

## Confidentiality and Wrongful Incarceration

BY PETER A. JOY AND  
KEVIN C. McMUNIGAL

Alton Logan has been in prison 26 years for the shotgun murder of Lloyd Wickliffe, a crime Logan maintains he did not commit. It is not DNA evidence that may free Logan, though, but the words of a man who claimed to be the actual killer, Andrew Wilson.

Andrew Wilson's public defenders recently demonstrated that in 1982 Wilson admitted killing Wickliffe. When police arrested Wilson for killing two police officers they found a shotgun linked to a shell at the scene of Wickliffe's murder. But police had already arrested Logan and another man, Edgar Hope, for Wickliffe's murder based on eyewitness identification, so the police did not charge Wilson for Wickliffe's murder. Logan's codefendant, Hope, however, told his attorney that Logan was not involved in the murder, and that Wilson was the actual shooter. Hope's attorney gave this information to Wilson's lawyers, who confronted Wilson with Hope's statement. Wilson nodded and said, "That was me."

Wilson's lawyers then faced a classic ethical dilemma. What may a lawyer do when a client admits to a crime for which another has been charged? Wilson's lawyers concluded that client confidentiality bound them to silence, but they obtained their client's consent to reveal the information after his death. Wilson's lawyers also drew up an affidavit that confirmed that they "obtained information through privileged sources that a man named Alton Logan who was charged in the fatal shooting of Lloyd Wickliffe . . . is in fact not responsible for that shooting." They placed the affidavit in a sealed envelope in a metal box in 1982, believing that revelation at a later date

would be more credible if supported by the affidavit. They released the affidavit after their client's death earlier this year.

The revelation that Wilson's lawyers waited more than a quarter of a century to reveal his admission has focused attention on current client confidentiality rules and whether they function properly in cases such as Logan's. Public reaction against Wilson's lawyers' adherence to their duty of client confidentiality that kept Logan in prison for more than half of his life has been mostly negative. The ABA Criminal Justice Section's Ethics, Gideon & Professionalism Committee is considering a draft proposal to amend Rule 1.6 of the Model Rules of Professional Conduct to allow disclosure in such situations. In this column we review the draft proposal, and discuss whether there should be a new exception to Model Rule 1.6's duty of client confidentiality to prevent the wrongful incarceration of another. The purpose of this column is both to analyze the issue and to encourage discussion and comments from readers.

### Draft Proposal

As discussed in our last column, *New Rules for Scientific and Exculpatory Evidence* (23 (No. 1) CRIM. JUST. 44 (Spring 2008)), the ABA recently amended Rule 3.8 to address a prosecutor's post-conviction obligations of disclosure and investigation when there is new, credible, and material evidence creating a reasonable likelihood that a defendant did not commit an offense for which he or she was convicted. Although the new amendment clarifies the obligations of prosecutors regarding wrongful conviction, nothing has yet been done either to require or allow disclosure of confidential information by defense counsel to prevent wrongful incarceration.

In response to this dilemma, Criminal Justice Section Ethics, Gideon & Professionalism Committee cochairs Bruce Green and Ellen Yaroshevsky have drafted the following proposal to amend Rule 1.6:

(c) A lawyer may reveal information relating to the representation of a deceased client to the extent the lawyer reasonably believes necessary to prevent or rectify the wrongful conviction of another.

The draft proposes amending Comment [15] to Model Rule 1.6 as follows:

Paragraph (c) recognizes the important societal interest in preventing and rectifying wrongful



**PETER A. JOY** is a professor of law and director of the Criminal Justice Clinic at Washington University School of Law in St. Louis, Missouri; he can be reached at joy@wulaw.wustl.edu. **KEVIN C. McMUNIGAL** is the Judge Ben C. Green Professor of Law at Case Western Reserve University School of Law in Cleveland, Ohio; he can be reached at kcm4@case.edu. Both authors are contributing editors to Criminal Justice magazine.



convictions, including both convictions of factually innocent individuals and convictions resulting from procedural improprieties. The interests underlying the confidentiality obligation are usually paramount in the case of living clients because clients will not be as forthcoming if there is a risk that their confidences will be disclosed during their lifetimes. However, the societal interest in disclosure may be paramount when the client is deceased, particularly when the client's reputation and estate will not be prejudiced by disclosure. In exercising discretion under Paragraph (c), a lawyer should consider the prior wishes of the deceased client to the extent they are known, the likelihood that a wrongful conviction will occur and can be prevented or that a wrongful conviction occurred and can be rectified by disclosure, the extent of the ongoing harm caused by the wrongful conviction, and the extent to which disclosure will prejudice interests important to the deceased client, including the deceased client's reputation and the financial interests of the deceased client's estate.

In evaluating the recommendation, it is important to note some of its features and limitations. First, disclosure under the proposal would be discretionary.

Second, the proposed amendment restrains the lawyer's discretion by limiting disclosure to situations when the client is deceased. Further, the Comment indicates that in exercising discretion the lawyer should consider the prior wishes of the deceased client and the extent to which disclosure will prejudice interests important to the deceased client, including the deceased client's reputation and the financial interests of the deceased client's estate. The preconditions for disclosure appear to narrow the proposed exception to confidentiality so much that the exception could rarely be used, especially when one considers that disclosure would be discouraged even when there is only reputational harm to a deceased client.

Finally, amending the ethical confidentiality rule in a jurisdiction does not resolve evidentiary issues that could bar the information being used in court proceedings. As discussed in the following section, attorney-client privilege has been used in several jurisdictions to prevent lawyers from revealing information that could prevent the wrongful incarceration of another. A confidentiality exception would allow revelation to the prosecution, the press, and

lawyers representing the person the information exonerates. Privilege becomes an issue when the lawyer seeks to testify in court about what the lawyer knows that may exonerate the accused. In addition, limitations on the use of alternate perpetrator evidence and hearsay would usually exclude this type of testimony.

Massachusetts has already amended its ethics rules to provide that "[a] lawyer may reveal . . . such information . . . to prevent the wrongful execution or incarceration of another." (MASS. R. PROF'L CONDUCT 1.6(b)(1).) Comment [9A] explains that this exception to confidentiality permits "a lawyer to reveal confidential information in the specific situation where such information discloses that an innocent person has been convicted of a crime and has been sentenced to imprisonment or execution." The Comment's explanation that the exception applies specifically when "an innocent person has been convicted of a crime and has been sentenced to imprisonment or execution" may be viewed as an example of when the exception applies or as a limitation on using the exception. Rather than clarifying the exception, the Comment appears to create an ambiguity in determining when the exception applies. We could find no reported instances of a lawyer making disclosure under this rule.

### Attorney-Client Privilege

There are several well-documented examples of confidential information being offered to exonerate someone accused of a crime. In *State v. Macumber*, 544 P.2d 1084 (Ariz. 1976), William Macumber was charged with murder. At Macumber's trial, two attorneys attempted to testify that their deceased client had confessed to the crime. The trial court refused to admit the evidence reasoning that attorney-client privilege survived the death of a client and that disclosure could only be made with the consent of the client or someone authorized by law to speak for the client. On appeal, the Arizona Supreme Court reversed on other grounds, but upheld the trial court's decision to exclude the confession, holding that in the absence of consent from the individual holding the privilege, the privilege could be asserted by the trial court itself to prevent disclosure. (*Id.* at 1086.)

*Macumber* illustrates the distinction between the legal ethics rule of client confidentiality and the evidentiary rule of attorney-client privilege. Both the trial court and the Arizona Supreme Court refused to permit the testimony from the lawyers on attorney-client privilege grounds even though the lawyers

had obtained an informal bar ethics opinion stating that they were ethically permitted to reveal the confidential information. (*Id.* at 1097 (Holohan, J., concurring).)

Other courts have also relied on attorney-client privilege to prevent lawyers from testifying about client statements exonerating someone charged with a crime. (*See, e.g., State v. Doster*, 284 S.E.2d 218, 220 (S.C. 1981) (applying attorney-client privilege to prevent lawyer from testifying about deceased client's statements that may have exonerated defendant); *State v. Valdez*, 618 P.2d 1234, 1236 (N.M. 1980) (holding attorney-client privilege prevented lawyer from testifying that a former client confessed to robbery).)

In *Morales v. Portunondo*, 154 F.Supp.2d 706 (S.D.N.Y. 2001), though, the court permitted a lawyer to disclose that his deceased client had confessed to a murder for which another man had been convicted. The court found the information covered by attorney-client privilege, but ruled that in a habeas action due process required admission of the evidence to guarantee fundamental fairness to the defendant. (*Id.* at 730-31.) In reaching its decision, the *Morales* court relied on *Chambers v. Mississippi*, 410 U.S. 284, 302-03 (1973), which used a due process analysis in holding that "the hearsay rule may not be applied mechanistically to defeat the ends of justice" to exclude statements of another admitting to a crime for which the defendant is on trial.

These cases demonstrate that any change in a state's ethics rules to create an exception to confidentiality to prevent wrongful incarceration needs to be supplemented by changes in the law of attorney-attorney client privilege if the confidential information obtained from a client is to be used in a court proceeding. Still, an exception to client confidentiality would permit a lawyer to reveal the information to the accused's defense counsel, the prosecutor, and the press. Such revelations might, in turn, lead to other admissible evidence or information that could prevent a wrongful conviction, incarceration, or execution.

### Should There Be an Exception?

Let's consider some of the pros and cons of such a proposal.

**Against the exception.** Confidentiality, a key aspect of the attorney-client relationship, is essential to building trust between client and lawyer. Confidentiality encourages lawyers to seek and clients to provide full information about the representation.

Confidentiality, it is argued, serves both clients and society since open communication enables the lawyer to represent the client effectively and gives the lawyer the opportunity to counsel the client against wrongful behavior. Exceptions to confidentiality arguably erode both lawyer and client incentives to seek and provide information, and thus threaten to undermine the quality of legal representation and the good it provides to society.

A separate argument against the exception that is the focus of this column is that such an exception is unlikely in reality to provide much benefit to the wrongfully accused or convicted. If a lawyer were to reveal a deceased client's confession to a crime for which another had been charged or convicted, there are a number of serious evidentiary barriers to the admission of such testimony in a court proceeding, including attorney-client privilege, the hearsay rule, and the alternate perpetrator doctrine. The confession was not made under oath and there was no opportunity either for cross-examination or to observe the client's demeanor. If the confession was made to a lawyer in the belief that it was protected by confidentiality and attorney-client privilege, it would also not be an admission against interest. In short, such a confession may carry little weight even if it were not barred by evidence law.

**For the exception.** One argument for such an exception is that ethical confidentiality rules have always recognized exceptions. Is one more, rather narrow, exception likely to have a significant marginal impact on the flow of information from client to lawyer or the resulting quality of representation? Some currently recognized exceptions, such as those pertaining to future crime or harm, seem much more likely to be triggered and thus more likely to impede the full and frank communication confidentiality is designed to facilitate than a wrongful conviction exception.

In response to the argument that this exception is unlikely to produce much benefit for someone wrongly charged or convicted due to various evidentiary barriers to admitting the client's confession in court, one can argue that revelation of the confession may produce benefits other than its use as evidence in a court proceeding. The revelation might help a wrongfully charged or convicted person attract public support, lead to other admissible evidence, or simply prompt the prosecution to reexamine a case.

Perhaps the most appealing argument for such an exception is that it helps address the need to remedy the wrongful convictions that have attained

such prominence in today's legal and popular culture. These DNA exonerations illustrate the need for more safeguards to ensure that the innocent are not convicted and incarcerated. One such response is the recent amendment to Model Rule 3.8 addressing a prosecutor's post-conviction obligations of disclosure and investigation. An additional response aimed at defense counsel is a wrongful incarceration exception. Failure to recognize such an exception is likely to attract public attention and undermine public confidence both in lawyers and our criminal justice system.

Finally, recognition of such an exception is consistent with a recent trend to ease confidentiality restrictions when doing so allows lawyers to serve an important public purpose. The current version of Model Rule 1.6, for example, recognizes more exceptions than did the original version of Model Rule 1.6. Many states have enacted exceptions more generous than those currently found in the Model Rules. Another example is Model Rule 1.13(c)'s "reporting out" exception to confidentiality in organizational representation the ABA adopted in response to the Enron scandal and other corporate wrongdoing. This trend expands a lawyer's duty to act cooperatively in

preventing and remedying wrongdoing, emphasizing the lawyer's role as an officer of the court rather than the lawyer's role as a zealous advocate of the client.

## Conclusion

The issue of wrongful conviction is a serious one. Studies of wrongful conviction reveal that both prosecutors and defense counsel often contribute to wrongful convictions. It would seem appropriate then, to look to both prosecutors and defense counsel to help remedy the problem. The current draft, very narrowly drawn and discretionary rather than mandatory, seems unobjectionable. Our view is that a more expansive exception may possibly be justified, without the death and reputational harm limits found in the current proposal.

If an exception to client confidentiality to prevent or remedy wrongful convictions is to be enacted, a robust exchange of views and discussion of the arguments for or against it is warranted. To that end, we urge you to share your views with the cochairs of the Ethics, Gideon & Professionalism Committee of the Criminal Justice Section. Professors Bruce Green ([bgreen@law.fordham.edu](mailto:bgreen@law.fordham.edu)) and Ellen Yaroshevsky ([yaroshef@yu.edu](mailto:yaroshef@yu.edu)). ■