

The Devil's Advocate

The scope of the lawyer-client duty and privilege of confidentiality is of special relevance to psychiatrists because, to the extent that logic has compulsion, the psychiatrist-patient duty and privilege should be coterminous with those of lawyer-client relationship. In general, a weighing of the salient factors as promulgated by Dean John Henry Wigmore might help to balance the scales. In relation to the issue, a recent New York State controversy is thought-provoking.

The Committee on Professional Ethics of the New York State Bar Association recently released its opinion on a highly publicized case which occurred near Syracuse, New York, in the early seventies. It is of interest that the report, although made in 1974, was not released until March, 1978, after all legal proceedings had been terminated. Since the matter was *sub judice*, ergo *sub silentio*. *Sed quaere*. Is it not a nice question of ethics to withhold and delay an opinion which perhaps should have provided guidance in determining the ambit of confidentiality?

The case in question involved the silence of a Syracuse lawyer who represented a mechanic charged with homicide who told his lawyer that he had killed two other people as well and disclosed the location of the bodies. The lawyer went to the scene, found the bodies, and photographed them. Later he destroyed the photographs. In taking the pictures, the lawyer moved parts of the bodies so that he could bring them within range of his camera.

For six months, the lawyer did not disclose the whereabouts of the bodies to the police, who were diligently searching for clues, nor did he disclose the facts to the father of one of the victims, who had come to him seeking help in finding his missing daughter.

Only during plea-bargaining negotiations with the prosecutor did the lawyer suggest that in return for lenient treatment of his client he was in a position to provide information about the two unsolved murders. The plea-bargaining failed, and the client was convicted and sentenced to life imprisonment, but at the trial, it was eventually disclosed that the lawyer had prior knowledge of other crimes his client had committed.

The lawyer then was indicted and charged with violating the public health law by failing to provide a decent burial for the dead bodies he had discovered and for failing to report the deaths to proper authorities. The charges eventually were dismissed and the lawyer was cleared. Therefore, the withholding of the Committee's opinion on the ethical question did not help or hurt the lawyer in question. However, doubt about the ethics of his nondisclosure to police and to a victim's father has persisted, and the opinion of the Bar committee may not resolve the question insofar as the press and public opinion are concerned.

First of all, it should be noted that the lawyer was a court-appointed counsel who, due to the fixed quality of the statutory fee, had no personal financial interest in the outcome of the case he was assigned to defend. There is no basis for an imputation of avarice or base motives. So far as we know, he merely followed his notion of his ethical obligation.

According to the Bar report, the lawyer can be faulted only for having moved portions of a body in order to take a photograph. The report said that such conduct should be avoided to prevent even the suggestion of an intent to tamper with or to suppress evidence. The committee said that the lawyer's relationship to his client in many respects was like that of priest and penitent, and that each was "bound by a bond of silence." Further, the committee said that

Proper representation of a client calls for full disclosure by the client to his lawyer of all possible relevant facts, even though such facts may be the client's commission of prior crimes.

To encourage full disclosure, the client must be assured of confidentiality. Frequently, clients have a disposition to withhold information from lawyers. If the client suggests that his confidence will not be adequately protected or in some way be used against him, he will be far more likely to withhold information which he believes to be to his detriment or which he does not want generally known.

The client who withholds information from his lawyer runs a substantial risk of not being accorded his full legal rights. At the same time, the lawyer from whom such information is withheld may well be required to assert, in complete good faith and with no violation [of the lawyers' code of ethics], totally meritless or frivolous claims or defenses to which his client has no legal right.

Thus, the interests served by the strict rule of confidentiality are far broader than merely those of the client, but include the interests of the public generally and of effective judicial administration. [The *New York Times*, March 12, 1978, p. 56, cols. 5-6].

The public may find it difficult to condone the lawyer's failure to notify the police and especially his withholding of information from a distraught parent. After all, physicians have a duty to report gunshot wounds, venereal disease, and other matters where there is a paramount public interest. In effect, the Bar committee says that the public interest in the administration of our current system of justice, with its division of labor between prosecutor, defense counsel, judge and jury, is more important than other matters of public concern.

On balance, perhaps the Bar committee is right. There may be no way that the lawyer could have disclosed without implicating his client, unless it was feasible to give an anonymous tip to the police so that the victims might receive a proper burial and parents might be spared the anguish of uncertainty. But the attempted use of the lawyer's information for plea-bargaining leverage is another matter. That turned the shield into a sword. It was one thing to withhold information and something else to disclose for the sake of achieving an advantage not otherwise obtainable. The

obligation of confidentiality is presumable for the client's protection and perhaps should not be negotiable for the achievement of an untoward advantage.

The public health aspects of the case also give us some pause, even though the charges were dismissed. Would it not be within the police power of the state to require *all persons* to report the finding of dead bodies, and if such a statute were in effect, would lawyers with murder suspects as clients be exempt? To put it differently, is the public interest in the administration of justice the paramount public interest, and one to which all other public interests are subordinate? Or is such an evaluation only a manifestation of the arrogance of lawyers? If a failure to inter the bodies occasioned a risk of the spread of contagion or disease, what price the lawyer's silence?

Some psychiatrists may take satisfaction in noting that the above-quoted portions of the committee's report apply, as lawyers say, *a fortiori* to the psychiatrist-patient relationship, even though only a small minority of states have followed the logic. On sober reflection, however, we should eschew absolutes. There is a conflict of interests, public and private. The line should not be drawn so as utterly to negate any significant public or private interest; rather there should be a careful balancing and weighing of the individual case.

Moreover, there are legally recognized limitations on confidentiality, which have been imposed by statute and decision. The clearest limitation is that neither the lawyer nor the physician may withhold information when a client or patient is known to be hell-bent on committing a serious crime. In addition, for the privilege to apply, the situation of the original disclosure must be a confidential one; if outsiders are present, the communication is not deemed to be confidential. Despite pressure from professionals to broaden the privilege and duty of confidentiality, perhaps the larger public interest requires their contraction, in an era when professions are becoming commercialized and collective concern and guilt may make the confessional seem to be a relic of the past.

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