NEW YORK STATE BAR ASSOCIATION
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Committee on Professional Ethics

Opinion #405 - 8/13/75 (37-75)

Topic: Disclosure of client's confidences.

Digest: Improper for a lawyer representing a client who is charged with the crime of larceny to divulge to the authorities confidential information obtained from the client as to the location of the stolen property.

Code: Canon 4
EC 4-1, 4-5
DR 4-101(B)(1),(2); 4-101 (C)(1),(3)

QUESTION

May an attorney who represents a client who is charged with the crimeof petit larceny and who confides to his attorney that he committed the crime and that he is concealing the stolen property reveal to the authorities the location of the stolen property?

OPINION

While it is not within the province of this Committee to determine questions of law, it should be noted, that an unlawful disclosure would be automatically unethical. CPLR 4503(a) prohibits an attorney from revealing "confidential communications made between the attorney and the client in the course of professional employment" without the client's consent.

The Code also obligates a lawyer to preserve the confidences and secrets of a client. 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."

The rationale underlying Canon 4 is reflected by EC 4-1 in the following language:

"Both the fiduciary relationship existing between lawyer and

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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 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."

EC 4-5 in pertinent part provides:

"A lawyer should not use information acquired in the course of the representation of a client to the disadvantage of the client...."

Athough there appears to be no statutory limitation on the operation of CPLR 4503(A), the courts in New York and in other states have consistently held, over the years, that any confidential communication made between lawyer and client in furtherance of an illegal act or fraud is not privileged. See,e.g., People v. Farmer, 194 N.Y. 251 (1909); People v. Peterson, 60 App. Div. 118, 69 N.Y. Supp 941 (1901); People v. Hunter, 139 Misc. 270, 249, N.Y. Supp. 66 (Ct. Gen. Sess. 1931).

The Code, in essence, reflects the exceptions that have been noted by the courts in DR 4-101(C) which provides:

"A lawyer may reveal:

"(1) Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them.

"(2) Confidences or secrets when permitted under Disciplinary Rules or required by law or court order.

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

"(4) Confidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct."

DR 4-101(C)(3) appears to be applicable to the confidential disclosure made by the client to his lawyer of the location of the

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stolen property since it reveals the commission of a crime that is continuing. It may be fairly assumed that such confidential disclosure implicitly expresses the client's intention to continue committing the crime. However, this provision is permissive and not mandatory. Accordingly, the answer to the question is that the attorney has no affirmative obligation to reveal to the authorities the location of the stolen property.

But the important question that arises is whether it would be a proper exercise of discretion for the lawyer to reveal to the authorities the location of the stolen property. Under the circumstances, it would be improper for the attorney to disclose this confidential information without the consent of his client.

Inherent in the disclosure of this confidence of the client is the serious risk of exposing the client as the possessor of the stolen property. In this connection, it should be noted that the act of concealment when committed by the thief, though a separate crime, is normally incident to the crime of larceny. It is this reality that has permitted the inference to be drawn from the unexplained recent and exclusive possession of stolen property that the possessor stole the property. Evidence of the concealment, therefore, would be evidence of the larceny.

Should the attorney reveal the location of the stolen property, he would, in effect, be assuming a role adverse to the interests of his client and repugnant to the confidential relationship between lawyer and client. In essence, he would be disclosing confidential information as to the crime of larceny that is charged against his client. In other words, he would be doing indirectly what he could not do directly as a matter of law, as well as ethical obligation.

There have been a numberof opinions issued by bar associations in response to questions that are analogous to the one presented. N.Y. County 462 (1958) related to a case in which a lawyer represented a client who fled before trial and for whose arrest a bench warrant was issued. Subsequently, the lawyer received a letter from the client who requested that the letter be kept confidential. The question asked by the attorney was whether he was obliged to reveal the whereabouts of his client. The opinion stated the following:

"1. He should notify the defendant that he cannot represent him so long as he remains a fugitive. He should further urge him to surrender to the proper authorities.

"2. He should not voluntarily seek out the public authorities and inform them of the address of the defendant.

"3. If a police officer, investigator, or prosecutor should approach the attorney for the address of the defendant, he should refrain from furnishing this information, which has been vouchsafed to him by a client who requested that it

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be kept confidential."

ABA 23 (1930) similarly held that a lawyer has no duty to reveal to the authorities the whereabouts of a fugitive client which he learned as the result of confidential information received from the relatives of the client. However, ABA 155 (1936)* held that a lawyer for a fugitive client with whom he had been communicating and who had refused to surrender, had the duty not only to withdraw from the case but also to reveal to the authorities the hiding place of his client. This opinion is distinguishable from ABA 23 (1930) on the facts. It appears that ABA 155 (1936)* involved a lawyer who apparently continued to communicate with his fugitive client even though the latter refused to return and surrender to the authorities. He was, in other words, implicitly encouraging his client not to return and surrender by not withdrawing from the case. No privilege attaches to a confidential communication in furtherance of the crime of bail jumping. However, should the attorney try to persuade the fugitive client to return and surrender and withdraw from the case upon the client's refusal to do so, the more consistent ruling appears to be that in N.Y.County 462 (1958) as previously noted. See N.Y.County 259 (1928); N.Y. City 312 (1932); ABA 287 (1953).

It should be noted that the questions to which ABA 155 (1936)* and N.Y.County 462 (1958) were responsive involved confidential information as to continuing crimes that were unrelated to the crimes charged against the clients. On the other hand, the question presented involves a confidential communication that relates, though indirectly as previously observed, to a past crime charged against the client.

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* ABA 155 (1936) has been withdrawn by ABA 84-349 (dated May 7, 1984).