The New York Times

When Law Prevents Righting a Wrong

By ADAM LIPTAK MAY 4, 2008

STAPLES HUGHES, a North Carolina lawyer, was on the witness stand and about to disclose a secret he believed would free an innocent man from prison. But the judge told Mr. Hughes to stop.

"If you testify," Judge Jack A. Thompson said at a hearing last year on the prisoner's request for a new trial, "I will be compelled to report you to the state bar. Do you understand that?"

But Mr. Hughes continued. Twenty-two years before, he said, a client, now dead, confessed that he had acted alone in committing a double murder for which another man was also serving life. After his own imprisoned client died, Mr. Hughes recalled last week, "it seemed to me at that point ethically permissible and morally imperative that I spill the beans."

Judge Thompson, of the Cumberland County Superior Court in Fayetteville, did not see it that way, and some experts in legal ethics agree with him. The obligation to keep a client's secrets is so important, they say, that it survives death and may not be violated even to cure a grave injustice — for example, the imprisonment for 26 years of another man, in Illinois, who was freed just last month.

A lawyer's broad duty to keep clients' confidences is the bedrock on which the justice system is built, they argue. If clients did not feel free to speak candidly, their lawyers could

not represent them effectively. And making exceptions risks eroding the trust between clients and their lawyers in future cases. Experts in legal ethics are quick to point out that the various players in the adversary system have assigned roles and that lawyers generally must tend to a limited one.

“Lawyers are not undercover informants,” said Stephen Gillers, who teaches legal ethics at New York University. Indeed, said Steven Lubet, who teaches legal ethics at Northwestern, few clients would confess to their lawyers if they knew the lawyers might some day choose to disclose that information.

The analysis does bend a bit, in two ways, in cases involving death.

Legal ethics rules vary from state to state, but many allow disclosure of client confidences to prevent certain death or substantial bodily harm. That means, several legal ethics experts said, that lawyers may break a client’s confidence to stop an execution, but not to free an innocent prisoner. Massachusetts seems to be alone in allowing lawyers to reveal secrets “to prevent the wrongful execution or incarceration of another.”

And there is debate over how a client’s death affects a lawyer’s obligation to keep the client’s secrets. Most lawyers and courts say the obligation lives on. But it can be hard to live with the consequences.

“I’ve never, ever, ever before violated a client’s confidence, never,” Mr. Hughes told Judge Thompson as he described what his client, Jerry Cashwell, had told him. “But Jerry’s dead. My disclosure can’t hurt him and I have to weigh that disclosure against the continuing harm” to the lifer, Lee Wayne Hunt.

Other lawyers have recently faced similar choices. In the Illinois case, Dale Coventry and W. Jameson Kunz waited 26 years to speak up about a client’s confession that freed Alton Logan, who had been serving a life sentence for murder. The lawyers said their client had given them permission to talk once he was dead. Last month, Mr. Logan was granted a new trial and freed on bond.

A Virginia lawyer, Leslie P. Smith, waited 10 years to disclose a secret that may save Daryl R. Atkins from execution, acting only after the Virginia State Bar gave him permission to speak.

Those lawyers have faced criticism from some laypeople for staying quiet so long. Mr. Hughes, by contrast, was rewarded with a disciplinary complaint for speaking up at all.

“Mr. Hughes has committed professional misconduct,” Judge Thompson wrote last year in a decision refusing to consider testimony that seemed to clear Mr. Hunt. The disciplinary complaint against Mr. Hughes was dismissed in January in a confidential decision. But the next day, the North Carolina Supreme Court refused to hear an appeal of Judge Thompson’s ruling, which had also accepted the prosecution’s argument that Mr. Hughes’ testimony was properly excluded because it was hearsay. Mr. Hughes is 56 and has seen a few things in a long career as a defense lawyer. He said there was not much reason to focus on his own travails.

“The only consequence for me is the bitterness and anger I feel over Mr. Hunt,” Mr. Hughes said. “I go home, have a glass of wine, work in the yard. And there’s a guy sitting in a prison camp two counties away, and my feeling is he’s going to be there for the rest of his life.”

Most experts in legal ethics agree that lawyers should be allowed to violate a living client’s confidences to save an innocent man from execution, but not to free someone serving a prison term, however long.

“I prefer to draw the line at the life-and-death situation,” said Monroe Freedman, who teaches legal ethics at Hofstra. “That situation is sufficiently rare that is doesn’t present a systemic threat. If that is extended to incarceration in general, it would end the sense of security clients have in speaking candidly with their lawyers.”

The questions get more complicated when the client has died.

Mr. Cashwell, Mr. Hughes’s client, committed suicide in 2002, more than a decade after he pleaded guilty to the 1984 killings of Roland and Lisa Matthews. Prosecutors had maintained that Mr. Hunt also participated in the killings, and Mr. Cashwell did nothing to refute them. But Mr. Hughes said that Mr. Cashwell confessed in private that he single-handedly killed the couple after an argument over whether a television was playing too loud. “Lee Wayne Hunt had nothing to do with it,” Mr. Hughes said.

Mr. Hunt has one novel avenue left — applying to the recently created North Carolina Innocence Inquiry Commission. That board makes recommendations to a three-judge panel that can free exonerated prisoners.

Both the United States Supreme Court and the North Carolina Supreme Court have said the lawyer-client privilege survives death, though they recognized that narrow exceptions might be possible. “Clients may be concerned about reputation, civil liability or possible harm to friends of family” if their secrets were disclosed after they died, Chief Justice William H. Rehnquist wrote for the majority in a 1998 Supreme Court decision.

Professor Freedman said that room remains for case-by-case analysis, and that Mr. Hughes was probably entitled to tell what he knows.

“If there is no threat of civil action against the client’s estate and there are no survivors who continue to believe in the client’s innocence,” Professor Freedman said, “there is no confidentiality obligation to begin with.”

Mr. Hughes said that sounded about right.

“What reputational interest did Jerry have?” he asked. “He had pleaded guilty to killing two people. He didn’t have an estate. His estate was a pair of shower shoes and two paperback books.”

A version of this article appears in print on , on Page WK4 of the New York edition with the headline: When Law Prevents Righting A Wrong.
