

DELAWARE STATE BAR ASSOCIATION
COMMITTEE ON PROFESSIONAL ETHICS

OPINION 1978-1

We have been asked to provide an opinion on professional ethics for a member of the Delaware Bar on the question of client confidences. The lawyer who has requested the opinion represents a client who was convicted in the United States District Court for the District of Delaware and sentenced to a term of imprisonment. Pending appeal, the client was released on his own recognizance. The Court of Appeals affirmed the conviction and the defendant was ordered to report to a federal prison.

On or before the date the client was scheduled to report to the prison, he called his attorney and told him that he was in a foreign country and unable to get back to the United States. The client provided his attorney with a foreign address and asked the attorney to tell the United States Government that he was making his best effort to come back to the United States, but so far was unsuccessful. The attorney did so but did not reveal the foreign address. The client has since returned to the United States and has requested his attorney not to reveal his whereabouts.

Additional information has also come to the attorney by way of the mails which contains evidence of the client's whereabouts in the United States. Apparently aware of this, the U.S. Attorney has asked for all such information including:

- (a) The client's foreign address;
- (b) A postcard received from the client;
- (c) A return receipt from a registered letter

sent by the lawyer to the client; and

- (d) The envelope which contained a letter received from the client bearing a United States postmark.

The lawyer asks us whether it would be unethical to provide the U.S. Attorney with the requested information.

OPINION

It would not be unethical to provide the U.S. Attorney with the requested information.

DISCUSSION

Canon 4 of the Delaware Lawyers' Code of Professional Responsibility directs that a lawyer should preserve the confidences and secrets of a client. Disciplinary Rule 4-101(C) qualifies this rule, however, by providing that a lawyer may reveal:

"(2) Confidences or secrets when permitted under Disciplinary Rules or required law or Court Order."

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

Delaware Lawyers' Code of Professional Responsibility, DR 4-101(C) (2-3).

ABA Formal Opinion 155 (May 4, 1936) considered a similar problem involving disclosure of the location of a client who had fled the jurisdiction of the Court while on bail. In that opinion, it is stated that:

"It is the duty of an attorney to maintain the confidence and preserve inviolate the secrets of his client, and it is the general rule that when a client gives his address to his attorney while consulting him in a professional capacity on a business matter for the purpose of enabling the attorney to communicate with him in respect thereto, it is a privileged communication. However, there are some circumstances under which such a communication is not privileged for reasons founded on sound public policy. In such cases the attorney may not remain silent.

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 a fugitive under these circumstances the attorney would not only be aiding his client to escape trial on the charge for which he was indicted, but would likewise be aiding him in evading prosecution for the additional offense of escape.

It is the opinion of the Committee that under such circumstances the attorney's knowledge of his client's whereabouts is not privileged, and that he may be disciplined for failing to disclose that information to the proper authorities. Equally, the attorney may be disciplined if, upon his client's refusal to surrender upon his advice, he continues to act as his attorney. If the fugitive persists on so evading a trial upon the charges against him, the attorney should terminate their relations. Failing in this, the attorney is guilty of a violation of his oath and of his duty to society."

ABA Formal Opinion 155 (May 4, 1946). This Opinion was made the subject of a footnote to DR 4-101(C)(2) of the American Bar Association Code of Professional Responsibility and was incorporated by reference into the Delaware Lawyers' Code of Professional Responsibility as an approved interpretative guideline. See Order of the Supreme Court of the State of Delaware of May 1, 1971 amending Rule 33(2) of the court and adopting the Delaware Lawyers' Code of Professional Responsibility.

The client in the case is committing the "continuing wrong", the crime of escape. The client can have no privileged witness and the communications are not privileged. 18 U.S.C.A. §751, 3150.

The principles outlined in ABA Opinion 155 accurately interpret DR 4-101(C)(2) and (3) of the Delaware Lawyers' Code of Professional Responsibility and are controlling.

Therefore, we conclude that the requirement of Canon 4 that a lawyer preserve the confidences and secrets of a client is not violated by the disclosure of evidence of the whereabouts of the client.

The Committee notes that some ethics opinions have taken the position that what constitutes privileged material is a matter of substantive law to be determined by a court on a case by case basis. [ABA Formal Opinion 247 (December 19, 1942); ABA Informal Opinion 393 (April 4, 1961)]. Even if the client were not committing a continuing crime, publicly exposed materials such as postcards and postmarks might not be considered "confidences of a client" since they can be said not to have been communicated under circumstances which suggest that they were intended to be kept confidential. III Wigmore, Evidence (McNaughton, rev. 1961) §2311.

We do not, however, need to resolve the question as to whether the information requested is, in fact, confidential or privileged in some other context. As we state above, the client is committing the continuing crime of escape and regardless of the intent or content of the communications they are not protected by privilege.

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