mental or physical well-being of their clients.<sup>35</sup>

Attorneys owe their clients an unerring duty to advocate zealously for their client's legal interests. "As a representative of his client, a lawyer must act as a zealous advocate, demonstrating loyalty to his client and giving him the best legal advice possible within the bounds of the law."<sup>36</sup> Exploiting the emotional volatility of an opposing party at trial to undermine his credibility and the jury/fact finder's sympathy for him arguably demonstrates zealous advocacy on the client's behalf. To hold such goading back to prevent the opposing party from getting angry at trial may well undermine a pivotal tool at trial, leading to negative consequences for the client. Put a different way, zealous advocacy allows an attorney to use all tools in his disposal to convince a jury of his client's case. Goading the defendant into a volatile state is arguably part of that toolkit.

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<sup>35</sup> See *Hitch v. Pima Cnty. Super. Ct.*, 708 P.2d 72, 76 (Ariz. 1985); *Hanumadass v. Coffield, Ungaretti & Harris*, 724 N.E.2d 14, 18 (Ill. App. Ct. 1999); *Sanders v. Leavitt*, 37 P.3d 1052, 1057 (Utah 2001).

<sup>36</sup> *Hitch*, 708 P.2d at 76.

Furthermore, while lawyers are duty-bound to supply competent legal advice and services to clients, select cases establish they are not responsible for the physical or mental well-being of their clients. “[T]he essential purpose of the attorney-client relationship is the *provision of competent legal services*, which does *not give rise to a duty* on the part of the attorney to *improve a client’s mental or emotional well-being*.”<sup>37</sup> The same holds true regarding the protection of clients from bodily harm – lawyers do not even have a legal duty to assure that minor clients are protected from mistreatment or abuse.

We find no compelling reason to conclude that the attorney defendants assumed, by virtue of representing the plaintiff class in the case of *David C.*, a duty to ensure Breanna’s physical well-being, either to protect her and the other members of the class from physical abuse inflicted by third parties such as the Widdisons, or to ensure that she received proper medical care. Counsel did not assume a role *in loco parentis*. Moreover, plaintiff did not provide, nor are we aware of, any authority which imposes a duty upon counsel for a plaintiff’s class to protect members of the class from abuse from third parties and care for their personal needs.<sup>38</sup>

As attorneys are not directly liable for the physical or mental well-being of their clients, a duty that assures zealous advocacy will not trigger violent rages from adverse parties cannot reasonably bind lawyers.

### Summary

When faced with knowledge of a potential volatile client, an attorney is presented with multiple professional duties and opinions. The Model Rules of Professional Conduct permit the disclosure of the client’s harmful propensities. The first level of analysis addresses the attorney’s reasonable assessment his client will likely harm another person or property. The law yields a different professional opinion if property is the only concern.

If the reasonable “fear threshold” rises to bodily injury, the next step is to identify which persons may be potential victims. Once a determination has been made to disclose, the final issue to be addressed is to whom the disclosure must be made and what information should be discussed.

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<sup>37</sup> *Hanumadass*, 724 N.E.2d at 18 (emphasis added).

<sup>38</sup> *Sanders*, 37 P.3d at 1057 (stating attorney defendants did not assume a duty to ensure nine-month-old child’s physical well-being or to ensure that child received proper medical care; baby died of pneumonia due to mother’s abuse and failure to supply adequate medical care).

The underlying tension between disclosure versus silence pits (a) maintaining rules and duties to protect the sanctity of the attorney-client privilege versus (b) the safeguarding of human life. Unfortunately, there are few bright lines and absolutes in this realm. The best an attorney can expect when presented with a potentially violent client is understanding that the rules of professional conduct and case law are propaedeutic and not conclusive.