Fordham Urban Law Journal

Volume 13 | Number 1 Article 2

1985

A Case for Increased Confidentiality

Abraham Abramovsky

A CASE FOR INCREASED CONFIDENTIALITY

*Abraham Abramovsky**

I. Introduction

The sixth amendment right to counsel[1] is a cornerstone of the American legal system.[2] This right entitles the defendant in a criminal case to competent and effective assistance of counsel.[3] To provide effective representation, an attorney must be fully informed of all relevant facts, including client indiscretions and crimes committed or contemplated by his client. Any restrictions on this free exchange between client and attorney substantially interfere with both effective representation and the privilege of confidentiality.[4]

---

* Professor of Law, Fordham University School of Law. B.A., City University of New York (Queens); J.D., State University of New York (Buffalo); LL.M., J.S.D., Columbia University.

1. U.S. CONST. amend. VI. The sixth amendment states: "In all criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of counsel for his defence [sic]." *Id.*

2. Brewer v. Williams, 430 U.S. 387, 409 (1977) (Marshall, J., concurring) (every American entitled to protective shield of a lawyer between himself and awesome power of State).

3. Strickland v. Washington, 104 S. Ct. 2052, 2064 (1984); McMann v. Richardson, 397 U.S. 759, 771 (1970); United States v. DeCoster, 487 F.2d 1197, 1201 (D.C. Cir. 1973).

4. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 4-1 (1981) [hereinafter cited as CODE]. Ethical Consideration (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 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.

Id. Lawyer conduct in the United States was originally governed by the Canons of Professional Ethics (Canons), which were adopted by the American Bar Association (ABA) in 1908. ABA Comm. on Professional Ethics and Grievances, Formal Ops. Foreword, at ix (1947). In 1969, a Model Code of Professional Responsibility (Code) was drafted and adopted by the ABA. ABA/BNA LAW. MANUAL ON PROF. CONDUCT (BNA) 1:301 (1984) [hereinafter cited as LAWYERS' MANUAL]. In August, 1983, the ABA House of Delegates adopted the Model Rules

Unless an attorney is well informed, it is impossible for him to meet his ethical obligation to represent clients zealously and effectively.[5] A trial attorney needs facts to draw up motion papers,

---

of Professional Conduct (Rules), which replaced the entire Code. LAWYERS' MANUAL, *supra*, at 1:101 and 1:301.

5. *See* CODE, *supra* note 4, DR 7-101, DR 7-102. Disciplinary Rule (DR) 7-101, entitled "Representing a Client Zealously," provides:

> (A) A lawyer shall not intentionally:
> (1) Fail to seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary Rules, except as provided by DR 7-101(B). A lawyer does not violate this Disciplinary Rule, however, by acceding to reasonable requests of opposing counsel which do not prejudice the rights of his client, by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, or by treating with courtesy and consideration all persons involved in the legal process.
> (2) Fail to carry out a contract of employment entered into with a client for professional services, but he may withdraw as permitted under DR 2-110, DR 5-102, and DR 5-105.
> (3) Prejudice or damage his client during the course of the professional relationship, except as required under DR 7-102(B).
> (B) In his representation of a client, a lawyer may:
> (1) Where permissible, exercise his professional judgment to waive or fail to assert a right or position of his client.
> (2) Refuse to aid or participate in conduct that he believes to be unlawful, even though there is some support for an argument that the conduct is legal.

CODE, *supra* note 4, DR 7-101.

DR 7-102, entitled "Representing a Client Within the Bounds of the Law," provides:

> (A) In his representation of a client, a lawyer shall not:
> (1) File a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another.
> (2) Knowingly advance a claim or defense that is unwarranted under existing law, except that he may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law.
> (3) Conceal or knowingly fail to disclose that which he is required by law to reveal.
> (4) Knowingly use perjured testimony or false evidence.
> (5) Knowingly make a false statement of law or fact.
> (6) Participate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false.
> (7) Counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent.
> (8) Knowingly engage in other illegal conduct or conduct contrary to a Disciplinary Rule.
> (B) A lawyer who receives information clearly establishing that:
> (1) His client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall

affidavits and memoranda. Such documents should not be the product of conjecture.[6] Often, necessary facts can be provided only by the client, and he must feel free to provide them. Similarly, to conduct a meaningful cross-examination the attorney must be fully apprised of the facts of the case. Finally, to develop an appropriate trial strategy and to determine which defenses to raise, which witnesses to call, or whether to have the defendant testify, the lawyer must be fully informed.[7]

The same is true outside of the criminal field. To properly evaluate a situation, an attorney advising a corporate client must know all relevant data. Both the common law and modern statutes emphasize that there must be a free flow of information between attorney and client.[8]

As explained in the Ethical Considerations of the Model Code of Professional Responsibility (Code):

> 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 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

---

reveal the fraud to the affected person or tribunal, except when the information is protected as a privileged communication.

(2) A person other than his client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal.

CODE, *supra* note 4, DR 7-102.

In People v. Belge, 83 Misc. 2d 186, 372 N.Y.S.2d 798, *aff'd,* 50 A.D.2d 1088, 376 N.Y.S.2d 771 (4th Dep't 1975), *aff'd,* 41 N.Y.2d 60, 359 N.E.2d 377, 390 N.Y.S.2d 867 (1976), the lower court stated: "The effectiveness of counsel is only as great as the confidentiality of its client-attorney relationship. If the lawyer cannot get all the facts about the case, he can only give his client half of a defense." 83 Misc. 2d at 189, 372 N.Y.S.2d at 801.

6. *E.g.,* N.Y. CRIM. PROC. LAW § 710.60(1) (McKinney 1971).

7. 1 ABA STANDARDS FOR CRIM. JUST. ch. 4, at 33 & 55 (2d ed. 1980) [hereinafter cited as ABA STANDARDS].

8. *See, e.g.,* ABA Comm. on Professional Ethics, Formal Op. 150 (1936) (common law origin of rule); *id.* Op. 247 (1942) (principle recognized in Ohio statute).

Professor Drinker, in his legal ethics treatise, stated:

> The rule . . . that confidential communications by or on behalf of a client may not be disclosed without his consent, has long been a rule of the common law, and is in many jurisdictions the subject of statute. As such, its application is usually a question of law rather than of ethics.

H. DRINKER, LEGAL ETHICS 132 (1953).

> 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.[9]

Thus, the Code implies that no consideration is more important than the duty of confidentiality. The Code's emphasis on confidentiality has been carried forward in the Model Rules of Professional Conduct (Rules).[10] In particular, Rule 1.6 reinforces the notion that client confidentiality should be a paramount consideration for the attorney, even if he becomes aware that his client is committing or intends to commit a crime.[11]

Dilemmas over client confidentiality may arise in a number of ways; for instance, when:

> (1) the client reveals his own past, ongoing, or intended future criminal conduct to his attorney;[12]
> (2) the client turns over fruits or instrumentalities of such a crime to his attorney;[13]
> (3) the client perjures himself;[14]
> (4) the client's criminal record becomes an issue at his sentencing hearing;[15] or

---

9. CODE, *supra* note 4, EC 4-1.
10. *See supra* note 4.
11. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1983) [hereinafter cited as RULES]. Rule 1.6, entitled "Confidentiality of Information," states:

> (a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).
> (b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:
> (1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm; or
> (2) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client.

Id.
12. *See infra* Section II.
13. *See infra* Section III.
14. *See infra* Section IV.
15. *See infra* Section V.

(5) the client becomes a fugitive from justice and his attorney is aware of his whereabouts.[16]

To illustrate the nature of the duty of confidentiality, this Article will set forth a series of hypotheticals.[17] The ethical dilemmas presented by each of these fact situations will then be analyzed. This Article posits that, in order to promote trust between attorneys and clients, the attorney should be permitted to guard his client's secrets in all circumstances and that the duty of confidentiality should remain paramount although the attorney conduct appropriate to the circumstances may differ. This Article concludes that the privilege of confidentiality should allow the attorney who comes into possession of fruits or instrumentalities of a crime to prevent their disclosure to prosecuting authorities, by submitting them instead to the administrative judge.[18]

II. Maintaining the Confidentiality of Client Criminal Conduct

A. A Hypothetical Case

> Defense counsel meets with a potential client who discloses that he has been in a serious fight with another person who is presently in a coma as a result of that confrontation. During the course of the consultation, the client reveals that he used a marble statuette to beat the victim about the head and face. The client further states that the police will never locate the statuette, since he has hidden it in a safety deposit box under a false name. The attorney then advises the client about the difference between assault and homicide and the available defenses. As the client is preparing to leave the office, he turns to the attorney and says that he is certain that he will never need the attorney's services and will never face criminal charges since only the victim knows who his assailant was, and the victim will never live to identify him to the authorities. After making this oblique threat, the client winks at the lawyer and departs.

This scenario presents the attorney with three ethical dilemmas. First, the client has admitted committing a past crime—the assault. Second, the client is committing the continuing crime of obstruction

---

16. *See infra* Section VI.

17. Unless otherwise noted, the hypothetical situations posited in this Article were devised by the author for illustrative purposes and such facts have not arisen in real cases to date.

18. *See infra* notes 71-110 and accompanying text.

of justice by concealing evidence of his crime. Third, the client has intimated that in the future he may commit the crime of murder to prevent the victim from identifying him to the authorities. Each of these confidences presents a different set of ethical considerations for the lawyer and will be discussed individually.

B. Past Crimes

Only in the rarest of circumstances is there a duty to disclose a client's past crimes.[19] On its face, Disciplinary Rule 4-101 does not permit an attorney to disclose a client's past crime unless the client has authorized him to do so,[20] he is required by law or court order to do so,[21] or he must use the information to defend himself against accusations of wrongful conduct.[22] This proscription against disclosure requires an attorney to maintain the secrecy of any facts relating to the crime, such as the location of a corpse.

In *People v. Belge*,[23] the court dismissed criminal charges against an attorney who failed to report to the authorities the location of a

---

19. Under DR 7-102, where the crime already committed involves fraud, the attorney is under a duty to rectify that fraud. *See* New Jersey State Bar Ass'n Advisory Comm. on Professional Ethics, Op. 520 (1983) (must reveal that client filed false financial information with court in divorce action); New York County Lawyers' Ass'n, Comm. on Professional Ethics, Question No. 574 (1969) (filing false VISA application must be reported while application still pending); New York State Bar Ass'n, Comm. on Professional Ethics, Op. 358 (1936) (must reveal filing of false bankruptcy petition); *see also infra* notes 111-79 and accompanying text. However, nearly every ethics opinion which has addressed this issue has held that an attorney has no ethical duty to disclose a client's past crimes. *See, e.g.*, ABA Comm. on Professional Ethics, Informal Op. 778 (1964) (misappropriation of funds); *id.* Op. 287 (1953) (perjury); *id.* Op. 268 (1945) (filing fraudulent divorce petition); State Bar of Arizona, Comm. on Rules of Professional Conduct, Op. 183A (1966) (bigamy); Los Angeles County Bar Ass'n, Comm. on Legal Ethics, Op. 386 (1980) (perjury); *id.* Op. 271 (1962) (judgment obtained against innocent party in paternity suit); *id.* Op. 267 (1960) (misappropriation of funds); New York State Bar Ass'n, Comm. on Professional Ethics, Op. 405 (37-75) (1975) (petit larceny); New York County Lawyers' Ass'n, Comm. on Professional Ethics, Question No. 560 (1968) (welfare fraud); *cf.* Maryland State Bar Ass'n Comm. on Ethics, Op. 84-43 (1983) (attorney must disclose fact that client committed perjury during deposition).

20. CODE, *supra* note 4, DR 4-101(C)(1), which provides: "A lawyer may reveal: [c]onfidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them."

21. *Id.* DR 4-101(C)(2) ("A lawyer may reveal: (2) [c]onfidences or secrets when permitted under Disciplinary Rules or required by law or court order.").

22. *Id.* DR 4-101(C)(4) ("A lawyer may reveal: (4) [c]onfidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct.").

23. 83 Misc. 2d 186, 372 N.Y.S.2d 798 (County Court, Onondaga Co. 1974), *aff'd*, 50 A.D.2d 1088, 376 N.Y.S.2d 771 (4th Dep't 1975), *aff'd*, 41 N.Y.2d 60, 359 N.E.2d 370, 390 N.Y.S.2d 867 (1976).

corpse after his client had informed him of its whereabouts, and he had visited the area and confirmed his client's account.[24] The court concluded that, under the fifth amendment,[25] Belge was constitutionally exempt from any statutory duty to report the location of the body.[26]

C. Continuing Crimes

In the above hypothetical,[27] it is important to note that although the client informed the attorney that he used the statuette to commit a crime, he did not deliver the instrumentality of the crime to the attorney. He has merely told the attorney of its existence and described its hiding place.[28] Thus, this communication ostensibly is protected as a client confidence.[29] However, there is also evidence of the continuing crime of obstruction of justice since the client is concealing evidence of a past crime.[30] When a continuing crime is involved, the communication no longer is classified as a confidence, and the protections of the attorney-client privilege do not apply.[31] However, an attorney is ethically obligated to maintain client secrets as well as client confidences.[32] It appears that information about the statuette would qualify as a client secret within the meaning of the Code.[33] Thus, the duty to keep the client's secrets may apply to this hybrid of past, present and future crimes.

Although there is a split among authorities, the prevalent and

---

24. 83 Misc. 2d at 187, 372 N.Y.S.2d at 799.

25. U.S. CONST. amend. V. The fifth amendment states: "[n]o person shall be . . . compelled in any criminal case to be a witness against himself . . . ."

26. *Belge,* 83 Misc. 2d at 190, 372 N.Y.S.2d at 803.

27. *See supra* Section II.A.

28. See *infra* notes 71-110 for a discussion of issues that arise when a client delivers fruits or instrumentalities of a crime to his attorney.

29. CODE, *supra* note 4, DR 4-101(A), which distinguishes between confidences and secrets as follows: " '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." *Id.* Generally, the attorney-client privilege is limited to confidential communications between the lawyer and the client made for the purpose of securing legal advice, not for the purpose of committing a crime. *In re* Grand Jury Proceedings, 689 F.2d 1351, 1352 (11th Cir. 1982). For a fuller discussion of the distinction between confidences and secrets in the context of delivery of the instrumentality of a crime, see *infra* notes 74-76 and accompanying text.

30. *See infra* notes 86-87 and accompanying text.

31. *See In re* Grand Jury Proceedings, 689 F.2d at 1352.

32. CODE, *supra* note 4, DR 4-101.

33. *See id.* The disclosure of such information would probably be embarrassing or detrimental to the client.

better view is that an attorney *may not* reveal this continuing crime to the authorities.[34] The primary rationale for this conclusion is that disclosure of the continuing crime would necessitate disclosure of the past crime, which is prohibited by the Code.[35]

An unpublished decision of the Supreme Judicial Court of Massachusetts illustrates the need for such a policy.[36] A client, Kenneth Krohn, retained James Pool as counsel to defend him on kidnapping charges.[37] Krohn informed Pool of the existence and location of two safe deposit boxes which had been rented under false names. One of the boxes contained cash, a handgun and false identification. The keys to the boxes, however, were in the possession of the United States Attorney.

Unbeknownst to Krohn, Pool approached the United States Attorney and offered to disclose the whereabouts of the safe deposit boxes and the false name under which they were rented.[38] Pool and the United States Attorney agreed that Pool could remove any money from the boxes, but that if the prosecution sought a warrant to search the boxes the source of information about the boxes would not be revealed.[39] After Pool had removed $48,000 from the boxes, the United States Attorney obtained a warrant and inventoried the boxes.[40] Although Krohn was informed that the United States Attorney had located the boxes, he was not told of his attorney's role in the affair for two years.[41]

In 1984, eleven years after he was retained by Krohn, Pool was disbarred for his violation of the Code of Ethics.[42] When interviewed,

---

34. *See* Callan & David, *Professional Responsibility and the Duty of Confidentiality: Disclosure of Client Misconduct In An Adversary System*, 29 RUTGERS L. REV. 332, 362-65 (1976) [hereinafter cited as Callan & David]. Examples of the majority view include New York State Bar Ass'n Comm. on Professional Ethics, Op. 405 (1975), discussed *infra* at note 44, and Los Angeles County Bar Ass'n, Comm. on Legal Ethics, Op. 267 (1960). Also see *infra* notes 189-230 and accompanying text, which discuss fugitive clients and whether there is a duty to keep their whereabouts confidential.

35. *See supra* notes 9-11 and accompanying text; Callan & David, *supra* note 34, at 363.

36. *In re* James M. Pool, No. 83-37BD (Mass. Jan. 17, 1984).

37. Kennedy, *Violation of Client Confidence Leads to Disbarment*, Nat'l L.J., Feb. 13, 1984, at 5, col. 1.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

Krohn stated that there was no proof that the contents of the boxes had enhanced the government's case against him, but clearly the items had "whetted the government's appetite."[43] The lesson of the *Krohn* case is that an attorney may not reveal his client's ongoing criminal activity.[44]

This conclusion is mandated by the fifth amendment.[45] When the client imparts incriminating information in confidence to his attorney, the attorney should not be permitted to violate that trust by incriminating the client. A contrary rule would vitiate the defendant's fifth amendment rights.[46]

Furthermore, as Professor Monroe Freedman has asserted, a lawyer who possesses all of the relevant facts, including his client's intention to continue committing an ongoing crime, is in an optimum position to counsel the client to cease this course of action.[47] Both the individual and society are best served when the attorney dissuades the client from continuing criminal activity.

D. Future Crimes

The greatest moral, legal and ethical dilemma for an attorney is posed when the client intimates or even declares to the attorney that

---

43. *Id.*

44. *Id.* A similar result was reached by the New York State Bar Association Committee on Professional Ethics. In a case where a client confided to his attorney that he was concealing the fruits of a larceny, the committee concluded that it would be improper to disclose this information except with the client's consent. N.Y. State Bar Ass'n, Comm. on Professional Ethics, Op. 405 (1975); *accord* Los Angeles County Bar Ass'n, Comm. on Legal Ethics, Op. 267 (1960).

45. U.S. CONST. amend. V. For the text of the fifth amendment, see *supra* note 25.

46. It is well established that an attorney has an affirmative duty to inform his client of his rights under the fifth amendment. Maness v. Meyers, 419 U.S. 449 (1975). Moreover, an attorney may not be held in contempt of court for advising his client to exercise his fifth amendment rights. *Id.* at 465-67.

In order to so advise his client, the attorney must possess all the relevant information, including the incriminating facts. ABA STANDARDS, *supra* note 7, ch. 4 at 33, 55.

47. *See Panel Discussion,* 35 U. MIAMI L. REV. 639 (1981). Professor Freedman stated:

> Bear in mind that one of the reasons that I and the Supreme Court and others [sic] have emphasized the lawyer-client privilege of confidentiality is that it puts the lawyer in a position to dissuade the client from an improper course of conduct. I can tell you from a good deal of experience and from what I have heard said by other lawyers that not only do lawyers give a lot of good advice, but it is very often taken.

Id. at 641.

he will commit a crime in the future.[48] In the above hypothetical,[49] the client's suggestion that he will murder the only potential adverse witness is an extreme example, yet it brings to light all of the relevant considerations.

Since the intended crime is murder, disclosure is permitted though not mandated under both the Code and the Rules.[50] Thus, in the hypothetical, the attorney has complete discretion to remain silent or to warn either the intended victim or the authorities. However, neither the Code nor the Rules provide a standard to govern the exercise of this discretion.[51] One suggested standard considers whether "the integrity of the rule of law [is] at stake."[52] Another standard determines whether the privilege of confidentiality outweighs the court's need to search for the truth.[53] Although commentators may disagree over what the standard should be, it is clear that a standard should be set.

When a client tells his attorney that he intends to commit a crime,

---

48. *See generally* Hazard, *How Far May a Lawyer Go In Assisting a Client In Legally Wrongful Conduct?*, 35 U. MIAMI L. REV. 669 (1981); Martin, *The Razor's Edge of Conflicting Duties: The Attorney Who Learns of Evidence Implicating His Client Has Some Difficult Choices to Make*, 4 CALIF. LAW. 15 (1984); Comment, *Proposed Model Rule 1.6: Its Effect On a Lawyer's Moral and Ethical Decisions With Regard to Attorney-Client Confidentiality*, 35 BAYLOR L. REV. 561 (1983); Comment, *Confidentiality and the Lawyer's Conflicting Duty*, 27 How. L.J. 329 (1984); *Moral Lepers? Hired Guns? The Fine Line Between Defending Rights and Concealing Wrongs*, 12 STUDENT LAW. 6 (1983).

49. *See supra* Section II.A.

50. *See* CODE, *supra* note 4, DR 4-101(C)(3), which provides: "[a] lawyer may reveal . . . [t]he intention of his client to commit a crime and the information necessary to prevent the crime," and Rule 1.6 (b)(1) of the Rules, which is quoted in full *supra* at note 11.

51. *See* Callan & David, *supra* note 34, at 355.

52. *In re* Callan, 66 N.J. 401, 407, 331 A.2d 612, 615-16 (1975). *Callan* involved attorneys who failed to inform the court that their client was making unauthorized disbursements from a rent strike fund.

Other recommended standards include whether the crime would "corrupt the process of the courts," ABA STANDARDS, *supra* note 7, Standard 4-3.7(d) (1979), and whether the crime is so "serious" that the benefits from its prevention "outweigh the important policy of protecting client secrets." Los Angeles County Bar Ass'n, Comm. on Legal Ethics, Op. 264 (1959).

53. *In re* Kozlov, 79 N.J. 232, 241, 398 A.2d 882, 886 (1979). In *Kozlov*, the client revealed to his attorney, Kozlov, information on misconduct of a juror in a criminal case, on the condition that Kozlov not reveal the source of the information. *Id.* at 235, 398 A.2d at 883. Kozlov sought to exercise the attorney-client privilege to keep the identity of his client a secret. *Id.* at 238, 398 A.2d at 884. The Supreme Court of New Jersey set aside the lower court's contempt judgment against Kozlov, holding that the privilege of confidentiality outweighed the court's interest in searching for the truth. *Id.* at 244, 398 A.2d at 888. The court's decision was strongly influenced by its belief that the information could be secured through other means that would be "less intrusive" on the attorney-client privilege. *Id.*

it may be difficult for the attorney to determine if the client is bragging or lying. Accurate prediction is a critical factor. A lawyer would substantially compromise his client's interests by incriminating him without at least a reasonable belief, let alone a moral certainty, that the client truly intends to carry out his threat.[54] To date, few cases have addressed a lawyer's duty in this situation.[55] However, two courts have imposed a duty upon a psychiatrist or psychologist to warn a third party of threats to his safety made by a patient.[56]

In *Tarasoff v. Regents of the University of California*,[57] the Supreme Court of California held that a therapist who had determined that his patient presented a serious danger of violence to a third person, "incur[red] an obligation to use reasonable care to protect the intended victim against such danger."[58] The Appellate Division of the New Jersey Superior Court followed the *Tarasoff* holding in *McIntosh v. Milano*.[59] Both courts rejected the argument that confidentiality is of the essence and should not be breached where a therapist is unable to predict with certainty a patient's dangerousness.[60] The decisions in *Tarasoff* and *McIntosh* have provoked much controversy.[61]

Even if one accepts the proposition that a therapist can reasonably predict a patient's behavior,[62] it is clear that a lawyer cannot do so. Lawyers are not trained to predict or analyze future human behavior and generally do not spend a sufficient amount of time

---

54. *See* LAWYER'S MANUAL, *supra* note 4, at 1:115 (citing Rule 1.6 comment).

55. *See, e.g.*, Hawkins v. King County, 602 P.2d 361 (Wash. Ct. App. 1979) (no duty for attorney to warn victim of planned assault by client).

56. *See* Tarasoff v. Regents of the University of California, 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976); McIntosh v. Milano, 168 N.J. Super. 466, 403 A.2d 500 (1979).

57. 17 Cal. 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14.

58. *Id.* at 431, 551 P.2d at 340, 131 Cal. Rptr. at 20.

59. 168 N.J. Super. at 489, 403 A.2d at 511-12.

The facts in *McIntosh* are similar to those in *Tarasoff*. The defendant psychiatrist, Milano, failed to warn Kimberly McIntosh that his patient had exhibited a threatening attitude towards her, although not marked by any express threats of violence directed against her. *Id.* at 473, 403 A.2d at 503-04. McIntosh subsequently was murdered by the patient, and her mother brought the suit against Milano for failing to warn Kimberly. *Id.* at 470, 403 A.2d at 502.

60. *See id.* at 490, 403 A.2d at 512; 17 Cal. 3d at 438, 551 P.2d at 347, 131 Cal. Rptr. at 27.

61. *See, e.g.*, Cocozza and Steadman, *The Failure of Psychiatric Prediction of Dangerousness: Clear and Convincing Evidence*, 29 RUTGERS L. REV. 1084 (1976); Stone, *The* Tarasoff *Decision: Suing Psychotherapists to Safeguard Society*, 90 HARV. L. REV. 358 (1976). For an argument that psychiatrists are unable to reliably predict dangerousness, see Diamond, *The Psychiatric Prediction of Dangerousness*, 123 U. PA. L. REV. 439 (1975) [hereinafter cited as Diamond].

62. *But see* Diamond, *supra* note 61, at 452 (arguing that psychiatrists cannot predict patients' behavior).

with their clients to draw reliable conclusions in this regard.[63] That is not to say that a lawyer should not act upon information he possesses which leads him to conclude with reasonable certainty that his client intends to kill.[64] In extreme situations, it is the lawyer's moral and ethical duty to prevent the intended crime.[65] Under normal circumstances, however, it is not the function of the lawyer to report intended crimes of the client.[66] Rather, client confidentiality should be paramount.

When a lawyer has knowledge of a potential crime intermediate steps should be pursued. First, the lawyer should attempt to dissuade the client from committing the crime.[67] If his advice is rejected, the lawyer should attempt to ascertain a means of warning the intended victim which will have the least detrimental effect on his client.[68] In these situations, the lawyer must weigh the client's fifth and sixth amendment rights against the likelihood that the crime will be committed.[69] Concomitantly, the lawyer must consider his ethical duties, as stated in the Code and Rules.[70] While murder is an extreme example, the same considerations apply to any violent criminal activity planned by the client and disclosed to the attorney. In the absence of reasonable certainty that death or serious physical injury will result, the scale must tip toward confidentiality.

III. Fruits and Instrumentalities

A new client arrives at an attorney's office carrying a gun and informs the attorney that the gun has just been involved in an

---

63. *See id.*

64. *See* Hodes, *The Code of Professional Responsibility, The Kutak Rules and the Trial Lawyers' Code: Surprisingly, Three Peas in a Pod*, 35 U. MIAMI L. REV. 739, 754-58 (1981) [hereinafter cited as Hodes].

65. As an example of such an extreme situation, Hodes posits a case in which the client tells his attorney that he will kill a named person on a date certain. *Id.* at 755.

66. Los Angeles County Bar Ass'n, Comm. on Legal Ethics, Op. 386 (1980) (no duty to disclose perjury of former client in continuing case); *see also supra* notes 50-53 and accompanying text.

67. *See supra* note 47 and accompanying text.

68. *See* CODE, *supra* note 4, EC 4-5 (lawyer should not use information obtained in course of representation of client to disadvantage of client); *see also supra* note 54 and accompanying text. *See generally* Bender, *Incriminating Evidence: What to do With a Hot Potato*, 11 COLO. LAWYER 881, 882 [hereinafter cited as Bender].

69. *See* Callan & David, *supra* note 34, at 355-56; *see also supra* notes 45-53 and accompanying text. This conclusion is based on an analogy to *Tarasoff* and *McIntosh*, which require therapists weighing the possibility of disclosure to determine whether a serious threat of violence to a third person is present.

70. *See supra* note 50 and accompanying text.

incident. The attorney believes both that the client has engaged in criminal activity and that the gun is unregistered. What if any, are the lawyer's ethical or legal obligations with regard to the gun? Several important issues arise. First, is the weapon entitled to protection under the Code's definition of a secret or confidence?[71] Second, must the lawyer deliver the weapon to the authorities?[72] Third, what is the proper manner in which to surrender an instrumentality while complying with the duty of confidentiality?[73]

Under the Code, an instrumentality does not qualify as a confidence unless it is protected by the evidentiary privilege.[74] Ostensibly, however, it may be argued that an instrumentality such as a gun fits within the strict definition of a secret, because it constitutes detrimental and embarrassing information obtained from the client during the professional relationship.[75] Nevertheless, the cases generally hold that an attorney may not retain possession of tangible evidence of a crime.[76]

The seminal case in this area is *In re Ryder*.[77] Ryder was an attorney who represented a criminal defendant who had robbed a bank.[78] The client authorized Ryder to remove the contents of his safe deposit box, which was found to contain the proceeds of the robbery and a sawed-off shotgun.[79] Ryder secreted these items in his own safe deposit box.[80] As a result, Ryder was suspended from

---

71. The Code provision which defines the terms "confidence" and "secret," DR 4-101(A), is quoted *supra* at note 29. *See also infra* notes 74-75 and accompanying text.

72. *See infra* notes 76-104 and accompanying text.

73. *See infra* notes 105-06 and accompanying text.

74. *See supra* note 29.

75. The gun is gained in the professional relationship and the client will have requested that its existence be held secret. *See* CODE, *supra* note 4, DR 4-101(A).

76. *See, e.g., In re* Ryder, 263 F. Supp. 360 (E.D. Va.), *aff'd*, 381 F.2d 713 (4th Cir. 1967) (gun and proceeds of robbery); Morrell v. State, 575 P.2d 1200 (Alaska 1978) (handwritten plans to carry out kidnapping scheme); People v. Lee, 3 Cal. App. 3d 514, 527, 83 Cal. Rptr. 715, 723 (1970) (blood-stained shoes); *See generally* Note, *Fruits of the Attorney-Client Privilege: Incriminating Evidence and Conflicting Duties*, 3 DUQ. U. L. REV. 239 (1965); Note, *Ethics, Law and Loyalty: The Attorney's Duty to Turn Over Incriminating Physical Evidence*, 32 STAN. L. REV. 977 (1980) [hereinafter cited as *Attorney's Duty*]; Comment, *The Right of a Criminal Defense Attorney to Withhold Physical Evidence Received From His Client*, 38 U. CHI. L. REV. 211 (1970); Comment, *The Problem of An Attorney in Possession of Evidence Incriminating His Client: The Need for a Predictable Standard*, 47 U. CIN. L. REV. 431 (1978); Note, *Legal Ethics and the Destruction of Evidence*, 88 YALE L.J. 1665 (1979).

77. 263 F. Supp. at 360.

78. *Id.* at 362.

79. *Id.* at 363.

80. *Id.*

the practice of law.[81] The court rejected the argument that the items were protected by lawyer-client confidentiality.[82] The court also rejected a fifth amendment argument by distinguishing items which are subject to seizure while in the defendant's possession from items which are immune from seizure while in the defendant's possession.[83] Since the money and the gun could be seized from the defendant, they were not protected from disclosure while held by the defendant's attorney.[84]

Situations may arise in which an attorney receives incriminating evidence from a third party such as a relative of a criminal defendant.[85] In these cases, the doctrine of confidentiality generally is inapplicable.[86] Moreover, where physical evidence is concerned, the legal proscriptions against concealing evidence and obstructing justice outweigh any ethical duty to maintain a confidence.[87] It should be recalled, however, that while the fifth amendment is inapplicable,[88] the sixth amendment right to effective assistance of counsel may be implicated when a third party gives incriminating evidence to the attorney in trust for a criminal defendant.[89]

It is interesting to note certain caveats in the law relating to fruits and instrumentalities of a crime. In *State v. Olwell*,[90] the Supreme Court of Washington affirmed the lower court's holding that an attorney who refused to testify at an inquest regarding incriminating physical evidence that he received from a client was not in contempt

---

81. *Id.* at 370. The case predates the Code. Therefore, it was decided under the Canons of Professional Ethics. *See supra* note 4. The Court concluded that Ryder violated the law by concealing evidence in violation of Canons 15 and 32. 263 F. Supp. at 369.

82. 263 F. Supp. at 365.

83. *Id.* at 365-66. In *Ryder*, the money and the gun were subject to seizure while in the defendant's possession. The court thus distinguished two taxpayer cases, United States v. Judson, 322 F.2d 460 (9th Cir. 1963) and Schwimmer v. United States, 232 F.2d 855 (8th Cir.), *cert. denied*, 352 U.S. 833 (1956), on the grounds that the papers sought from the attorney there would not be subject to a subpoena duces tecum if in the taxpayer's possession. 263 F. Supp. at 365-66.

84. 263 F. Supp. at 366-67.

85. *See, e.g.*, Morrell v. State, 575 P.2d 1200 (Alaska 1978) (evidence received from defendant's house guest); People v. Lee, 3 Cal. App. 3d 514, 83 Cal. Rptr. 715 (1970) (evidence received from defendant's wife).

86. *Morrell*, 575 P.2d at 1210-11; *Lee*, 3 Cal. App. 3d at 527, 83 Cal. Rptr. at 723.

87. *See Ryder*, 263 F. Supp. at 369.

88. *See supra* note 83 and accompanying text.

89. *See Morrell*, 575 P.2d at 1211 n.17. For a discussion of the sixth amendment as it relates to the ethical obligations of attorneys, see *supra* notes 1-8 and accompanying text. The sixth amendment is quoted *supra* at note 1.

90. 64 Wash.2d 828, 394 P.2d 681 (1964).

of court.[91] The court stated that the attorney should, on his own motion, deliver the suspect instrumentality to the prosecutor.[92] However, to preserve attorney-client confidentiality, the court concluded that the jury should not be informed of the source of the instrumentality.[93]

Another caveat in this line of cases emerges from *Anderson v. State*.[94] In *Anderson*, the attorney who came into possession of goods stolen by his client turned them over to the police.[95] Both the attorney and his receptionist were subpoenaed to testify.[96] The Florida appellate court held that neither the attorney nor his receptionist could be compelled to divulge the source of the stolen goods.[97] Moreover, the prosecutor was barred from introducing evidence that the defense attorney's office delivered the stolen property.[98] The court noted that ordinarily the attorney-client privilege does not extend to withholding the identity of a client[99] but concluded that, in the case at hand, compelling the lawyer to testify as subpoenaed would do "violence" to the attorney-client privilege.[100]

Once a client shows incriminating evidence to a lawyer, the lawyer becomes obligated to advise the client to surrender it to him so that

---

91. *Id.* at 830-31, 394 P.2d at 683-84. *But see* Dyas v. State, 539 S.W.2d 251, 256 (Ark. 1976) (attorney received incriminating evidence from defendant's spouse; *Olwell* thus distinguished).

92. 64 Wash.2d at 832, 394 P.2d at 684-85.

93. *Id.* at 833, 394 P.2d at 685. The court weighed the prosecution's need to recover the evidence against the defendant's privilege of confidentiality. *Id.*

94. 297 So. 2d 871 (Fla. Dist. Ct. App. 1974).

95. *Id.*

96. *Id.*

97. *Id.* at 875.

98. *Id.*

99. *Id.* at 874. There is a paucity of authority relating to confidentiality of the client's identity. Neither the Code nor the Rules address this issue. The general rule, however, is that the client's identity is not protected under the attorney-client evidentiary privilege. *See, e.g., In re* Grand Jury Proceedings, 600 F.2d 215 (9th Cir. 1979); *In re* Grand Jury Subpoenas Served Upon Field, 408 F. Supp. 1169 (S.D.N.Y. 1976).

There are specific exceptions to this general rule. Where sufficient information regarding the lawyer-client relationship has already been revealed, such that disclosure of the client's name would reveal the entire communication, the name may be withheld. NLRB v. Harvey, 349 F.2d 900 (4th Cir. 1965). Similarly, where disclosure of a client's identity would expose the client to criminal prosecution for a past crime, the identity may be protected. *In re* Grand Jury Proceedings, 600 F.2d 215 (9th Cir. 1979).

For a comprehensive analysis of questions concerning the confidentiality of client identity, see Note, *Disclosure of a Client's Identity: The Ethical Dilemma*, 8 J. OF THE LEGAL PROFESSION 197 (1983).

100. *Anderson*, 297 So. 2d at 875.

he may deliver it to the authorities.[101] Otherwise, the attorney would be directly or indirectly advising his client to conceal or destroy the evidence.[102]

When the client simply tells the lawyer the location of incriminating evidence, the lawyer may go to the spot and observe the evidence but may not touch or remove it.[103] Once the attorney takes the affirmative step of touching or tampering with the physical evidence, a duty to surrender it to the authorities arises.[104] A practical problem is who are the proper authorities to whom the tangible evidence must be delivered.

One author has suggested specific guidelines for the attorney faced with fruits or instrumentalities of his client's crimes: (1) once the lawyer accepts the property, it must be surrendered voluntarily to the authorities; (2) the laywer should advise the client of his duty to deliver the property to the authorities; (3) the lawyer must try to discourage the client from destroying evidence; (4) the lawyer must not disrupt, alter, or disturb the evidence. If he does, he must surrender the property; (5) when surrending the evidence, the lawyer should avoid revealing the client's identity or any statements the client made about the evidence. In fact, a lawyer should consider hiring a second lawyer to deliver the items; (6) the attorney should make no statements unless he is compelled to do so by the court; (7) the delivery should be made to the prosecutor, who as an attorney should be more sensitive to attorney-client confidentiality than a police official.[105]

Among the most important of these recommendations is anonymous delivery. Anonymous surrender of incriminating evidence has been sanctioned by the Ethics Committtee of the New York City Bar Association.[106] A lawyer should avoid revealing the client's

---

101. Bender, *supra* note 68, at 887.

102. *Id.* DR 7-102(A)(7) prohibits an attorney from counseling his client to engage in illegal conduct. CODE, *supra* note 4, DR 7-102(A)(7).

103. Bender, *supra* note 68, at 888.

104. *Id.* at 888-89; *cf.* People v. Belge, 83 Misc. 2d 186, 372 N.Y.S.2d 798, *aff'd,* 50 A.D.2d 1088, 376 N.Y.S.2d 771 (4th Dep't 1975), *aff'd,* 41 N.Y.2d 60, 359 N.E.2d 370, 390 N.Y.S.2d 867 (1976) (attorney did no more than observe location of corpse; no violation of public health laws to fail to report location of body to proper authorities).

105. Bender, *supra* note 68, at 892-93.

106. New York City Bar Ass'n Ethics Committee, Op. 81-99 (1981). The Committee stated: "[A] lawyer must decide what the law requires and do nothing beyond the requirements of the law which would endanger the confidentiality of confidences and secrets." *Id.; see also* New York State Bar Ass'n, Comm. on Professional Ethics, Op. 405 (1975) and Op. 466 (1977) (if no legal duty to disclose physical evidence, duty to preserve client confidences is paramount and no ethical duty attaches); *cf.* New York State Bar Ass'n, Comm. on Professional Ethics, Op.

identity or the circumstances under which he obtained possession of the evidence.[107] What is required is a buffer between the prosecuting authorities and the defense lawyer. The most efficacious and readily available buffer is the administrative judge of the court.[108] Incriminating evidence could be delivered to the administrative judge who would then weigh the probative value of the item against its prejudicial effect. As a result of this balancing process, the evidence either would be admitted at trial or excluded. Furthermore, the administrative judge could determine which additional facts about the evidence should be deemed admissible and which should be excluded.[109] This procedure would assure that the trial judge would not be prejudiced by apprisal of all the facts and circumstances relating to the incriminating evidence, thus maintaining client confidentiality to the utmost degree permitted by law.[110]

IV. Client Perjury

During the course of a trial or immediately thereafter, a lawyer learns that his client committed perjury or urged another defense witness to perjure himself.[111] May the lawyer keep the client's secret? In this situation there are two fundamental considerations. There is the legal obligation to avoid the subornation of perjury.[112] At the

---

530 (1981) (attorney has duty to turn over documentary evidence surreptitiously removed from police headquarters).

107. Bender, *supra* note 68, at 892.

108. The position of chief administrator, or administrative judge of the New York court system is described in the New York Judiciary Law, Sections 210-17. N.Y. JUD. LAW §§ 210-17 (McKinney 1984). The chief administrative judge is vested with authority to designate administrative judges for the lower state courts, *id.* § 212(1)(d), and to adopt rules and orders regulating practice in the courts. *Id.* § 212(2)(d).

109. Although the administrative judge is not specifically vested with authority to perform these functions under the New York Judiciary Law, it could be argued that such duties are encompassed within the administrative judges' general supervisory duties. N.Y. JUD. LAW § 211. Furthermore, the law could be amended to provide a specific grant of authority to administrative judges in cases involving confidentiality claims.

110. The client is protected because information about his identity and the circumstances under which the evidence was recovered would not be revealed to the trial judge. *See supra* note 107 and accompanying text.

111. Perjury is defined as "a crime committed when a lawful oath is administered, in some judicial proceeding, to a person who swears wilfully, absolutely and falsely, in a matter material to the issue or point in question." BLACK'S LAW DICTIONARY 1025 (5th ed. 1979).

112. *See, e.g.*, N.Y. PENAL LAW § 210 (McKinney 1975). It is not clear whether an attorney who does not procure the false testimony can be held criminally liable. *See In re* Hardenbrook, 135 A.D. 634, 121 N.Y.S. 250 (1st Dept. 1909); *appeal denied*, 145 A.D. 935, 129 N.Y.S. 1126 (1911), *aff'd per curiam*, 199 N.Y. 539, 92 N.E. 1086 (1910). In *Hardenbrook*, the Appellate Division, First Department,

same time, there are ethical duties to the court and to the client. Disciplinary Rule 7-102(A) of the Code provides in pertinent part that in his representation of a client, a lawyer shall not: "[k]nowingly use perjured testimony or false evidence."[113] Thus, an attorney is prohibited from suborning perjury. In the normal course of events an attorney is also under a duty to report perjury to the tribunal. Disciplinary Rule 7-102(B)(1) provides:

> (B) A lawyer who receives information clearly establishing that: (1) His client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal, *except when the information is protected as a privileged communication.*[114]

---

stated that "it is quite probable that . . . more than mere knowledge by a lawyer examining a witness in court that the witness is committing perjury is necessary to justify a conviction" for the subornation of perjury. 135 A.D. at 643, 121 N.Y.S. at 257.

Professor Monroe Freedman suggests that where an attorney advises his client that perjury is unlawful but then permits his client to testify, the element of wilfulness is lacking. M. FREEDMAN, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM 31 (1975) [hereinafter cited as FREEDMAN]. *But see* Meagher, *A Critique of Lawyers' Ethics in An Adversary System*, 4 FORDHAM URB. L.J. 289 (1976). Meagher asserts that when an attorney knowingly elicits false testimony, the requisite intent is present. *Id.* at 290. This view is also stated in Herbert v. United States, 340 A.2d 802, 804 (D.C. 1975) (citing Gregory v. United States, 369 F.2d 185, 188 (D.C. Cir. 1966)). Since this Article focuses on ethical duties, the law on suborning prejury is outside its scope. *See generally* Wolfram, *Client Perjury*, 50 S. CAL. L. REV. 809 (1977). It has been suggested that in a federal case an attorney may violate 18 U.S.C.§ 2(a) which provides that whoever aids, abets, counsels, commands, induces, or procures the commission of an offense against the United States is punishable as a principal. 18 U.S.C. § 2(a) (1983). *See generally* 64 A.L.R.3d 385, 387 (1975).

113. CODE, *supra* note 4, DR 7-102(A)(4).

114. *Id.* DR 7-102(B)(1) (emphasis added). The italicized exception was not originally part of the Rule, but was added in 1974.

Originally, three mandatory disclosure provisions existed under the Canons of Professional Ethics. Canon 1 applied to complaints against judges, Canon 29 created an obligation to expose dishonest lawyers, and Canon 41 pertained to perjury and informing the injured party of a client's fraud. CANONS, *supra* note 4, Canons 1, 29 and 41.

When the Code was originally drafted in 1969, the duty under Canon 41 to expose client frauds was incorporated in Disciplinary Rule 7 without the exception for privileged communications. This created conflicting duties. Under certain circumstances, a lawyer was obliged to disclose otherwise privileged information concerning his client. Yet, he was also under a duty to keep client confidences in order to effectively and zealously represent his client.

Soon after the insertion of the privileged communications caveat, the ABA had occasion to interpret the meaning of the phrase "privileged communications." The phrase was interpreted to comprise both confidences and secrets as defined in DR 4-101. ABA Comm. on Professional Ethics, Formal Op. 341 (1975).

This provision presents a difficult and perplexing moral dilemma for the attorney.[115] In reaching a decision as to the proper course of action, a lawyer must consider not only his legal and ethical obligations but also the client's constitutional rights to due process[116] and effective assistance of counsel.[117] A fundamental aspect of the obligation to provide effective representation includes the requirement that the attorney proffer any admissible testimony the client wishes to present unless the lawyer knows it to be fraudulent.[118] Knowledge is the key. A lawyer may not determine that testimony is false based on mere inconsistencies in the client's recital of the facts. Instead, the attorney must possess a firm factual basis before concluding that his client is lying.[119]

---

115. FREEDMAN, *supra* note 112, at 28-29.

116. Due process is a general concept that encompasses numerous other specific rights. Thus, while there is no constitutional provision granting the right to testify on one's own behalf, such a right is covered by the broad umbrella of due process under the fifth and fourteenth amendments, and thus, is a client right which the lawyer must respect. *See* Farretta v. California, 442 U.S. 806, 819-20 n.15 (1975); Chambers v. Mississippi, 410 U.S. 284, 294 (1973); Harris v. New York, 401 U.S. 222, 225 (1971); Yakus v. United States, 321 U.S. 414, 433 (1944); *see also* Hughes v. State, 513 P.2d 1115 (Alaska 1973); Arizona v. Noble, 109 Ariz. 539, 514 P.2d 460 (1973); People v. Robles, 2 Cal. 3d 205, 466 P.2d 710, 85 Cal. Rptr. 166 (1970); People v. Farrar, 36 Mich. App. 294, 193 N.W.2d 363 (1972).

Nevertheless, the Supreme Court has held that while every defendant is privileged to testify, this privilege shall not be construed to include a right to commit perjury. Harris v. New York, 401 U.S. 222, 225 (1971).

117. The Supreme Court has held that the sixth amendment encompasses the right to effective assistance of counsel before, during and after trial. *See* Argersinger v. Hamlin, 407 U.S. 25 (1972) (no person may be imprisoned for even petty offenses unless represented by competent counsel); United States v. Wade, 388 U.S. 218 (1967) (right to effective assistance prior to trial at critical prosecutive stages); Douglas v. California, 372 U.S. 353 (1963) (right to competent counsel on appeal); Gideon v. Wainwright, 372 U.S. 335 (1963) (right to counsel extended to states via fourteenth amendment); Powell v. Alabama, 287 U.S. 45, 71 (1932) (Court's duty to assign counsel, in capital case, "is not discharged by an assignment at such time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case"). For a general discussion of the standards of attorney competence, see Finer, *Ineffective Assistance of Counsel*, 58 CORNELL L. REV. 1077 (1973); Gard, *Ineffective Assistance of Counsel—Standards and Remedies*, 41 MO. L. REV. 483 (1976); Stone, *Ineffective Assistance of Counsel and Post-Conviction Relief in Criminal Cases: Changing Standards and Practical Consequences*, 7 COLUM. HUMAN RIGHTS L. REV. 427 (1976).

118. Ethical Consideration 7-26 provides:

> The law and Disciplinary Rules prohibit the use of fraudulent, false, or perjured testimony or evidence. A lawyer who knowingly participates in introduction of such testimony or evidence is subject to discipline. A lawyer should, however, present any admissible evidence his client desires to have presented unless he knows, or from facts within his knowledge should know, that such testimony or evidence is false, fraudulent, or perjured.

CODE, *supra* note 4, EC 7-26.

119. United States *ex rel* Wilcox v. Johnson, 555 F.2d 115, 120 (3d Cir. 1977);

One commentator has suggested:

> [B]ecause of the unique character of the relationship between attorney and client, a strong argument can be made that the level of certainty of wrongdoing an advocate should reach before revealing the client's alleged wrongdoing is *even higher than the level of certainty required of the trier of fact in a criminal proceeding* . . . . Great violence would be done to [the attorney-client] relationship and the values it reflects if clients could not be confident that their lawyers would not turn against them unless their wrongdoings were *completely indisputable.*[120]

There does not appear to be an affirmative duty to investigate the client's story for the purpose of disproving it.[121] However, once the attorney reasonably believes that his client intends to commit, or is in fact committing perjury, the attorney has three options: (1) to allow the defendant to testify in the normal fashion asking relevant questions to direct the testimony;[122] (2) to ask no questions but permit the defendant to deliver a free-flowing narrative;[123] or (3) to attempt to withdraw from the case.[124] Serious problems exist in each of these courses of action.

The first option is clearly impermissible under Disciplinary Rule 7-102(A)(4),[125] which prohibits the knowing use of perjured testimony.[126] It should be noted, however, that under the proposed American Lawyer's Code of Conduct this course of action was recommended.[127]

---

see State v. Lloyd, 48 Md. App. 535, 542, 429 A.2d 244, 248 (1981) (citing State v. Whiteside, 272 N.W.2d 468, 469 (Iowa 1978)) (defense counsel should not dictate what is true and what is false absent "compelling support for his conclusion").

120. Brazil, *Unanticipated Client Perjury and the Collision of Rules of Ethics, Evidence, and Constitutional Law*, 44 MO. L. REV. 601, 609 (1979) (emphasis added).

121. *See* State v. Zwillman, 112 N.J. Super. 6, 16, 270 A.2d 284, 289 (N.J. Super. Ct. App. Div. 1970).

122. *See infra* notes 126-27 and accompanying text.

123. *See infra* notes 128-43 and accompanying text.

124. *See infra* notes 146-59 and accompanying text.

125. CODE, *supra* note 4, DR 7-102(A)(4).

126. *Id.* Moreover, DR 1-102(4) prohibits engaging in dishonest, fraudulent or deceitful conduct, and DR 1-102(5) prohibits engaging in conduct that is "prejudicial to the administration of justice." CODE, *supra* note 4, DR 1-102(4) & (5). Finally, DR 4-101 provides that a lawyer may reveal his client's intention to commit a crime such as perjury. *Id.* DR 4-101. Thus, perjury is not protected by client confidentiality under the Code.

127. Under the leadership of Professor Freedman, a commission of the Roscoe Pound—American Trial Lawyers Foundation was formed to establish a new code for lawyer conduct. Under the Public Discussion Draft released in December 1981, the protection of client confidences outweighs almost every other consideration

The second option, merely sitting back and permitting the defendant to present his narrative, seems more appealing. In fact, it is authorized under the American Bar Association (ABA) Defense Standards in the event that withdrawal from the case is not possible.[128] However, this option clearly contravenes the Code and existing law.[129] It would be unethical for an attorney to refer to his client's testimony in his summation to the jury, knowing it to be false. On the other hand, the failure to summarize and argue that testimony alerts the jury that the testimony lacks credibility or merit. Additionally, since the prosecution is permitted to comment on any failure to argue the defendant's testimony, defense counsel's omission of this testimony in the summation is potentially prejudicial to the defendant's case.[130] In effect, by choosing this second option, the attorney tells the jury that the defendant is lying, and is, therefore, guilty.[131]

---

including candor to the tribunal. THE AMERICAN LAWYER'S CODE OF CONDUCT ch. 1 Comment (American Trial Lawyers Foundation Discussion Draft 1981) [hereinafter cited as CODE OF CONDUCT]. Thus, if the attorney permits the defendant to take the stand, conducts a normal direct examination and argues the testimony to the jury in summation of the case, he has not violated the Code of Conduct. *Id.* (Illustrative Case 1(j)). Moreover, under the Code of Conduct, failure to present a client's false testimony would subject the attorney to discipline. *Id.; see* Erickson, *The Perjurious Defendant: A Proposed Solution to the Defense Lawyer's Conflicting Ethical Obligations to the Court and to His Client*, 59 DEN. L.J. 75, 86-87 (1981) [hereinafter cited as Erickson]; FREEDMAN, *supra* note 112, at 31; Comment, *The Perjury Dilemma In An Adversary System*, 82 DICK. L. REV. 545, 552 (1978).

128. ABA PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION 274-75, § 7.7 (1980) [hereinafter cited as ABA DEFENSE STANDARDS]. Under the ABA Defense Standards, an attorney is instructed first to seek withdrawal without revealing the basis for the motion. *Id.* If the motion is denied the defendant may give a narrative statement. No guidance is provided as to redirect or how to handle an objection by the prosecution to this mode of testimony. *See* FREEDMAN, *supra* note 112, at 37. Under the ABA Defense Standards the attorney may not refer to the perjurious testimony in his arguments to the jury. ABA DEFENSE STANDARDS, *supra* at 274-75, § 7.7. While still a judge of the District of Columbia Circuit Court of Appeals, Warren Burger asserted that where the attorney is not permitted to withdraw, "[h]e should confine himself to asking the witness to identify himself and to make a statement, but he cannot participate in the fraud by conventional direct examination." Burger, *Standards of Conduct for Prosecution and Defense Personnel: A Judge's Viewpoint*, 5 AM. CRIM. L. Q. 11, 13 (1966).

129. State v. Whiteside, 272 N.W.2d 468, 470 (Iowa 1978) (attorney for criminal defendant not required to present perjured testimony); Bennett v. State, 549 S.W.2d 585, 587 (Mo. Ct. App. 1977) (defense attorney in criminal prosecution shall not present perjured testimony).

130. Erickson, *supra* note 127, at 83.

131. Casual summation by an attorney has been deemed prejudicial because it indicates disbelief in the defendant's testimony and thus constitutes a violation of the defendant's right to effective assistance of counsel. Matthews v. United States, 449 F.2d 985, 992-94 (D.C. Cir. 1971) (Leventhal, J., concurring); *cf.* Johns v.

The risk of selecting the second option was dramatized in *Lowery v. Cardwell.*[132] Jacqueline Lowery was indicted and tried for first degree murder in a shooting incident.[133] She waived her right to trial by jury and the case was tried by a judge.[134] Lowery testified that she did not walk outside with the victim, did not go to his car, and did not shoot him.[135] On eliciting this testimony, defense counsel requested a recess and, in chambers, moved to withdraw from the case. He refused to state his reasons for moving to be relieved.[136] The judge denied the motion. Upon his return to the courtroom, defense counsel stated that he had no further questions.[137] During the closing statements, defendant's lawyer did not refer to her testimony and argued only that reasonable doubt was present and that no case existed for first-degree murder.[138] The judge found Lowery guilty of second-degree murder.[139]

On appeal from denial of a writ of habeas corpus, the Court of Appeals for the Ninth Circuit reversed.[140] The court held that the defense attorney's conduct deprived the defendant of a fair trial.[141] It is interesting to note that despite this holding, the court cited the ABA Defense Standards with approval.[142] The court distinguished between "a passive refusal to lend aid to perjury [permitted by the ABA Defense Standards] and [the] direct action . . . [of pursuing a] court order granting leave to withdraw [as had occurred in *Lowery*]."[143] The court concluded that "this conduct affirmatively and emphatically called the attention of the fact finder to the problem

---

Smyth, 176 F. Supp. 949, 953 (E.D. Va. 1959) (attorney's conscience prevented him from arguing client's case to jury).

132. 575 F.2d 727 (9th Cir. 1978); see State v. Lowery, 111 Ariz. 26, 523 P.2d 54 (1974) for disposition of case at state level.

133. 575 F.2d at 728.

134. *Id.*

135. *Id.* at 729.

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.* at 732.

141. 575 F.2d at 731. In a concurring opinion, Judge Hufstedler concluded that the defendant's sixth amendment right to effective assistance of counsel had been violated. 575 F.2d at 732.

142. 575 F.2d at 731 n.5.

143. *Id.* at 731. It has been suggested that a further distinction exists between knowing prior to trial that the client intends to lie and being surprised by the client's perjury at trial. *Id.* at 730-31, *citing* ABA DEFENSE STANDARDS, *supra* note 128, § 7.7.

counsel was facing"[144] and thus jeopardized the defendant's fair trial rights.[145]

The third option available to a defense lawyer who knows that his client intends to lie is to move to withdraw from the case. This is the recommended first step under the ABA Defense Standards.[144] A majority of the cases approve of seeking withdrawal where counsel is unable to dissuade his client from committing perjury.[147]

For example, in *State v. Henderson*,[148] the defendant informed his attorney a few days before the trial that he intended to perjure himself.[149] The attorney decided to withdraw from the case. He contacted the deputy county attorney, and together they orally applied to both the trial judge and the administrative judge for his removal from the case.[150] Both judges were informed that the defendant intended to lie on the witness stand. The request was denied.[151] The defendant was informed of these events the next day.[152] The defendant refused to demand a new lawyer, hoping to win on appeal on the ground that his attorney had violated client confidentiality.[153] Based on these facts, defense counsel again requested to be relieved. Once again the request was denied.[154] After completion of the state's case, a third request to withdraw was denied.[155] On appeal from his conviction, Henderson asserted that he was denied fair representation.[156] The court held that the attorney properly requested permission to withdraw and that the trial court properly exercised its discretion in refusing to grant the request.[157] The court reasoned that the defendant's refusal to request new counsel was immaterial, since the same dilemma would have arisen if new counsel had been appointed.[158]

---

144. 575 F.2d at 731.
145. *Id.*
146. ABA DEFENSE STANDARDS, *supra* note 128, § 7.7(a).
147. *See, e.g.*, Thornton v. United States, 357 A.2d 429 (D.C.), *cert. denied*, 429 U.S. 1024 (1976); State v. Fosnight, 235 Kan. 52, 679 P.2d 174 (1984); *In re* Palmer, 296 N.C. 638, 252 S.E.2d 784 (1979); State v. Trapp, 52 Ohio App. 2d 189, 368 N.E.2d 1278 (1977).
148. 205 Kan. 231, 468 P.2d 136 (1970).
149. *Id.* at 233, 468 P.2d at 138.
150. *Id.* at 233-34, 468 P.2d at 138-39.
151. *Id.* at 234, 468 P.2d at 139.
152. *Id.*
153. *Id.*
154. *Id.*
155. *Id.* at 234-35, 468 P.2d at 139-40.
156. *Id.* at 235-36, 468 P.2d at 139-40.
157. *Id.* at 239, 468 P.2d at 141-42.
158. *Id.* at 238, 468 P.2d at 141-42.

The *Henderson* court erroneously approved of the defense attorney's method of seeking withdrawal. In seeking withdrawal, an attorney must avoid prejudice to the client while preserving the client's fair trial and due process rights. The *Henderson* court erred in determining that the attorney had not violated his duty of confidentiality.[159]

A preferable approach was suggested by the Colorado Supreme Court in *People v. Schultheis*.[160] In *Schultheis*, the court provided four guidelines. First, a lawyer may not offer perjured or false testimony.[161] The court reasoned that as an officer of the court a lawyer owes a duty not to perpetrate fraud. Second, when efforts to dissuade the client from lying fail, the attorney must seek to withdraw.[162] The *Schultheis* court held that this duty to attempt to withdraw does not arise merely upon learning of the client's intention. Rather, the duty arises when serious disagreement as to the presentation of evidence and conduct of the trial occurs.[163] The court rejected mandatory withdrawal, noting that under certain circumstances withdrawal would be impractical.[164] Third, the court reasoned that the client's communication of his intention to commit perjury

---

159. *Id.* at 237, 468 P.2d at 141. The court stated:

> While as a general rule counsel is not allowed to disclose information imparted to him by his client or acquired during their professional relation, unless authorized to do so by the client himself [citation omitted], the announced intention of a client to commit perjury, or any other crime, is not included within the confidences which an attorney is bound to respect. [citation omitted]

Id.

160. 638 P.2d 8 (Colo. 1981). In *Schultheis*, the defendant was charged with the murder of a fellow inmate in the Denver County Jail. Schultheis demanded that his attorney call two alibi witnesses but intimated that they would lie. Schultheis' attorney, faced with his ethical duty not to present false evidence, moved to withdraw. The motion was denied. Schultheis ultimately was convicted of first degree murder.

The Colorado Court of Appeals reversed the conviction, finding a denial of effective assistance in refusing to relieve the attorney. 618 P.2d 710, 714. The Supreme Court of Colorado, in turn, reversed the court of appeals and directed it to affirm the defendant's conviction. 638 P.2d at 15. *See generally* Note, *Lying Clients and Legal Ethics: The Attorney's Unsolved Dilemma*, 16 CREIGHTON L. REV. 487 (1983); Note, *Perjured Alibi Testimony: The Defense Attorney's Conflicting Duties*, 48 MO. L. REV. 257 (1983).

161. 638 P.2d at 11.

162. *Id.* at 13.

163. *Id.*

164. *Id.* at 14-15. The court realized that a motion to withdraw on the eve of trial would cause undue delay and that a defendant could cause further delays by retaining several attorneys in succession, informing each of his intention to lie. Alternatively, the court posited that the client would lie to his attorney and the perjured testimony would be presented. *Id.*

is privileged.[165] Thus, counsel should not reveal to the judge either the specific reasons for withdrawing or the Code provision under which he seeks to withdraw.[166] Counsel should merely state that he has irreconcilable differences with the client.[167] Fourth, if the motion to withdraw is denied, the attorney must continue to effectively represent his client.[168]

It is clear that an attorney must safeguard his client's rights even while seeking to withdraw from representation. One commentator has proposed the establishment of advisory councils which would function outside the judicial system.[169] A trial attorney, upon learning of his client's intention to commit perjury or present false evidence, could submit a written statement to the council outlining the basis for his decision to withdraw.[170] The council would then make a recommendation to the court on the request. If the claim were deemed substantial, the council would advise the court to allow the lawyer to withdraw.[171] This recommendation would appear on the outside of a sealed file and would bind the court.[172] The information in the file would be available for impeachment purposes if the defendant took the witness stand. If the next appointed counsel learned of the client's intention to commit perjury and also sought permission to withdraw, the court would be permitted to open the two files submitted by the council. This information could then be used to preclude the defendant from testifying and could be considered as a factor in sentencing.[173]

While this proposal seeks to protect the defendant, it too is impractical. Undoubtedly, it would take great effort to form advisory councils. Additionally, unless volunteers came forward, the personnel

---

165. *Id.* at 13. This construction is narrower than Disciplinary Rule 4-101(C)(3) of the Code, which permits, but does not require, disclosure of a client's intention to commit a crime. CODE, *supra* note 4, DR 4-101(C)(3). However, the court's view is consistent with Rule 1.6, which permits disclosure only of crimes likely to result in bodily harm. RULES, *supra* note 11, Rule 1.6. Rule 1.6 is quoted *supra* at note 11.

166. 638 P.2d at 13.

167. *Id.* at 14.

168. *See id.* The Rules similarly provide that where a motion to withdraw is denied the "lawyer shall continue representation notwithstanding good cause for terminating the representation." RULES, *supra* note 11, Rule 1.6.

169. Erickson, *supra* note 127, at 88-91. The Advisory Council would be composed of eminent trial lawyers, selected on the basis of their experience, integrity, and standing at the trial bar. *Id.* at 88-89.

170. *Id.* at 89.

171. *Id.*

172. *Id.*

173. *Id.* at 90.

costs of such a venture could be great. A more workable and equally effective solution, which already exists, is utilization of the administrative judge.

When an attorney contemplates withdrawal from a case, he should apply to the administrative judge rather than the trial judge. In this way, the trial judge is not made aware that the defendant intends to perjure himself. If permission to withdraw is denied, the lawyer should not reveal client confidences. Rather, the lawyer must provide that degree of effective assistance which falls short of actual subornation of perjury.[174]

In responding to these dilemmas, an attorney should pinpoint exactly when he learned of his client's perjury. For example, if the lawyer learns of his client's fraud on the court months after the client has testified, the duty to preserve client confidences prevails.[175] On the other hand, a lawyer may not assist in his client's perjury if he learns in advance of the client's intention to lie.[176] Specifically, an attorney may never permit his client to sign an affidavit which he knows to be false.[177] Similarly, it would be unethical to address the court on information and belief knowing the statements to be false.[178] A lawyer may not assist in the preparation of a false alibi or other false testimony.[179] Notwithstanding the importance of client confidentiality, a lawyer may never suborn perjury.

V. Sentencing Hearing

Prior to sentencing, a client confides in his lawyer that he is nervous because of his prior convictions and the effect they will

---

174. *See supra* note 118 and accompanying text.

175. *See* ABA Comm. on Professional Ethics and Grievances, Formal Op. 287 (1953). In that case the client lied about certain dates during a divorce proceeding. Three months later the client came to the attorney because his former wife was threatening to reveal his perjury unless he provided her with support money. The ABA committee opined that the duty to preserve confidences prevailed over the duty to reveal client deceptions. *Id.*

Reviewing that opinion in 1975, the ABA committee reiterated that tradition coupled with substantial policy considerations guide the lawyer to ensure that client secrets will not be revealed. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 341 (1975). The committee concluded that this interpretation does not go "too far" in relieving an attorney of liability to others since a lawyer is compelled to disclose fraud if the information is obtained outside the confidential relationship. *Id.*

176. *See supra* note 113 and accompanying text.

177. *See supra* note 118 and accompanying text.

178. *See* CODE, *supra* note 4, DR 7-102(A)(5) and DR 7-106(C)(1).

179. *See supra* note 113 and accompanying text.

have on the sentence. During the sentencing hearing, it is apparent that the judge is misinformed when he comments on the defendant's clear record as he imposes a minimum sentence. May the lawyer remain silent? Or, must the lawyer respect his obligation of candor to the tribunal and straighten out the misunderstanding?

These facts closely resemble the perjury situation.[180] Analytically, however, this hypothetical is distinguishable because silence rather than affirmative falsehood is involved. In this situation, client confidentiality supersedes any other duty. An ABA opinion rendered in 1953 supports this contention.[181] In that opinion, the ABA Ethics Committee concluded that no duty exists to reveal the client's previous criminal record if his attorney learned of it through the client's communications.[182] The same result would be reached under the Rules. In fact, under the Rules, the client's criminal record would be privileged even if the attorney learned of it from a third party as long as the information was received in the course of representation.[183]

A different situation is presented if the judge directly inquires of the attorney whether he knows of any prior convictions. Although an attorney must do all that is within his power to protect a client's confidential communications, he may not lie to the court.[184] The attorney may not respond negatively when he, in fact, knows of prior convictions.[185] Nor may he affirmatively disclose the information he has learned from his client since he is obliged to keep it confidential.[186] In essence, the judge is asking whether the defendant has committed prior crimes and this information uniformly is subject to the privilege of confidentiality.[187] The mere fact that the information is being used only for the purpose of sentencing does not substantially alter the attorney's duty of confidentiality. The attorney's only alternative is to remain silent and seek to be excused to see the administrative judge.[188] At all times, the notion of candor to the tribunal must be weighed against the duty of confidentiality.

---

180. *See supra* notes 111-79 and accompanying text.
181. ABA Comm. on Professional Ethics and Grievances, Formal Op. 287 (1953).
182. *Id.*
183. *See* RULES, *supra* note 11, Rule 1.6.
184. *See supra* note 178 and accompanying text.
185. *Id.*
186. *See supra* note 11 and accompanying text.
187. *See supra* notes 19-22 and accompanying text.
188. See *supra* notes 108-10 & 173 and accompanying text for discussion of utilization of the administrative judge.

VI. Fugitive Client

Pending appeal, a client is released on his own recognizance. The appeal is unsuccessful and the client is ordered to report to prison. He then flees the country. Later, the client informs his lawyer of his foreign address and asks him to tell the federal authorities that he is trying, albeit with difficulty, to return to the United States. The lawyer complies. Eventually the client returns to the United States, but he will not report to the federal authorities. Based on the mail he receives from his client, the lawyer is certain that he knows where the client is located, but he remains silent. The client requests that his attorney not reveal his whereabouts. What are the lawyer's duties?

This situation is not a hypothetical, but a real case that posed an ethical dilemma for an attorney in the state of Delaware.[189] The United States Attorney demanded that the attorney provide the actual letters and postcards from the client.[190] The Delaware Bar Association advised the attorney that it would not be unethical to turn over the requested information.[191] The Delaware Bar Committee cited ABA Opinion 155[192] which provided:

> When the communication by the client to his attorney is in respect to the future commission of an unlawful act or to a continuing wrong, the communication is not privileged. One who is actually engaged in committing a wrong can have no privileged witnesses, and public policy forbids that an attorney should assist in the commission thereof, or permit the relation of attorney and client to conceal the wrongdoing.
>
> A defendant in a criminal case when admitted to bail is not only regarded as in the custody of his bail, but he is also in the custody of the law, and admission to bail does not deprive the court of its inherent power to deal with the person of the prisoner. Being in lawful custody, the defendant is guilty of an escape when he gains his liberty before he is delivered in due process of law, and is guilty of a separate offense for which he may be punished. In failing to disclose his client's whereabouts as fugitive under these circumstances the attorney would not only be aiding his client to escape trial on the charge for which he was indicted,

189. Delaware State Bar Ass'n Comm. on Professional Ethics, Op. 1978-1 (1978).
190. *Id.*
191. *Id.*
192. ABA Comm. on Professional Ethics and Grievances, Formal Op. 155 (1936), *withdrawn,* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 84-349 (1984); *see infra* notes 217-19 and accompanying text.

> but would likewise be aiding him in evading prosecution for the additional offense of escape.[193]

In the case cited by the Delaware Bar Committee, the ABA Ethics Committee concluded that the attorney would be subject to discipline for refusing to disclose information to the authorities and for continuing to represent a fugitive client.[194] The Delaware State Bar Ethics Committee found that Opinion 155 was controlling and no privilege was accorded to the information and documents sought by the United States Attorney's Office.[195]

In 1970, in the course of advising an attorney representing an army deserter, the ABA Ethics Committee drew a clear distinction between what was and was not within the ambit of confidentiality.[196] If the fugitive asked the lawyer about his rights, then the attorney's advice was privileged. However, if the fugitive asked the lawyer for advice on how to flee or to remain a fugitive, the lawyer had a threefold obligation.[197] First, the lawyer must advise the client to surrender himself to the proper authorities.[198] Second, if the client refuses to surrender, the lawyer must withdraw from representation.[199] Third, the lawyer must warn the client that he has an ethical duty to reveal the client's whereabouts if the illegal desertion persists and the conduct is brought to his attention again by the client.[200]

The reasoning of the above opinions[201] is faulty and is violative of the attorney-client privilege. Sound public policy mandates preserving client confidences.[202] New York City Bar Association Ethics Committee Opinion 81-13[203] presents a cogent approach to this situation. Opinion 81-13 dealt with an attorney who knew where his client, who had fled from justice, was hiding.[204]

The New York City Bar Association Ethics Committee reasoned

---

193. ABA Comm. on Professional Ethics and Grievances, Formal Op. 155; *see also* ABA Comm. on Professional Ethics, Formal Op. 156 (1936) (client violated terms and conditions of probation), *withdrawn,* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 84-349; New York County Bar Ass'n, Ethics Op. 462 (1958) (client defaulted and forfeited bail money).

194. ABA Comm. on Professional Ethics and Grievances, Formal Op. 155.

195. Delaware State Bar Ass'n Comm. on Professional Ethics, Op. 1978-1.

196. ABA Comm. on Professional Ethics, Informal Op. 1141 (1970).

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

201. *See supra* notes 189-200 and accompanying text.

202. *See supra* notes 4-18 and accompanying text.

203. New York City Bar Ass'n Ethics Comm., Op. 81-13 (1981).

204. *Id.*

that the information was obtained through the attorney-client relationship, and thus, was protected under Disciplinary Rule 4-101.[205] The Committee stated that if the client's flight constitutes a crime, it is a continuing crime which the attorney may reveal pursuant to Disciplinary Rule 4-101(C) but which he is not required to reveal.[206] Furthermore, the Committee determined that a lawyer has a duty to apprise his client of the consequences of his flight.[207] Significantly, the Committee departed from the view expressed by the ABA in Informal Opinion 1141[208] and concluded that an attorney is permitted to withdraw from representation of the fleeing client[209] but is not required to do so. Thus, if the attorney believes that his client's conduct constitutes a crime, he should not knowingly counsel his client to remain a fugitive. Nevertheless, continued representation by the lawyer would not constitute a violation of Disciplinary Rule 7-102(A)(7).[210]

The opinion of the New York City Ethics Committee refuted the ABA Formal Opinion 155's premise that continued representation tacitly encourages the client not to return.[211] The New York Committee reasoned that continued representation would ultimately promote client adherence to the law.[212] Moreover, it acknowledged that all persons, regardless of their conduct, are entitled to legal advice and that the legal system benefits when such advice is available.[213] Although the Code proscribes attorney involvement in the commission of crime through advice to clients, the mere maintenance of a lawyer-client relationship should not be equated with involvement.[214] The Code

---

205. *Id.*; CODE, *supra* note 4, DR 4-101.

206. New York City Bar Ass'n Ethics Comm., Op. 81-13. CODE, *supra* note 4, DR 4-101(C).

207. New York City Bar Ass'n Ethics Comm., Op. 81-13.

208. *See supra* notes 196-200 and accompanying text.

209. New York City Bar Ass'n Ethics Comm., Op. 81-13; *see* CODE, *supra* note 4, DR 7-102(A)(7) and DR 2-110.

210. Disciplinary Rule 7-102(A)(7) provides: "In his representation of a client, a lawyer shall not: . . . (7) Counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent." CODE, *supra* note 4, DR 7-102(A)(7). The Second Circuit Court of Appeals has expressly recognized the power of the District Court to entertain motions to dismiss indictments on behalf of fugitives represented by counsel. United States v. Weinstein, 511 F.2d 622, 629 (2d Cir.), *cert. denied,* 422 U.S. 1042 (1975). Any other result would preclude the attorney from negotiating his client's surrender.

211. *See supra* notes 192-94 and accompanying text.

212. New York City Bar Ass'n Ethics Comm., Op. 81-13.

213. *Id.*

214. *See* CODE, *supra* note 4, DR 7-102(A)(7)(1) (quoted *supra* at note 210).

grants discretion to attorneys,[215] and it would be inconsistent with the Code to require an attorney to withdraw.[216]

Recently, the ABA withdrew Formal Opinions 155[217] and 156,[218] reasoning that they were inconsistent with both the Rules and the Code.[219] Thus, the New York precedent seems to have prevailed,[220] and the reasoning underlying the Delaware opinion has been called into question.[221]

What are the practical consequences of these opinions? In view of the fact that the client's whereabouts may constitute a secret or a confidence under the Code, what course of action would an attorney subpoenaed by a grand jury follow when asked where his client is hiding? First, the lawyer must assess whether the information is a "confidence" subject to the attorney-client evidentiary privilege, which is considerably narrower in scope than the privilege given to client secrets.[222] Although the attorney may not classify his client's whereabouts as a secret, if he in good faith classifies them as a confidence, an ethical duty to preserve confidentiality still arises.[223] Consequently, the attorney should assert the privilege of confidentiality as to a client's whereabouts in virtually every conceivable situation in which it becomes an issue.

What happens if a court rejects the lawyer's assertion of the privilege and directs him to testify? Under the Code, a lawyer may reveal client confidences when required by law or court order.[224] Furthermore, the lawyer is directed not to fail to disclose whatever he is legally required to reveal.[225] The better interpretation of the

---

215. *See generally* CODE, *supra* note 4, Preamble.

216. New York State Bar Ass'n Ethics Comm., Op. 529 (1981).

217. ABA Comm. on Professional Ethics and Grievances, Formal Op. 155; *see supra* notes 192-95 and accompanying text.

218. ABA Comm. on Professional Ethics and Grievances, Formal Op. 156; *see supra* note 193.

219. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 84-349. The opinions were not withdrawn in response to a specific inquiry on an ethical issue, but rather, as part of a general review of ABA opinions which was conducted after the adoption of the Rules by the ABA House of Delegates in August, 1983. *Id.*

220. *See supra* notes 203-16 and accompanying text.

221. *See supra* notes 189-95 and accompanying text.

222. See *supra* note 29, which sets forth the Code definitions of "confidences" and "secrets."

223. *See* CODE, *supra* note 4, EC 4-4.

224. *Id.* DR 4-101(C)(2).

225. *Id.* DR 7-102(A)(3). Compare Rule 1.7(b) of the January 1980 discussion draft of the Rules, which provides that a lawyer *must* reveal that which he is required by law to reveal. RULES, *supra* note 4, Rule 1.7(b) (Discussion Draft 1980).

phrase "required by law or court order" is that it prevents disclosure unless a final court order, which is not subject to further review, has been issued.[226] Immediate compliance with an initial court order may well constitute a dereliction of the attorney's duty to defend a client zealously.[227] Appeal of the order should be sought even though the attorney may face contempt charges.[228]

The New York State Bar Association Ethics Committee concurs with this point of view. The Committee has asserted that "where the order is subject to good faith challenge, the lawyer should be free to postpone giving the court-ordered testimony pending appropriate review."[229] This position is consistent with the following conclusion articulated by the United States Supreme Court: "When a court during trial orders a witness to reveal information, . . . [c]ompliance could cause irreparable injury because appellate courts cannot always 'unring the bell' once the information has been released. . . . [T]he person to whom such an order is directed has an alternative [of seeking precompliance review.]"[230]

VII. Conclusion

Lawyer-client confidentiality is an essential feature of the American adversarial system of justice. To be effective, an attorney must be fully informed of all pertinent facts related to the legal matter. A free flow of communication between client and lawyer must be encouraged. On the other hand, it is recognized that in certain limited circumstances it may be necessary to reveal client confidences in order to save a human life. It is contended, however, that permissive disclosure provisions suffice in such a situation.

Lawyers should not commit crimes nor should they assist their clients in criminal activity. However, vital constitutional rights will be lost if lawyers become whistleblowers. The final version of the Rules, particularly Rule 1.6, should be adopted. Limited permissive disclosure represents a proper balancing of society's needs against the client's constitutional rights. The delicate lawyer-client relationship requires discretion in the disclosure of client confidences. In exercising that discretion, lawyers must be trusted to make moral and ethical decisions.

---

226. THE AMERICAN LAWYER'S CODE OF CONDUCT Rule 1.3 (Discussion Draft 1981); *see also* Hodes, *supra* note 64, at 759-60.

227. *See generally* Hodes, *supra* note 64, at 759-60.

228. *Id.* Hodes asserts that under each of the three ethics codes a case can be made for mandatory, or at least voluntary, disclosure of a fugitive client's whereabouts. *Id.* at 758.

229. New York State Bar Ass'n Ethics Comm., Op. 528 (1981).

230. Maness v. Meyers, 419 U.S. 449, 460-61 (1975).