NEW YORK STATE BAR ASSOCIATION
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Committee on Professional Ethics

NYSBA

Opinion #479 - 2/28/78 (33-74)

Topic: Client's confidences and secrets; past crimes disclosed to lawyer; plea bargaining.

Digest: Lawyer should not reveal client's confidences or secrets learned during the course of representation, even though they include the revelation by the client of his prior commission of serious undiscovered crimes; lawyer may not properly move corpse discovered by him as result of client's confidential disclosure; lawyer may with client's consent disclose confidences during plea bargaining.

Code: Canon 4, 7, 9;
EC 4-1, 4-5, 7-26, 7-27;
DR 1-102(A)(3), 4-101(B) and (C), 7-102, 7-102(A) and (B)(1).

PRELIMINARY STATEMENT

The following opinion, incorporating only minor editorial changes unrelated to substance, was prepared in 1974. Its publication was withheld until, as we have recently learned, all proceedings relating to the matter were concluded. Reported proceedings are discussed in People v. Belge, 83 Misc. 2d 186 (1975), aff'd 50 App. Div. 2d, 1088 (4th Dept. 1975), aff'd 41 N.Y. 2d 60 (1976).

The allegations on which our opinion was based may be summarized as follows:

A client charged with homicide tells his lawyer during the course of representation that he had previously killed two other persons in homicides totally unrelated to that for which he has been indicted. The lawyer makes a record of his client's conversation containing this incriminating information. At the lawyer's request, the client also informs him of the location of the corpses, which was indicated on a diagram.

Following such disclosure, the lawyer goes to this location, discovers the bodies and photographs them. Before doing so, he moves parts of a body which had been dismembered to bring it within range

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of his camera. No attempt is made to conceal either body in any way.

At a later date, the lawyer destroys the photographs, the record of his conversation with his client and the diagram of the location of the bodies. He does not disclose to the authorities or to anyone else any of the information so obtained. Thereafter, during discussions with the District Attorney concerning the crime charged in the indictment, the lawyer, in discussing the possibility of an appropriate plea disposition, suggests that he is in a position to provide information concerning two unsolved murders still under investigation by the authorities.

QUESTIONS

1. Under the circumstances alleged, would a lawyer be acting improperly in failing to disclose to the authorities his knowledge of the two prior murders and the location of the bodies?

2. Under the circumstances alleged, would a lawyer be acting improperly in withholding and destroying (a) the records of his conversation with the client, (b) the photographs taken by him of the bodies of the victims and (c) the diagram showing the physical location of the bodies?

3. Under the circumstances alleged, would a lawyer be acting improperly in moving parts of one of the bodies prior to taking photographs?

4. Under the circumstances alleged, would a lawyer be acting improperly, in his attempt to negotiate a plea disposition, in suggesting to the District Attorney that he had information concerning two unsolved murders?

OPINION

The questions raised are complex and difficult. Legal issues, upon which we do not pass, may be inextricably interwoven with ethical considerations. Illegal conduct involving moral turpitude is *per se* unethical. DR1-102(A)(3)

1. The lawyer's failure to disclose his knowledge of the two unrelated homicides was not improper, assuming, as the facts given us indicate, that the information came to the lawyer during the course of his employment. Furthermore, the requirements of Canon 4 that "a lawyer should preserve the confidences and secrets of a client," and of EC 4-1 and DR 4-101(B), would have been violated if such disclosure had been made.

EC 4-1 provides:

> "Both the fiduciary relationship existing between lawyer and client and the proper functioning of the legal system require the preservation by the lawyer of confidences and secrets of one who has employed or sought to employ him. A

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client must feel free to discuss whatever he wishes with his lawyer and a lawyer must be equally free to obtain information beyond that volunteered by his client. A lawyer should be fully informed of all the facts of the matter he is handling in order for his client to obtain the full advantage of our legal system. It is for the lawyer in the exercise of his independent professional judgment to separate the relevant and important from the irrelevant and unimportant. The observance of the ethical obligation of a lawyer to hold inviolate the confidences and secrets of his client not only facilitates the full development of facts essential to proper representation of the client but also encourages laymen to seek early legal assistance."

DR 4-101(B) provides:

"Except when permitted under DR 4-101(C), a lawyer shall not knowingly:

(1) Reveal a confidence or secret of his client.

(2) Use a confidence or secret of his client to the disadvantage of the client.

(3) Use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure."

Proper representation of a client calls for full disclosure by the client to his lawyer of all possibly relevant facts, even though such facts may reveal the client's commission of prior crimes. To encourage full disclosure, the client must be assured of confidentiality, a requirement embodied by law in the attorney-client privilege and broadly incorporated into Canon 4 of the Code and the EC's and DR's thereunder.

Frequently clients have a disposition to withhold information from lawyers. If the client suspects that his confidences will not be adequately protected or may in some way be used against him, he will be far more likely to withhold information which he believes may be to his detriment or which he does not want generally known. The client who withholds information from his lawyer runs a substantial risk of not being accorded his full legal rights. At the same time, the lawyer from whom such information is withheld may well be required to assert, in complete good faith and with no violation of EC 7-26 or DR 7-102(A), totally meritless or frivolous claims or defenses to which his client has no legal right. Thus, the interests served by the strict rule of confidentiality are far broader than merely those of the client, but include the interests of the public generally and of effective judicial administration.

Narrow and limited exceptions to the rule of confidentiality

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have been incorporated in DR 4-101(C) and DR 7-102(B)(1), the most important of which relate to information involving the intention of the client to commit a crime in the future or the perpetration of a fraud during the course of the lawyer's representation of the client, or where the client consents following full disclosure. The future crime exception recognizes both the possible preventability of the crime, as well as the total absence of any societal need to encourage criminal clients to make such disclosures to their lawyers. The fraud exception, under the latest American Bar Association clarifying amendments, applies only to confidences and secrets not falling within the attorney-client privilege (DR 7-102(B)(1), as amended effective March 1, 1974)*, and recognizes the paramount obligation of the lawyer to serve his clients "within the bounds of the law," as required by Canon 7. None of the specified narrow exceptions appear to apply to the situation here presented.

Virginia State Bar Association Opinion #135 (1964) states:

> "The sound public policy supporting the inviolability of the client's confidences is that there should be perfect freedom of consultation by a client with his attorney without any apprehension of disclosure by the attorney to the detriment of the client. The essence of the administration of justice under our system of criminal procedure requires full and free disclosures by the accused to his counsel who is preparing to defend him; otherwise, the accused would not dare to consult a skillful defender or would be obliged to tell him only half-truths. This in turn necessitates secrecy by the attorney in preserving the confidences disclosed."

In Baird v. Koerner, 279 F.2d 623, 629-30 (9th Cir. 1960), the court stated:

> "While it is the great purpose of the law to ascertain the truth, there is the countervailing necessity of insuring the right of every person to freely and fully confer and confide in one having knowledge of the law, and skilled in its practice, in order that the former may have adequate advice and a proper defense. This assistance can be made safely and readily available only when the client is free from the consequences of apprehension of disclosure by reason of the subsequent statements of the skilled lawyer."

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* The New York State Bar Association did not amend DR 7-102(B)(1) until November 6, 1976, when it adopted an amendment limiting the fraud exception to the normal rule of confidentiality, so that the exception would not apply to any "information protected as a confidence or secret." See N.Y. State 454 (1976).

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In State v. Kociolek, 23 N.J. 400, 415, 129 A. 2d 417, 425 (1957), the court held that compelling a lawyer to produce evidence obtained through confidential communications with a client, would be tantamount to forcing the client to testify against himself, and would effectively inhibit clients from confiding in attorneys, thus diluting the constitutional right to the assistance of counsel.

Moreover, if a lawyer were compelled to reveal information inculpating a client, the lawyer would, in effect become his client's adversary in violation of the mandate of EC 4-5 and DR 4-101(B).

Thus, the lawyer was under an injunction not to disclose to the authorities his knowledge of the two prior murders, and was duty-bound not to reveal to the authorities the location of the bodies. The lawyer's knowledge with respect to the location of the bodies was obtained solely from the client in confidence and in secret. Without the client's revelation in secret and in confidence, he would not have been in a position to assist the authorities in this regard. Thus, his personal knowledge is a link solidly welded to the chain of privileged communications and, without the client's express permission, must not be disclosed. The relationship between lawyer and client is in many respects like that between priest and penitent. Both lawyer and priest are bound by the bond of silence.

As already noted, the rule of confidentiality has limits in situations involving the intention of the client to commit a crime or the perpetration of a fraud in the course of representation. DR 4-101(C); DR 7-102(B)(1). See also 8 Wigmore, Evidence §§ 2295, 2298 (McNaughton Rev. 1961). Similar exceptions exist where a lawyer "knowingly ... take[s] possession of and secrete[s] the fruits [or] instrumentalities of a crime" with intent to prevent their use as evidence. In re Ryder, 381 F.2d 713, 714 (4th Cir. 1967), affirming 263 F. Supp. 360 (E.D. Va. 1967). Cf., State v. Olwell, 64 Wash. 2d 828, 394 P. 2d 681 (1964).

2. A lawyer's obligation to hold a client's confidences and secrets inviolate extends beyond information imparted orally and embraces written material from the client "coming into existence merely as a communication to the attorney." See 8 Wigmore, Evidence § 2307 (McNaughton Rev. 1961).

The memorialization by a lawyer of statements, information and documents received from a client, whether by shorthand or longhand notes, dictated and typed memoranda, speedwriting, electronic or magnetic recording, xerox, photostat, photograph or other form of recordation or reproduction does not alter the fact that the communication from the client is privileged. Such memorialization may be useful in facilitating the handling of a matter by the lawyer and is part of the lawyer's work product. When the lawyer's purpose is served, the work product may be destroyed without violation of ethical standards.

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Similarly, written material prepared by the client for his lawyer is a form of written communication and falls within the attorney-client privilege. Such documents are not instruments or fruits of the crime, which under certain circumstances the lawyer might be obliged to turn over to authorities. See, e.g., State v. Olwell, supra. Accordingly, neither the lawyer nor his client was obliged to reveal an incriminating diagram, whether prepared by the client for his lawyer or by the lawyer on the basis of information gained by him during the course of the client's representation, under EC 7-27 and DR 7-102. Provided it was not contrary to his client's wishes for him to do so, there was no ethical inhibition against its destruction by the lawyer.

3. This Committee does not pass upon the legality of alleged conduct, but if such conduct is illegal, it would of course be unethical, with rare exceptions of inadvertent violations involving no moral turpitude. Thus, any tampering, concealment or destruction of physical evidence in violation of N.Y. Penal Law § 215.40 would also be violative of the Code. Even in the absence of any violation of law and in the absence of an intention on the part of the lawyer to tamper, conceal or destroy evidence, there could be an appearance of impropriety in violation of Canon 9 in moving a part of one of the bodies. Such conduct should be avoided to prevent even the appearance that there might have been an intent to tamper with or suppress evidence.

4. There is no ethical impropriety in the lawyer's discussing with the District Attorney the possibility of an appropriate plea disposition, provided that the lawyer had the express consent of his client before making such disclosure. Plea bargaining is an accepted part of our criminal procedures today. A lawyer engaged or attempting to engage in it with his client's consent would be properly serving his client. Thus, the lawyer's suggestion to the District Attorney that he might be in a position to assist the authorities in resolving open cases during such a discussion would appear to involve no violation of proper professional standards. One can conceive of a variety of circumstances in which such a disclosure might be helpful to a client. For example, the disclosure of the client's commission of prior crimes of violence might very well establish the client's need for confinement for medical treatment rather than imprisonment.
