NEW YORK STATE BAR ASSOCIATION
ONE ELK STREET ALBANY NEW YORK 12207 TEL. (518) 463-3200

# Committee on Professional Ethics

NYSBA

Opinion #562 - 7/19/84 (38-83)

Topic: Intent of client to commit a crime; withdrawal from employment; confidences and secrets of clients.

Digest: Guidelines for lawyer whose client manifests an intent to commit a crime: lawyer may not knowingly further client's criminal purpose; should try to persuade client to abandon prospective criminal act; and has discretion to take appropriate action to prevent the crime. Withdrawal from representation may be permissive or mandatory.

Code: Canon 7;
EC 4-1, 4-2, 4-4, 5-1, 7-1, 7-5;
DR 1-102(A) (3) and (4), 2-110, (B) (2) and (C) (1) (b), 4-101(A), (B), (C) and (C) (3), 7-102 (A) (7).

## QUESTION

What general guidelines apply to a lawyer whose client has manifested an intent to commit a crime?

## OPINION

All of a lawyer's obligations to a client are subject to the basic requirement that they be exercised "within the bounds of the law." See especially Canon 7, EC 5-1 and 7-1, and DR 1-102(A)(3) and (4). Thus a lawyer can never properly "assist his client in conduct that the lawyer knows to be illegal." DR 7-102(A)(7). Nor may a lawyer ever "encourage or aid his client to commit criminal acts or counsel his client on how to violate the law." EC 7-5. "[W]here the lawyer becomes a motivating force by encouraging his client to commit illegal acts or undertakes to bring about a viola-

tion of law, he oversteps the bounds of propriety. . . . It is the encouragement of illegal conduct that is proscribed, not the mere giving of advice as to what conduct may be deemed illegal or a discussion of its consequences." N.Y. State 455 (1976). Section 4-3.7(a), of the 1979 ABA Defense Function Standards, recognizes a similar standard, providing that: "It is a lawyer's duty to advise a client to comply with the law, but the lawyer may advise concerning the meaning, scope, and validity of a law."

Where a client wants the affirmative assistance of a lawyer in the commission of a future crime, the lawyer must, of course, not knowingly further the client's criminal purpose. The lawyer should also make all reasonable efforts to persuade the client to abandon the prospective violation of law, including informing the client of the potentially serious consequences to the client that the contemplated criminal conduct is likely to cause. Where the lawyer's efforts appear fruitless, the lawyer would have grounds to withdraw from the employment. DR 2-110(C)(1)(b). In any event, the lawyer would be required to terminate the representation if "continued employment will result in violation of a Disciplinary Rule." DR 2-110(B)(2).

Where the client manifests a continuing intent to commit a future crime, the lawyer should also consider the difficult issue of whether to disclose the client's criminal purpose in an attempt to prevent the crime.

The basic rule requiring the preservation of client confidences and secrets is found in DR 4-101(A) and (B), which provide:

DR 4-101 Preservation of Confidences and Secrets of a Client.

(A) "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

(B) 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.

The ethical confidentiality obligation is far broader than the familiar attorney-client evidentiary privilege, and "exists without regard to the nature or source of information or the fact that others share the knowledge." EC 4-4. "It applies to substantially all information gained in the professional relationship." N.Y. State 528 (1981).

The preservation of client confidences and secrets has long been recognized as essential to "the fiduciary relationship existing between lawyer and client and the proper functioning of the legal system." EC 4-1. As pointed out in N.Y. State 479 (1978), "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." See also Drinker, Legal Ethics 131-33 (1953), which quotes, inter alia, W. H. Taft, Ethics in Service 31-32 (1915) and ABA 91 (1933). Without the rule of confidentiality, clients are less likely to seek timely legal assistance or to provide their lawyers with sufficiently complete information to permit the lawyer to render legal advice that often will keep clients from overstepping the bounds of law. Where communication is not open and full, lawyers are unlikely to have the opportunity to advise and influence clients to abandon threatened violations of law. The rule also plays an important role in preserving a client's constitutionally protected (a) right to effective representation by counsel in criminal cases and (b) privilege against self-incrimination. Cf. Lowery v. Cardwell, 575 F. 2d 727 (9th Cir. 1978); ABA Inf. 1314 (1975). Thus, information relating to past crimes is clearly privileged and, absent client consent, may not be revealed. See, e.g., N.Y. State 479 (1978); ABA Inf. 1470 (1981).

The obligation of confidentiality is, however, subject to a small number of narrowly limited, but well recognized, exceptions. EC 4-2; DR 4-101(C); e.g., Drinker, Legal Ethics 137-39 (1953); 8 Wigmore, Evidence §§ 2298-99 (McNaughton rev. 1961); Clark v. United States, 289 U.S. 1, 15 (1933). Cf. ABA 341 (1975), which recognizes that the duty to preserve client confidences and secrets "is so important that it should take precedence, in all but the most serious cases," over other ethical duties.

The exception here relevant is DR 4-101(C)(3), which provides:

(C) A lawyer may reveal:

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(3) The intention of his client to commit a crime and the information necessary to prevent the crime.

Under this exception, information that a client will commit a crime in the future is not a confidence or secret that a lawyer is bound to respect. The open and full communication that the general confidentiality rule is designed to foster loses much of its public interest character when the information conveyed relates to crimes that the client is going to commit.

The manifested purpose of DR 4-101(C)(3) is to give the lawyer the professional discretion to disclose information "necessary to prevent the [prospective] crime." The Code neither mandates nor forbids the disclosure of such information, recognizing that a wise decision necessarily depends upon a number of factors that will vary from case to case, and that the public interest would not be served by a rule prohibiting disclosure when a lawyer believes that he can and should attempt to prevent the crime. Every lawyer with such information is thus given the discretion to make a subjective decision, based on individual judgment and conscience, as to what action should be taken in such situations. A decision either to take or not to take preventive action involving disclosure would neither violate the ethical mandates of the Code nor subject the lawyer to professional discipline.

Before resorting to any disclosure of confidences the lawyer should, wherever practicable, try to discuss the matter with the client, in the hope of persuading the client to change his or her mind and abandon the prospective criminal act. If possible, the lawyer should encourage or assist the client to seek needed help, especially where the client's likely criminal purpose appears to be a product of drug or alcoholic addiction, or of an apparently compulsive mental or emotional problem. Cf. N.Y. State 486 (1978). Furthermore, the factual context in which the lawyer must act may well involve a substantial element of unpredictability. Thus the lawyer may not be in a position to know with reasonable certainty whether the client will in fact carry out the threatened crime. Should the lawyer conclude that some disclosure adverse to the client's interest appears necessary to prevent the threatened crime, the lawyer would be free, though not required, to make a limited disclosure that should be no greater than the lawyer believes necessary to prevent the crime.

There are numerous ethics authorities interpreting DR 4-101(C)(3) which point out that a lawyer has discretion to disclose information regarding a client's future crimes under any circumstances. E.g., ABA Inf. 83-1500 (1983); ABA Inf. 1470 (1981); ABA Inf. 1349 (1975); N.Y. State 486 (1978). Two ethics opinions have attempted to give lawyers significant guidance as to appropriate

factors to take into account in deciding whether or not to disclose the client's criminal purpose in an attempt to prevent the crime. Los Angeles Opinion 353, 51 L.A.B.J. 513,515-517 (1976), indexed in Maru's Digest 10546 (1980 Supp.); Mass. Opinion 79-1, 64 Mass. L. Rev. 91 (1979), indexed in Maru's Digest 11445 (1980 Supp.). The Los Angeles opinion concluded that the disclosure exception of DR 4-101 (C)(3) "is inapplicable if the attorney has any doubt 'of the existence of an imminent danger that a crime will be committed.'" This opinion further states that "information even as to an intended future crime should not be divulged unless the intended acts of the client are of a nature so serious that the benefits of their prevention outweigh the policies underlying the confidentiality principle."

Massachusetts Opinion 79-1, 64 Mass. L. Rev. 91 (1979), indexed in Maru's Digest 11445 (1980 Supp.), recognizes that DR 4-101(C)(3) "does not state how certain the lawyer must be of the client's intention before breaking the confidence nor does it give any guidance about how the lawyer is to exercise the discretion the rule gives." Using Section 3.7* of the 1971 ABA Defense Function Standards as "a helpful guide to interpreting DR 4-101(C)(3)," the opinion states:

> The more dangerous the crime, the more lawyers ought to consider very seriously breaking the confidence and, as a corollary, the less absolutely certain they need be of the client's intention to commit the crime. The more trivial the crime, the less responsibility lawyers should feel to reveal. * * * * [T]here are considerations that point both ways. While

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*Section 3.7 (renumbered § 4-3.7 in 1979) relates to "[a]dvice and service on anticipated unlawful conduct." Section 3.7(d) provided in pertinent part (with minor verbal variations not affecting substance) and Section 4-3.7(d) currently provides: "A lawyer may reveal the expressed intention of a client to commit a crime and the information necessary to prevent the crime; and the lawyer must do so if the contemplated crime is one which would seriously endanger the life or safety of any person or corrupt the processes of the courts and the lawyer believes such action on his or her part is necessary to prevent it." Mass. 79-1 further states that Section 3.7 was "designed only as [a] guide . . . and not [as a] disciplinary rule."

> there may be differences of opinion about what the lawyer should do, it seems quite clear that this is a case where under the rules as written, the lawyer may properly follow either course.

We believe that conscientious lawyers, faced with the decision of whether or not to exercise their discretionary power to make the limited disclosure "necessary to prevent" a threatened crime, should consider a number of factors. The basic considerations would be the seriousness of the potential injury (especially when the threatened crime involves death or grave bodily injury), its likelihood and imminence, and the apparent absence of any other feasible way in which such prospective harm can be prevented. The lawyer may also appropriately give weight to other factors of potential relevance, including the extent to which the client may have attempted to involve the lawyer in the prospective crime, the circumstances under which the lawyer acquired the information of the client's intent, and any possibly aggravating or extenuating factors. As already noted, however, disclosure under this exception should be limited to what the lawyer believes necessary to prevent the crime.

In the final analysis, conscientious lawyers should act in accordance with their own judgment and conscience, and do what they believe to be morally right. As we again emphasize, DR 4-101(C)(3) neither requires nor forbids the lawyer to take preventive action involving disclosure. Thus whatever decision the lawyer makes within the scope of the exception would neither violate the mandates of the Code nor subject the lawyer to professional discipline.*

## CONCURRING OPINION

Four members of the Committee concur with the guidelines set forth in the majority opinion and with the interpretation of the Code of Professional Responsibility implicit in them. We write separately to emphasize that a lawyer, as a member of society, has duties to that society, and that the continued legitimacy of the legal profession's role in society requires a frank recognition by

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*We have reviewed the authorities cited by the authors of the concurring opinion and in our view, at least some of those authorities fail to support the broad conclusions for which they are cited. It should in any event be noted that the authors of the concurring opinion and the majority of the Committee are in agreement that under the Code of Professional Responsibility and the law of this state, disclosure by a lawyer faced with the dilemma of which we write is discretionary.

the profession that other societal interests must be considered when the profession drafts its working rules. While the attorney-client privilege indeed serves important societal purposes, it must be emphasized that there will be occasions when society's other claims, especially those based on accepted notions of basic morality that underlie our civilization, cannot be ignored by the profession. See generally, People ex rel. Karlin v. Culkin, 248, N.Y. 465, 470-78, 162 N.E. 487, 489-91 (1928) (Cardozo, C.J.).

When a lawyer is determining whether to exercise his discretion under DR 4-101(C)(3) to reveal the intention of his client to commit a crime, it would be well for him to keep these duties in mind, as well as the guidelines set forth in the majority opinion. For despite the discretion afforded lawyers in the Code of Professional Responsibility, as well as in Canon 37 of the former Canons of Professional Ethics, courts, ethics committees and legal scholars have from time to time been so outraged by a lawyer's failure to disclose the intention of his client to commit a crime, that they have ignored the discretionary wording of the ethics rules and suggested that professional discipline might result from a failure to disclose a client's intent to commit a future crime. In re Callan, 66 N.J. 401, 331 A.2d 612, 615-16 (1975); ABA 314 (1965); ABA 155 and 156 (1936) (ultimately withdrawn in ABA 84-349 (1984)); Hoffman, On Learning of Corporate Client's Crime or Fraud -- the Lawyer's Dilemma, 33 Bus. Law. 1389, 1410-11 (1978); Callan & David, Professional Responsibility and the Duty of Confidentiality: Disclosure of Client Misconduct in an Adversary System, 29 Rutgers L. Rev. 332, 354 (1976); H. Drinker, Legal Ethics 137 (1953).

While we agree with the majority that these authorities do not interpret the Code of Professional Responsibility as it exists in New York, nevertheless they show that despite the provisions of the Code, the claims of society are not and should not be ignored. We call particular attention to Section 90(2) of the New York Judiciary Law, which gives courts power to impose discipline on lawyers who are "guilty of ... any conduct prejudicial to the administration of justice." We believe that any lawyer faced with a DR 4-101(C)(3) problem should be aware of these authorities.

Moreover, in some states the societal interest in disclosure of a client's future crimes has resulted in judicial creation of a tort duty in lawyers, Hawkins v. King County, 602 P.2d 361, 365 (Wash. Ct. App. 1979), or health professionals who have similar confidential relationships with their clients, MacDonald v. Clinger, 84 App. Div. 2d 482, 487, 446, N.Y.S. 2d 801, 805 (4th Dept. 1982); Lipari v. Sears Roebuck & Co., 497 F. Supp. 185, 188-194 (D. Neb. 1980); Bradley Center, Inc. v. Wessner, 161 Ga. App. 576, 287 S.E. 2d 716, 721 (1982); McIntosh v. Milano, 168 N.J. super. 466, 403, A.2d 500, 511-13 (1979); Tarasoff v. Regents, 17 Cal. 3d 425, 551, P.2d 334, 342-48, 131 Cal. Rptr. 14 (1976); Jane Doe v. Joan Roe, 93 Misc. 2d 201, 214, 400 N.Y.S. 2d 668, 677,

(Sup. Ct. N.Y. County 1977), to warn potential victims of at least certain kinds of crimes. No such duty for lawyers has been created in New York as far as we know, but again any lawyer faced with a DR 4-101(C)(3) problem should know of the existence of such cases.

Finally, while mere knowledge of a client's future crimes will not subject a lawyer to criminal liability, knowledge combined with other actions which might be construed as helping to cover up the criminal activity might result in criminal liability under an obstruction of justice or misprision theory. Cf., e.g., People v. Belge, 83 Misc. 2d 186, 372 N.Y.S. 2d 798, 803 (Onondaga County Ct.), aff'd, 50 App. Div. 2d 1088, 376 N.Y.S. 2d 771, 772 (4th Dept. 1975), aff'd, 41 N.Y. 2d 60, 390 N.Y.S. 2d 867, 359 N.E. 2d 377 (1976); 18 U.S.C. § 4.

The point we wish to make is that a lawyer faced with a decision whether to disclose his client's intent to cheat, rob, kill, or commit any other future crime should not lightly fail to disclose merely because the Code of Professional Responsibility allows him that option. Societal constraints on lawyers' behavior can be ignored only at the profession's peril.