The Movie ‘Spotlight’ and Legal Ethics

By Joel Cohen and James L. Bernard

Like all good movies about an important and controversial event, the story told in the movie “Spotlight,”¹ about the role of the Boston Globe in uncovering the breadth of the clergy scandal that impacted the Boston diocese, was no doubt some combination of truth and dramatization. One startling and poignant scene is worth discussing from an ethics point of view. Once the Globe’s investigative team was on to this devastating story which suggested that the priest abuse scandal may have involved up to 70 priests in Boston, the Globe’s Spotlight team editor, Robby Robinson, one of the heroes in the drama, went directly to the home of attorney “Jim Sullivan” who represented the diocese and had skillfully managed to keep settlements, and payouts to victims, under seal. Robinson, as would any good gumshoe, wanted to pry the clandestine open for the world to see, and maybe in doing so bring closure to the abuse.

Standing before Sullivan at Sullivan’s home, Robinson boldly asked if all 70 of the priests on his list had been accused as, without that information, Robinson could not “go to press.” Sullivan (understandably) refused. He was, after all, a lawyer for the diocese. Still, a couple of seconds later, Sullivan, seemingly looking for a vehicle to do the right thing while ostensibly adhering to his professional obligations, found himself at that situs where legal ethics and morality intersect. He emerged from his home and asked to see Robinson’s list. Rather than nodding, or mouthing the words “all 70 of them,” he took a pen and circled the whole list, basically acknowledging to Robinson—giving the reporter a source’s “confirmation”—that indeed all 70 were implicated and that the scandal wasn’t about only a few aberrant priests, however horrific even that would have been.

¹ Spotlight, Open Road Films, Released Nov. 6, 2015.
It is important to state that this article is not intended to single out the church—there have been too many accusations made in schools, religious institutions and communities all over the world. Nor is the article intended to cast aspersions on attorney Sullivan. “Spotlight” is a dramatization, and Sullivan is a composite character. Moreover, it is not clear whether “Sullivan” represented the priests as well as the diocese. So for purposes of this ethics column, let’s propose the Spotlight fact pattern as a hypothetical, add that Sullivan represented the diocese and the priests, and that he engaged in the legerdemain brilliantly depicted in the film to craftily communicate what he clearly could not directly say.

Now, Sullivan cannot circumvent an attorney’s ethical obligation of confidentiality by “merely” circling names. But let’s look at whether an attorney could ethically confirm to a reporter, or anyone, that incriminating information. And as we do, remember —given the gravity of what happened—there is no easy answer. Maybe it is best to read this article thinking about whether we, as ethical lawyers (and moral people), can stand behind attorney Sullivan’s action.

Ethical Obligations

Even though Spotlight’s story occurred in Boston, we explore our hypothetical through New York’s Rules of Professional Conduct. With certain exceptions, the rules impose a broad and affirmative obligation on lawyers to not knowingly reveal “confidential information” or use such information “to the disadvantage of a client or for the advantage of the lawyer or a third person.” The ethical obligation to maintain the ‘confidences’ and ‘secrets’ of clients and former clients is broader than the attorney-client privilege, and exists ‘without regard to the nature or source of information or the fact that others share the knowledge.” “Confidential information” includes information “likely to be embarrassing or detrimental to the client if disclosed.” This may even include disclosure of a client’s name.

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2 Boston Globe reporter Michael Rezendes, who was a member of the Spotlight team, confirmed this in an email on March 8, 2016.
3 New York Rules of Professional Conduct, 22 N.Y.C.R.R. 1200. Although there are differences in the rules adopted by Massachusetts, the circling of names would likely be a violation of that state’s rules as well. Mass. Rules of Professional Conduct, Rules 1.6, 1.8(b), 1.9(c).
4 Rule 1.6; cf. ABA Model Rules of Professional Conduct, ABA Rule 1.6; see also Rule 1.8(b), ABA Rule 1.8(b) (a lawyer shall not use information relating to representation to the disadvantage of the client unless the client gives informed consent or it is otherwise permitted); Rule 1.9(c); ABA Rule 1.9(c) (duties to former clients); generally Roy D. Simon, Simon’s New York Rules of Professional Conduct, Rule 1.6, Thomson-Reuters, 2015; for a discussion of Rule 1.6, see, Joel Cohen, “Confidentiality: Keeping Secret Non-Privileged Information,” N.Y.L.J. Aug. 11, 2015.
6 Rule 1.6(a).
While there are a dearth of rulings, the U.S. Court of Appeals for the D.C. Circuit found that “[d]isclosure of a client’s identity falls within the scope of Rule 1.6(a)(1).”  The American Bar Association explains: “…the names, addresses and phone numbers of clients of Legal Services Offices are secret within the meaning of [the predecessor to ABA Rule 1.6] since it might be an embarrassment to the client for any number of reasons to have it revealed that he was a client of the Legal Services Office.”

Leading ethics scholar Professor Roy D. Simon, in a recent letter to Counsel for the Majority Leader of the New York State Senate discussing proposed statutory amendments, agrees. Referring to the fact that information is confidential if embarrassing or detrimental, he states unequivocally: “A client thus has the right to instruct a lawyer: ‘Do not disclose the fact that I am your client.’”

Unquestionably, the information in our hypothetical is confidential under the rules—the settlement agreements themselves which Sullivan negotiated with the victims were subject to confidentiality provisions. But what if Sullivan thought his clients were going to commit future crimes? Did he then have a right to identify them? Rule 1.6(b) provides exceptions through which a lawyer “may”—but is not required to—disclose information. The exceptions “sit on a knife edge—either Rule 1.6(b) provides an exception allowing a lawyer to...reveal a client’s confidential information, or else the lawyer is prohibited from using or revealing it. There is no in between.”

That said, Rule 1.6(b) allows a lawyer to “reveal or use confidential information to the extent that the lawyer reasonably believes necessary: ...(2) to prevent the client from committing a crime....” To ethically disclose the anticipated commission of a crime, the lawyer must first have information “that would lead a reasonable person to believe that a client intends to commit a crime.” The lawyer must then consider, among other things, the seriousness and imminence of potential injury; the “apparent absence of any other feasible way to prevent” injury; and “the circumstances under which the lawyer acquired the information of the client’s intent....”

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7 In re Hager, 812 A.2d 904 (D.C. 2002) (District of Columbia’s Rules are similar to those in New York).
10 Simon, at p. 264 (Emphasis added).
11 Cf. ABA Rule 1.6(b) which requires that the crime be 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.”
13 Rule 1.6, Comment 6A.
He must then—before disclosure—determine whether there is any way other than disclosure to prevent the injury. Indeed, the lawyer’s duty is, if practicable, to first ask the client to reconsider and then, in effect, “threaten” disclosure in an attempt to persuade the client to mend his ways. In sum, “…disclosure adverse to the client’s interests should be no greater than the lawyer reasonably believes necessary to prevent the threatened harm or crime.”

The Rule 1.6(b) carve-out which permits disclosure based on criminal activity has another aspect—if the attorney is concerned that the client will continue his crime, counsel must consider whether the offense is “factually indistinguishable” so that it is really just on-going. If so, the client confidence may not be disclosed. It is hard to imagine that one could consider sexual abuse an ongoing offense (unlike, e.g., a continuing fraud). No matter, as the bar association tells us (likely given another exception which permits disclosure if there will be substantial bodily harm): “…a different balance, and outcome, exists for emergencies which involve the prevention of serious bodily injury or death. In these situations, which the Committee anticipates will be rare, client confidentiality must yield to the lawyer’s decision to protect human life.”

All of this has assumed that the priests in “Spotlight” were Sullivan’s clients, but what if the church was his client? The Rule 1.6(b)(2) carve-out exists to prevent the “client” from committing a crime, and putting aside a creative theory of criminal liability against the church for a “cover up,” the church was not committing the crimes, the priests were. But 1.6(b)(1) permits disclosure to prevent “reasonably certain death or substantial bodily harm,” and doesn’t require that it be the client causing that harm. Assuming we all agree that molestation causes “substantial bodily harm,” we still face all of the same issues, and the outcome shouldn’t change even assuming the client changes.

In a Massachusetts Bar Opinion (the venue for Sullivan), a lawyer was a board member of an organization that ran a camp for abused children. He previously represented a client who had, after being accused of indecent assault on children, pleaded guilty to simple assault. He was sentenced to probation.

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14 Id.
15 2002-01; but see New York State Bar Association Ethics Opinion 866-11 (Op. 866-11) (“Whether the company...has committed a crime..., and whether that crime is a continuing one, are questions of law beyond the jurisdiction of this Committee.”) (construing prior Disciplinary Rule); see also, Simon, at p. 272.
16 Rule 1.6(b)(1), Comment 6B. “Such harm is reasonably certain to occur if it will be suffered imminently or if there is present and substantial risk that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat.” See also Op. 866-11; Restatement (Third) of the Law Governing Lawyers, §66.
17 2002-01.
The lawyer later learned that his former client became a counselor at his organization’s camp. The bar concluded that if the “lawyer believes, based on all the information in his possession, including information gained in the prior representation, that the client’s proclivities rise to the level of ‘intention’ to commit a crime against the children currently under his care, he may reveal that intention to the appropriate persons as well as information sufficient to prevent the crime, if he is unable to persuade the former client to make the appropriate disclosure.”  

Returning to our hypothetical: Assume Sullivan reasonably believed that at least some of the priests still worked in schools and parishes and would continue their crimes, leading to serious bodily harm. To avail himself of the exceptions to Rule 1.6, wouldn’t Sullivan have had to talk to those priests who specifically told him, in effect, “I can’t stop myself?” And when those individual priests said, again, “I tried, but I can’t stop myself,” go to the authorities? And then only with regard to those specific priests? Even if Sullivan reasonably believed all of the authorities knew and would do nothing, a lawyer’s disclosure must be narrow, no more than “necessary” to prevent the crime and made to those who can prevent it.  

True, “[i]t may well be that no one person alone will be able to prevent it, or it may be very difficult to determine who is in a position to prevent the crime.” But even so, Sullivan’s decision to circle all of those names, thereby identifying all of the priests, cannot be what Rule 1.6(b) intended. In our New York-centric hypothetical, does anyone really believe that confirming sexual abuse to a New York tabloid could be the narrowest, reasonable and necessary way to stop the abuse?  

Now, telling a tabloid might literally be the best way to get the word out inasmuch as it—rather than say, a reputable newspaper (like the Globe)—may not require elaborate sourcing to go to print, and a layperson might see it as the most “ethical” way to do one’s duty as a concerned citizen. But legal ethics are different and sometimes counterintuitive—they are far more weighted to client confidentiality than might be the general public’s moralistic view of things.  

**Conclusion**  

Whether and how to report your client’s confidences is a difficult decision indeed. The rules make disclosure permissive—not mandatory—leaving the decision to the lawyer’s own conscience, as guided by the rules. The Preamble to the ABA Rules recognizes that [v]irtually all difficult ethical problems arise from conflict between a lawyer’s responsibilities to clients,  

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18 Massachusetts Bar Association Ethics Opinion 90-2.  
19 Simon, at p. 271.  
20 Simon, at p. 271.
to the legal system and to the lawyer’s own interest in remaining an ethical person while earning a satisfactory living. Such issues must be resolved through the exercise of sensitive professional and moral judgment guided by the basic principles underlying the Rules. 21

So let’s return to our hypothetical one last time and ask: What would you have done if you were Jim Sullivan? Or perhaps this: What would you have done if you were armed with Sullivan’s knowledge, but were not a lawyer and thus not constrained by the rules?

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21 ABA Rules Preamble 9; See also, ABA Rules Scope 16; Rules Preamble, at 3 (the Preamble has not been adopted by New York’s courts); Simon, at p. 15.