

DELAWARE BAR ASSOCIATION PROFESSIONAL ETHICS COMMITTEE

Opinion 1988-2

Background

Lawyer L has a client who has revealed to him that he has AIDS. The client lives with a woman who is a client of lawyer L's law partner, P.

The information concerning AIDS was disclosed to lawyer L in connection with his representation of the client. The client has asked L not to reveal the fact to anyone.* However, L told P the client has AIDS, and apparently that is when P revealed he was representing the woman with whom the client lives. The client has been living with P's client for approximately six months.

Lawyer L is concerned he has an obligation to make sure the woman living with his client is aware of the fact his client has AIDS. He does not know whether his client has told the woman. If he learns his client has not told the woman and insists his client do so, L wonders whether he has done enough or if he should reveal the fact to the woman directly.

L has requested advice from the Professional Ethics Committee on whether he has a duty to tell the woman directly his client has AIDS, and if he has no duty, whether he may properly disclose such information directly to the woman notwithstanding his client's request that the information not be revealed to anyone.

Conclusion

Lawyer L has no duty to warn the woman his client has AIDS. Under a literal reading of the applicable provisions of the

* In revealing the information to his partner, P, we have assumed lawyer L's disclosure was impliedly authorized in accordance with the following excerpt from the comments to Rule 1.6 of the Rules of Professional Conduct:

Lawyers in a firm may, in the course of the firm's practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be confined to specified lawyers.

Also, we have assumed disclosure to the Professional Ethics Committee is impliedly authorized. Anonymity of the client and the woman appears to be assured.

Code of Professional Responsibility, lawyer L may not tell the woman his client has AIDS over the objection of his client. However, lawyer L on humanitarian grounds should strongly urge his client to disclose or authorize him (lawyer L) to disclose and should point out to his client the danger in not disclosing, i.e., possible criminal or civil liability. If lawyer L nevertheless believes the moral compulsion to disclose is overwhelming, he must do so with the understanding he may have to accept discipline if he cannot convince a disciplinary authority to read in a "moral compulsion" exception to the rule governing confidentiality of information received from a client.

Discussion

The applicable Rule of Professional Conduct is Rule 1.6, which reads as follows:

RULE 1.6 Confidentiality of Information

(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.

The comments to the Rule explain the limited circumstances under which a lawyer may make disclosure adverse to his client:

Disclosure Adverse to Client

The confidentiality rule is subject to limited exceptions. In becoming privy to information about a client, a lawyer may foresee that the client intends serious harm to another person. However, to the extent a lawyer is required or permitted to disclose a client's purposes, the client will be inhibited from revealing facts which would enable the lawyer to counsel against a wrongful course of action. The public is better protected if full and open communication by the client is encouraged than if it is inhibited.

Several situations must be distinguished.

First, the lawyer may not counsel or assist a client in conduct that is criminal or fraudulent. See Rule 1.2(d). Similarly, a lawyer has a duty under Rule 3.3(a)(40) not to use false evidence. This duty is essentially a special instance of the duty prescribed in Rule 1.2(d) to avoid assisting a client in criminal or fraudulent conduct.

Second, the lawyer may have been innocently involved in past conduct by the client that was criminal or fraudulent [sic]. In such a situation the lawyer has not violated Rule 1.2(d), because to "counsel or assist" criminal or fraudulent conduct requires knowing that the conduct is of that character.

Third, the lawyer may learn that a client intends prospective conduct that is criminal and likely to result in imminent death or substantial bodily harm. As stated in paragraph (b)(1), the lawyer has professional discretion to reveal information in order to prevent such consequences. The lawyer may make a disclosure in order to prevent homicide or serious bodily injury which the lawyer reasonably believes is intended by a client. It is very difficult for a lawyer to 'know' when such a heinous purpose will actually be carried out, for the client may have a change of mind.

The lawyer's exercise of discretion requires consideration of such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, the lawyer's own involvement in the transaction and factors that may extenuate the conduct in question. Where practical, the lawyer should seek to persuade the client to take suitable action. In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to the purpose. A lawyer's decision not to take preventive action permitted by paragraph (b)(1) does not violate this Rule.

There is no Delaware statute which clearly makes criminal the transmission of AIDS to an unknowing victim. Moreover, here it is not at all certain the client will actually transmit AIDS to the woman with whom he lives, and, therefore, the likelihood of imminent death or substantial bodily harm is less than in the situation where a client informs his lawyer he intends to commit murder. Furthermore, under existing Delaware law, lawyer L is not faced with a certain risk of civil or criminal liability if he maintains silence. Delaware law presently imposes no duty to warn a potential victim that AIDS may be contracted.

According to the letter of the Code of Professional Responsibility, therefore, lawyer L must maintain silence if his client requires. But lawyer L may appropriately confront his client and under any moral code should do so. Lawyer L should urge his client on humanitarian grounds to disclose to the woman that he has AIDS or to authorize him (lawyer L) to make such disclosure. Also, lawyer L should point out to his client the potential dangers to the client in not disclosing. He should tell the client that although under existing law it is probably not a criminal act to fail to disclose, a test case might be made. For example, a prosecutor might argue that the client's conduct constitutes reckless endangering under 11 Del.C. §§ 603 or 604.** Also, lawyer L should point out that there may be possible civil liability to the woman for failure to warn although existing law imposes no such obligation.

** According to a recent law review article, court decisions in other jurisdictions have upheld criminal liability for intentional transmission of AIDS. See 92 Dickinson Law Review 868, f.n. 42 (Summer 1988). We have found no authority from any other jurisdiction to the effect that reckless or negligent transmission of AIDS is criminal, but this entire area of the law (e.g., AIDS law) is evolving rapidly.

If, following confrontation with the client, the client still refuses to disclose his condition to the woman, then lawyer L's duty is one of non-disclosure. If lawyer L's moral code is such that he cannot abide by this duty, he may be pressed to the point of civil disobedience because obeying the letter of the law may require him to sacrifice more than he can bear of his own moral code. If so, Lawyer L should inform his client of the decision to disclose and should be prepared to accept discipline if he cannot convince a disciplinary authority to read in a "moral compulsion" exception to the letter of Rule 1.6.