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When Silence is a Crime and Speech is a Violation:

The California Attorney's Conundrum

EVERY CALIFORNIA ATTORNEY UNDERSTANDS that the duty of confidentiality is the bedrock of the profession. Without it, clients will not speak freely, and without candid communication, effective representation is impossible.

What happens when the law commands an attorney to speak but the attorney's ethical obligations command the attorney stay silent?

Attorneys who occupy the dual professional roles described below, the intersection of California Rule of Professional Conduct 8.3, the Child Abuse and Neglect Reporting Act (CANRA), and the permissive disclosure framework of California Rule of Professional Conduct 1.6(b) create a collision of duties with no clean resolution.[1 2] In this article we examine that collision, offer a realistic hypothetical to illustrate it, and confront the analytical difficulties which arise from this collision of duties.[3]

The Three Frameworks

Rule of Professional Conduct 8.3 provides that an attorney who knows that another lawyer has committed a violation of the Rules of Professional Conduct raising a substantial question as to that lawyer's honesty, trustworthiness, or fitness as a lawyer "shall inform the State Bar."[4] Cal. R. Prof. Conduct 8.3(a). The obligation is mandatory in its language. The mandatory nature of this language is immediately qualified in RPC 8.3(d) which states that the rule does not require disclosure of information protected by the duty of confidentiality under Business and Professions Code section 6068(e) or Rule 1.6.[5] In practice, this means that when an attorney learns of another lawyer's misconduct through a client communication, the attorney cannot report without the client's informed consent.[6] Thus Rule 8.3 yields to Rule 1.6 by its own terms.

CANRA, codified at Penal Code sections 11164 through 11174.3, imposes mandatory reporting obligations on enumerated categories of professionals—including physicians, teachers, social workers, and therapists—who know or reasonably suspect that a child has been the victim of abuse or neglect.[4 8 9] Cal. Penal Code § 11165.7.[10] Failure to report is a misdemeanor punishable by up to six months in county jail and a fine of up to $1,000. Cal. Penal Code § 11166(c). Attorneys acting solely in their capacity as attorneys are not among the categories of mandated reporters enumerated in the statute. However, an attorney who also holds a license or occupies a role independently qualifying them as a mandated reporter is subject to CANRA in that separate capacity.[10] The critical unresolved question is whether the attorney-client privilege shields information received by a dual-role professional during the provision of legal services. In *Elijah W. v. Superior Court*, the court held that CANRA does not override the attorney-client privilege or defense counsel's duty of confidentiality, emphasizing that legislative guidance would be required before such reporting obligations could be imposed on attorneys, as doing so could jeopardize a defendant's right to a fair trial.[11] This decision reinforced the principle that attorney-client confidentiality occupies a distinct and elevated position among statutory privileges, one that CANRA's drafters did not displace.[11] It bears noting, however, that the *Elijah W.* court's analysis focused specifically on defense counsel in the dependency context.[11] Whether its reasoning extends with equal force to an attorney who independently qualifies as a mandated reporter through a non-legal professional license—and who receives information triggering a reasonable suspicion of abuse outside any adjudicative proceeding—remains an open question on which no published California appellate decision has squarely ruled.

RPC 1.6(b) provides that an attorney "may" reveal confidential information to the extent the attorney reasonably believes the disclosure is necessary to prevent a criminal act that the attorney reasonably believes is likely to result in death or substantial bodily harm.[12] This is a discretionary safety valve—not a mandate.[12] Before making any such

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disclosure, Rule 1.6(c) requires the attorney to make a good-faith effort to persuade the client not to commit the criminal act and to inform the client of the attorney's ability or decision to reveal the information.[13] The rule further provides that an attorney who chooses not to reveal information under this exception does not, by that choice alone, violate the Rules of Professional Conduct.[7]

Separately, Evidence Code section 956.5 provides a statutory exception to the attorney-client privilege when the attorney reasonably believes disclosure is necessary to prevent a criminal act likely to result in death or substantial bodily harm—an exception that operates independently of the Rules of Professional Conduct and directly modifies the scope of the privilege itself.[14] Evidence Code section 956.5 modifies the duty of confidentiality under Business and Professions Code section 6068(e), creating an exception to what would otherwise be an inviolable obligation.[14] The result is that an attorney who learns of a credible, specific threat has both an ethical permission (Rule 1.6(b)) and a statutory privilege exception (Evidence Code § 956.5) to disclose—but is never required to do so. [12] The much-discussed *Tarasoff v. Regents of University of California* (1976) 17 Cal.3d 425 duty, which requires psychotherapists to take reasonable steps to protect identifiable third parties from serious threats of violence, has never been extended to attorneys by any California court.[14] This article does not speculate that such an extension is imminent. Rather, the tension for attorneys lies entirely within the discretionary framework: the attorney *may* speak, faces professional and relational consequences for doing so, and faces moral—though likely not legal—consequences for remaining silent.

The Impossible Triangle: A Hypothetical

Consider James Johnson, a sole-practitioner family law attorney in Sacramento.[15] James represents Rachel Langford in a custody dispute against her husband, Nathan. James is also a Licensed Clinical Social Worker (LCSW), a profession expressly enumerated as a mandated reporter category under Penal Code section 11165.7(a)(17). Although James does not currently maintain an active therapy caseload, he holds an active LCSW license and periodically provides clinical consultations through a community organization. His mandated reporter status attaches to his LCSW licensure and is not contingent on whether he is providing clinical services at any given time.

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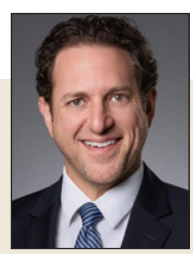
During a privileged attorney-client meeting, Rachel tells James two things: First, she tells James that that Nathan has been leaving their four-year-old daughter, Lily, alone with Nathan's brother, Mark, and that Lily has been exhibiting sexualized behavior and told Rachel that "Uncle Mark plays the secret touching game." Rachel begs James not to report this—she fears CPS involvement will cost her custody, and she wants to deploy the information strategically at trial. Second, Rachel becomes distraught and states: "If the court gives Nathan overnight custody again, I will kill Mark for what he did to Lily. I have a knife. I know his schedule. He is alone every Thursday night." The statement is specific, credible, and directed at an identifiable victim.

James now faces simultaneous obligations pulling in incompatible directions.

As a mandated reporter by virtue of his LCSW licensure, CANRA requires a report by James to child protective services or law enforcement. Unfortunately, the information came from James' client, during an attorney-client consultation, for the purpose of obtaining legal advice. It falls squarely within the attorney-client privilege under Evidence Code section 954 and the duty of confidentiality under Business and Professions Code section 6068(e)(1) and Rule 1.6(a). No published California appellate decision squarely resolves whether CANRA's criminal penalties attach to a dual-role attorney who receives information triggering a reasonable suspicion of abuse during the provision of legal



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services. James faces the prospect of criminal prosecution for silence and professional discipline for speech.

RPC 1.6(b) permits James to warn of but does not require him to warn of Rachel's threat against Mark but before he may warn, Rule 1.6(c) requires that James first make a good-faith effort to persuade Rachel not to carry out the act and inform her of his ability or decision to reveal the information.[14] If James warns Mark or contacts law enforcement, he is ethically protected under Rule 1.6(b) and the privilege exception of Evidence Code section 956.5.[12] If he remains silent and Mark is killed, James faces no disciplinary liability— the Rules of Professional Conduct confirm that non-disclosure is not a violation.[13] But there is a further complication the privilege analysis must confront: Rachel's communication is not merely a report of emotional distress—it is a statement of specific criminal intent, including the weapon, the target, and the schedule.[18] Under Evidence Code section 956, the attorney-client privilege does not apply when the client seeks or obtains legal services to enable or aid in the commission of a crime or fraud.[19] If Rachel's disclosure of her murder plan is construed as a communication in furtherance of a future crime, the privilege may not attach to that specific statement at all.[18] The burden of proving the crime-fraud exception lies with the party asserting it, and courts construe it narrowly.[20] But the factual predicate here—a specific, operational plan communicated to an attorney—is precisely the scenario the exception was designed to address.[21]

The Structural Problem

James's predicament is not a failure of professional judgment. It is a structural fault line in California law. The attorney-client privilege, as the court noted in *Edwards Wildman Palmer LLP v. Superior Court*, is strictly statutory, and California courts lack the authority to create implied exceptions to it, even in cases involving serious ethical or fiduciary concerns. This principle protects the integrity of the attorney-client relationship, but it also means that when an attorney's legal obligations as a mandated reporter collide with the privilege, there is no judicial mechanism to harmonize the conflict.[22] The Legislature has not spoken to the specific question of attorneys who hold independent mandated reporter status through separate professional licensure, and the courts have declined to fill the gap.

Practical Guidance

Attorneys who find themselves anywhere near this intersection should take several immediate steps. First, contact the State Bar Ethics Hotline for guidance specific to the facts at hand. Second, carefully evaluate whether the information triggering the reporting obligation was obtained in the attorney's legal capacity or in the separate professional capacity—because the answer may determine whether the privilege attaches.

This is not merely an academic distinction; an attorney who receives the same information during a clinical consultation rather than a legal consultation may have an entirely different set of obligations.[23] Third, before invoking the permissive disclosure exception of Rule 1.6(b), comply with Rule 1.6(c) by making a good-faith effort to persuade the client not to commit the threatened act and by informing the client of the attorney's ability or decision to disclose.[13] Fourth, actively pursue written informed consent from the client.[6] In many real-world scenarios, disclosure can be framed as advancing the client's interests, and obtaining consent eliminates the ethical conflict entirely.[6] Fifth, consider whether continued representation is tenable. Withdrawal may be necessary where the attorney's personal legal obligations are irreconcilable with the client's instructions, and Rule 1.16(b)(4) provides a mechanism for permissive withdrawal when the client insists on conduct the attorney finds repugnant. Sixth, consider seeking judicial guidance—a motion in the pending family court proceeding may allow the court to address the competing obligations directly. Finally, document every step of the analysis contemporaneously. If a court, a prosecutor, or the State Bar later scrutinizes the attorney's conduct, a well-reasoned contemporaneous memorandum reflecting the attorney's good-faith effort to navigate the conflict will be the single most important piece of evidence in the attorney's defense.

The uncomfortable truth is that California law has not resolved the tension at the heart of this triangle. Until the Legislature or the courts provide definitive guidance, attorneys in dual roles must navigate by analogy, ethics opinions, and the exercise of careful professional judgment—knowing that any path they choose may expose them to liability on another front.

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[1] Cal. Rules Prof. Conduct, rule 1.6
[2] Cal. Rules Prof. Conduct, rule 8.3
[3] Cal Pen Code § 11166
[4] Cal. Rules Prof. Conduct, rule 8.3
[5] *Id.*
[6] Cal. Rules Prof. Conduct, rule 1.6
[7] *Id.*
[8] *Elijah W.. v. Superior Ct.*, 216 Cal. App. 4th 140 (2013) | California Court of Appeal, Second District
[9] Cal Pen Code § 11165.7
[10] Cal Pen Code § 11166
[11] *Elijah W.. v. Superior Ct.*, 216 Cal. App. 4th 140 (2013) | California Court of Appeal, Second District
[12] Cal. Rules Prof. Conduct, rule 1.6
[13] *Id.*
[14] Cal Evid Code § 956.5
[15] *Edwards Wildman Palmer LLP v. Superior Ct.*, 231 Cal. App. 4th 1214 (2014) | California Court of Appeal, Second District
[16] Cal Pen Code § 11166
[17] Cal. Rules Prof. Conduct, rule 1.6
[18] *People v. Superior Ct.* (Bauman & Rose), 37 Cal. App. 4th 1757 (1995) | California Court of Appeal, Second District
[19] Cal Evid Code § 956
[20] *Geilim v. Superior Ct.*, 234 Cal. App. 3d 166 (1991) | California Court of Appeal, Second District
[21] *Id.*
[22] *Elijah W.. v. Superior Ct.*, 216 Cal. App. 4th 140 (2013) | California Court of Appeal, Second District
[23] *Id.*

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