

DELAWARE STATE BAR ASSOCIATION
COMMITTEE OF PROFESSIONAL ETHICS
OPINION 1980-2

We have been asked to provide an opinion concerning professional ethics to a member of the Delaware Bar concerning the obligation of a Delaware lawyer to disclose evidence of a possible violation of the criminal law by a person other than his client. The circumstances which form the basis for this request are as follows.

During the usual course of discovery in a civil proceeding, an attorney engaged exclusively in private practice becomes aware that the financial records of an opposing party contain information which evidences a possible violation of applicable criminal law. This discovery is made upon inspection of financial records produced by the opposing party pursuant to a request for production of documents.

The attorney has concluded that there exists no duty of general application under Delaware law to disclose evidence of the commission of a crime. The question presented, therefore, is whether the ethical standards

governing the practice of law in Delaware place upon an attorney engaged exclusively in private practice a higher duty than is applicable to society at large.

OPINION

The Delaware Lawyer's Code of Professional Responsibility does not impose upon Delaware lawyers any duty to make disclosure of evidence of past criminal conduct independent of that imposed by the substantive law. However, if the evidence discloses an intention to engage in future criminal conduct, disclosure to the proper authorities is required.*

PAST CRIMINAL CONDUCT

The only opinion which has been found which considered a question analogous to that presented here with respect to the obligation to disclose evidence of past criminal conduct is Opinion No. 265 of the Association

* This committee does not pass on questions of law. See American Bar Association Informal Opinion 1026 (February 1, 1968). Therefore, the Committee does not comment on any conclusions concerning the effect of the substantive law and this opinion is limited to matters of professional ethics. In addition, the opinion does not purport to address the obligation of a Delaware lawyer to make disclosure of evidence of past criminal conduct by another lawyer.

of the Bar of the City of New York. The question considered in that opinion was whether it was proper professional conduct for an attorney who had in his possession certain papers of a corporation, of which his former client was a stockholder and which client he no longer represented, to deliver such papers to the proper authorities for the prosecution of a crime which the papers disclosed was perpetrated by the officers of the corporation. The documents in issue in that case were delivered to the attorney voluntarily by one of the officers of the corporation in the course of the attorney's original investigation of a matter for his former client. Concluding that it was proper professional conduct for the attorney to make delivery of the documents to the authorities, the opinion went on to hold that:

"Under the circumstances, in the opinion of the Committee, it is not professionally improper to deliver such papers to the proper authorities for the prosecution of the crime in question, for, since the papers disclose that the crime has been committed by the officers of the corporation, it is the duty of the attorney to deliver to such authorities whatever evidence he may have in the matter, in order that the law may be

upheld and that the parties who, apparently, have committed the crime be brought before the Court, and, if guilty, that they be properly punished. If the proper authorities have legally required that such papers be delivered to them, it is the duty of the attorney to so deliver such papers."

(emphasis added). Opinion No. 265 was rendered in 1933 and did not purport to construe the current American Bar Association Code of Professional Responsibility or the Delaware Lawyers Code of Professional Responsibility (sometimes hereinafter referred to as the "Delaware Lawyers Code"). Moreover, several factors strongly suggest that the "duty" to reveal past criminal conduct referred to in that opinion may be inapplicable to Delaware lawyers.

Initially, no provision of the Delaware Lawyers Code directly imposes an obligation on a Delaware lawyer to make disclosure of evidence that a person who is not his client has committed a crime at some time in the past. While DR 1-102(A)(5) provides that a lawyer shall not engage in conduct that is prejudicial to the administration of justice, this provision does not appear sufficiently specific to warrant the imposition of such a duty. Secondly,

the specific provision of the Code dealing with disclosure of information to authorities contains no reference to an obligation to make disclosure under the circumstances here presented. DR 1-103*. Had the Delaware Supreme Court desired to impose such an obligation, it is reasonable to assume that it would have done so in the section of the Delaware Lawyers Code which specifically deals with the obligation to disclose information to authorities.

It is also worthwhile to consider that, as a practical matter, a vast amount of information could be construed as evidencing a "possible violation"

*DR 1-103 which is titled "Disclosure of Information to Authorities", provides:

- (A) A lawyer possessing unprivileged knowledge of a violation of DR 1-102 shall report such knowledge to a tribunal or another authority empowered to investigate or act upon such violation.
- (B) A lawyer possessing unprivileged knowledge or evidence concerning another lawyer or a judge shall reveal fully such knowledge or evidence upon proper request of a tribunal or other authority empowered to investigate or act upon the conduct of lawyers or judges."

(Footnotes omitted).

of criminal law which, when viewed in light of all the facts, demonstrates the commission of no crime whatever. To require Delaware lawyers to report every item of information suggesting a "possible violation" would be an exceedingly onerous burden which the Delaware Supreme Court may have viewed as unwarranted. Additionally, the policy considerations relating to disclosure of past criminal conduct are distinguishable from those governing future criminal conduct. Where evidence of future criminal conduct exists, an obligation of disclosure may be mandated by the need to prevent prospective injury to persons, property and societal interests in general. Where past criminal conduct is involved, the need for disclosure may not be as imminent or compelling in that the injury cannot be prevented and may have occurred in the distant past.

It is the view of the Committee that the Delaware Lawyers Code should not be construed as compelling disclosure of information which evidences a possible past violation of the criminal law in the absence of specific language evidencing an intention of the Delaware Supreme Court to impose such a duty.

A lawyer would, of course, be permitted to make full disclosure should he so desire. However, a different rule applies with respect to evidence of future criminal activity.

FUTURE CRIMINAL CONDUCT

The Delaware Lawyers Code contains a specific provision applicable to the duty to disclose future criminal conduct. DR 4-101(C)(3) provides that a lawyer may reveal "the intention of his client to commit a crime and the information necessary to prevent the crime." Significantly, one of the footnotes to DR 4-101(D)(3) contains a citation to American Bar Association Opinion 314 (1965) which is interpreted as requiring that a lawyer must disclose even the confidences of his clients if "the facts in the attorney's possession indicate beyond reasonable doubt that a crime will be committed."

If an attorney has an affirmative duty to reveal the intention of his client, with whom he has a fiduciary relationship, to commit a crime, it would follow that a similar duty exists requiring disclosure

of the intention to commit a crime of a person not his client, and with whom he has no fiduciary relationship. This duty to disclose future criminal activity finds justification in part in the interest of society and the courts in preventing the infliction of injuries which have not yet occurred. Therefore, to the extent that the information disclosed by the documents in issue here indicates an intention to engage in future criminal activity, disclosure would be required.

Dated: February 6, 1980