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The Reasonably Certain Ethics of a Minority Report

By James Juo, Esquire

The film *Minority Report* (2002), directed by Steven Spielberg and starring Tom Cruise, posits a legal system where a “Precrime” department preemptively arrests people for homicides before they happen, based on reports generated from a trio of precognitives, or precogs—people who literally see the future.

If a lawyer were to have precogs in his or her employ, what issues of legal ethics would be raised from having such foreknowledge? Would a lawyer in that position have an obligation to disclose a client’s confidence to prevent the death of another person?

The Model Rules of Professional Responsibility

Rule 1.6(b) of the Model Rules of Professional Responsibility, states that 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;...” Some states,

however, require that a lawyer “shall” reveal such information to prevent the imminent death of another person. See, e.g., Rule 4-1.6 of the Florida Rules of Professional Conduct.

The comments to Model Rule 1.6 state that 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. “The client can, of course, prevent such disclosure by refraining from the wrongful conduct.” *Id.* Some courts also have found that lawyers are permitted to disclose verbal threats

by a client against other persons in order to prevent death or bodily harm. See, e.g., *State v. Hansen*, 862 P.2d 117 (Wash. 1993) (finding no ethical violation by a lawyer telling a judge that a prospective client had threatened to kill the judge); *United States v. Alexander*, 287 F.3d 811 (9th Cir. 2002) (finding that a client's threats to kill several people were not protected attorney-client communications because they were not made in order to obtain legal advice, and would be subject to the crime-fraud exception).

But how would Model Rule 1.6(b) apply in a world where, instead of mere verbal threats by a client who may just be venting anger or blowing off steam, a lawyer is given a precog report predicting that his or her client will cause someone's death?

Minority Report—the Short Story

Minority Report was originally a 1956 short story by Philip K. Dick in which the protagonist John Anderton (who heads the Precrime program) receives a report that he will murder a man named Leopold Kaplan—a man who Anderton had never heard of. The prediction causes Anderton to flee, and to vow that he will not harm Kaplan. Anderton later learns of the existence of a “minority report” that predicted no murder but which was overridden by the contrary predictions of the other two precogs. Kaplan turns out to be a retired military general plotting to disband the police and its Precrime system, who will use the discovery of Anderton's minority report as an excuse to launch his plan to replace the police with the military. Anderton later shoots and kills Kaplan in order to end the plot.

As explained in the original story, “The three reports were consecutive.” Each of the three precogs had a different prediction because of Anderton's knowledge of the preceding prediction. The first precog predicted that Anderton kills Kaplan in order to stop Kaplan's original plan to initiate martial law; but not in the prediction of the second precog which factored in Anderton's knowledge of the first prediction and his decision to not fulfill it; yet Kaplan dies in the third's prediction because Anderton changed his mind again after discovering the second's minority report and Kaplan's plan to use it to destroy the Precrime system. Professor Robert Batey analogized this to an aspect of Werner Heisenberg's uncertainty principle: The measurement of an object can alter the object being measured. See Robert Batey, *Minority Report and the Law of Attempt*, 1 Ohio St. J. Crim. L. 689, 691 (2004).

The three reports were in effect “minority reports” based on the different “time-paths” created as Anderton learned of each prediction.

Minority Report—the Movie

The film version kept the basic notion of the precogs predicting Anderton will kill a man whose name he does not know, but changed other aspects of the story.

The precog predictions in the film are like flashes of dream imagery, rather than having hard explanatory details as the predictions in the original story. The images in the film version have to be deconstructed and deciphered for visual clues in order to determine where the crime will take place.

This is illustrated in an early scene in the film where the precogs foresee a cuckolded husband stabbing his wife and her lover to death after discovering them together. With the precog's “report” consisting of fleeting images associated with the names of the victim and the perpetrator, Anderton sifts through the precogs' visions to deduce the location of the future crime. A police team is then dispatched to prevent the killings and make an arrest.

The precogs in the film can predict only intentional killings. There is less advance notice for crimes of passion (such as the one that was to be committed by the jealous husband) than for planned murders. The crime is prevented from happening by imprisoning those predicted to commit the crime before it can actually occur.

The precogs later predict that Anderton will kill a man named Leo Crow, even though Anderton does not know anyone by that name. He flees, and comes to believe that there must be a minority report for him because he has no reason to kill a stranger. But there was no “minority report” for Anderton in the film—all three precogs saw Anderton's involvement in the killing.

Anderton later discovers evidence that Crow is a serial child abductor who was involved in the disappearance of Anderton's young son several years prior. Anderton raises his gun at Crow, apparently intending to kill Crow. But, after a lengthy pause, Anderton begins to give the *Miranda* warnings—showing that he intends to arrest Crow instead of murdering him.

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But Crow had been promised that his family would be provided for if he falsely confesses to having previously kidnapped and killed Anderton's child years earlier, and allows Anderton to kill him. Believing that his family will not be recompensed if he does not die, Crow then wrestles with Anderton, urging him to shoot. During the struggle, the gun is discharged and Crow is killed. Although Anderton did not intend to kill Crow, and thus lacked the mens rea for murder, Crow is killed nonetheless. The precog visions were technically correct (Crow dies) but incomplete (Crow caused his own death).

The film poses issues of free will, determinism, and the meaning of "attempt" in criminal law. One interpretation of the predictions in the film is that once enough precursor steps for a murder have been taken to cause a precog report to be generated, the inertia of events set in motion will lead to someone's death unless thwarted by an intervening event such as an arrest by those having knowledge of the pending prediction.

How Certain Is a Precog Report?

So, would employing precogs give a lawyer clear guidance as to whether he or she can ethically disclose confidential client information in order to prevent that client's predicted wrongdoing? See Model Rule 1.6(b). Or would it just give a false sense of certainty?

If a lawyer believes that his or her client is contemplating some wrongful conduct, would the lack of a precog report indicate that the conduct was not "reasonably certain" to cause harm or injury? *Assuming that the level of metaphysical certainty needed to generate a precog report is greater than being "reasonably certain" (e.g., a present and substantial threat), the absence of a report should not necessarily prevent a disclosure under Model Rule 1.6(b). The lack of a positive precog report, however, might suggest the negative—a metaphysically certainty that death would not result—but might not rule out substantial bodily harm.*

Conversely, would having a precog report be sufficient to establish that harm or injury was "reasonably certain"? *Consistent with the above assumption, the metaphysical certainty that a death will occur should be sufficient to establish a "reasonably certain" harm or injury.*

What if there is a minority report? Is the harm then no longer "reasonably certain" such that the lawyer would be ethically bound under Model Rule 1.6 to not make a disclosure? *Although a minority report may suggest a lack of metaphysical certainty, a*

present and substantial threat of harm or injury would still exist. One could also draw an analogy to a three-member judicial panel where a two-to-one majority opinion would be the controlling decision.

What if the lawyer asks the client about the death predicted in the precog report? *If the client responds that the victim is already dead, then Model Rule 1.6(b) would no longer apply because disclosure would not prevent a death. But if the client does not confirm the victim's death, then the lawyer might reasonably believe the victim could still be alive and that disclosure would be necessary to prevent an imminent death. McClure v. Thompson, 323 F.3d 1233, 1247 (9th Cir. 2003) (finding that a criminal defense lawyer who disclosed to authorities where the bodies of two murder victims were located, did not violate his ethical duty of confidentiality to the client who committed the murders because the client deliberately withheld the fate of the victims from the lawyer—"when [the lawyer] informed [his client] that he had an obligation to disclose the children's whereabouts if there were a chance they were alive, [the client] did not tell him they were dead.").*

And, if the lawyer has a precog report predicting the client will cause someone's death, then can the client still prevent disclosure by "refraining" from such wrongful conduct, as suggested in the Comments to Model Rule 1.6? *The existence of a precog report suggests that events already have been set in motion that will result in someone's death notwithstanding the client's decision to refrain from wrongful conduct, so a present and substantial threat may still persist unless outside actors with knowledge of the prediction intervene. In the movie, for example, Anderton decided to refrain from killing Crow, but Crow still died (although apparently not quite as originally foreseen). In the short story, however, Anderton changed his mind about refraining from killing Kaplan after he read the precog reports including the minority report. Thus, a client might not be able to prevent disclosure by the attorney in the face of a precog report.*

But, of course, we have no precogs to provide the predictions necessary for such fanciful inquiries. A lawyer in possession of confidential information that can prevent reasonably certain death or substantial bodily harm of another person must make do without metaphysical crutches when faced with this difficult situation. ♦

James Joo, Esquire is a partner at Fulwider Patton LLP in Los Angeles, California. His practice is focused on intellectual property including patents and trademarks. He is a member of the Honorable Benjamin Aranda III AIC.