

Distinguishing among Past, Continuing & Future Crimes

BY MARY C. DALY

Two different clients visit a lawyer's office on the same afternoon. Client A tells the lawyer that he's been desperate for money and has robbed a bank: "I did it last week." He asks the lawyer to tell him what criminal penalties he is likely to face if he is caught. Client B tells the lawyer that he's out of work and is planning to rob a bank. He wants to know what criminal penalties he will face if he is caught. Client B listens carefully to the lawyer's entreaties that he abandon his project, but he leaves the office seemingly determined to proceed. May the lawyer disclose his conversation with Client A? With Client B?

The duty to preserve the confidentiality of client communications is one of the principal ethical responsibilities that a lawyer owes a client. That duty is not absolute, however. DR 4-101(C) of the New York Code of Professional Responsibility (Code) permits a lawyer to reveal confidential communications in five limited sets of circumstances. This article examines one of those sets, the so-called "future crime" exception. We analyze Formal Opinion 2002-1 issued by the Committee on Professional and Judicial Ethics of the Association of the Bar of the City of New York (Committee). That Opinion adds a much needed gloss to the future crime exception. It does this first, by providing a framework to distinguish between future and continuing crimes and, second, by articulating a "reasonable belief" test as the appropriate standard to guide a lawyer in evaluating the likelihood that the client will actually commit the threatened crime.

DR 4-101(A) distinguishes between two types of client communications - confidences and secrets. A confidence is "information protected by the attorney-client privilege" and a secret is "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." DR 4-101(B) establishes the rule for both a confidence and a secret - neither may be disclosed knowingly unless it falls within one of the five exceptions listed in Subsection (C). In our hypothetical, the communications of both Clients A and B clearly fall into the category of secrets.

Future Crime Exception

Whether the lawyer may disclose either communication without the client's consent depends in large measure on the interpretation of Subsection (C)(3). This exception permits a lawyer to reveal the "intention of a client to commit a crime and the information necessary to prevent the crime."

Two competing public policies collide in DR 4-101. Public policy #1: to encourage clients who may be prosecuted to seek legal advice, a lawyer should be discouraged from disclosing a client's communications relating to the possible commission of a past crime. Thus, the secret of Client A's robbery of the bank must be maintained by the lawyer. Unless "required by law or court order," none of the exceptions in DR 4-101(C) would permit disclosure of the statements made by Client A.

Public policy #2: to protect society at large and shield innocent individual victims from harmful conduct that is threatened but has not occurred, a lawyer should be permitted to disclose the probability of a future crime. Thus, our lawyer is free to contact law enforcement authorities and to reveal Client B's intention to rob the bank. The lawyer's disclosure, of course, is limited to "information necessary to prevent the crime." For example, if it is possible to reveal the client's plan to commit the crime without disclosing his identity, disclosure of the client's identity will violate Subsection (C)(3).

The dividing line between past and future crimes can't always be drawn clearly. Client A's statement "I did it last week" clearly refers to a past crime. The analysis becomes more complicated, however, if Client A adds "I'm hiding the money in the attic of my house." With this additional statement, the client has confessed to the crime of possession of stolen property, a continuing offense. The client's statement triggers further analysis of subsection (C) (3). Should a continuing crime be characterized as a past crime or a future crime?

The Committee's analysis in Formal Opinion 2002-1 provides invaluable assistance in answering this question. The Opinion is comprehensive and canvasses the existing literature thoroughly. Under the Committee's opinion, central to the lawyer's analysis of any consultation is "the purpose for which the client consults the lawyer and, therefore, the context in which the lawyer learns of the client's crime." Client A in our hypothetical consulted the lawyer in the context of the completed crime of bank robbery. He wanted to know the range of penalties that might be imposed if he were convicted of bank robbery.

In the Committee's view, if a client consults a lawyer with respect to the consequences of completed criminal conduct, the lawyer may not disclose the continuing effects of the crime "if the client's completed conduct has satisfied all elements of the crime, i.e. where the continuing offense is 'factually indistinguishable from a past offense' aside from temporal continuation." Applying the framework of this analysis, it is clear that Client A's possession of the proceeds of the bank robbery is factually indistinguishable from the robbery itself.

Although the law may have defined separately the crimes of bank robbery and possession of stolen goods, the two are inextricably bound when the same person commits both at the same time. Consequently, the lawyer in our hypothetical is ethically prohibited from disclosing Client A's possession of the proceeds. In this context, the possession of stolen property constitutes a continuing offense, not a future crime.

The Threat of Bodily Harm

The Committee's analysis is straightforward, and its conclusion entirely consistent with the public policy of encouraging prospective clients to seek legal advice. The Committee recognized, however, that a rigid application of the analysis could have horrendous consequences under certain circumstances, which, fortunately, rarely occur. Suppose, for example, that instead of confessing to a bank robbery, Client A confesses to having kidnapped the child of a wealthy executive and adds that he is holding the child in the attic of his house. A strong argument can be made that Client A is consulting the lawyer only with respect to the completed crime of kidnapping. However, because there is now a threat of imminent serious bodily injury or death, the Committee would refuse to apply the standards applicable to circumstances "factually indistinguishable from a past offense." It reasoned that "client confidentiality must yield to the lawyer's decision to protect human life." The Committee's stand in this regard is

eminently sensible and does not in any rational way weaken its underlying conclusion that in almost all instances a lawyer may not disclose continuing offenses that are factually indistinguishable from completed criminal conduct.

Formal Opinion 2002-1 also addressed this question: "When can a lawyer conclude that the client's intent to commit a future crime is sufficiently imminent and real to permit disclosure." The Committee rejected the position that the complete absence of guidance in Subsection (C)(3) gave a lawyer unfettered discretion to disclose. Instead, it argued for a "reasonable belief" standard. Under this standard, the lawyer in our hypothetical could not automatically assume that Client B would proceed to rob the bank. He would be required to reach a reasonable belief that the crime would be committed only after analyzing all the facts and circumstances. In some instances, it may not be reasonable to take a client's professed intention at face value.

On the other hand, the "reasonable belief" standard does not encompass ostrich-like behavior. The Committee cautioned that "an attorney need not turn a blind eye to circumstances that would lead a reasonable person to believe that a client intends to commit a crime even though the lawyer does not 'know' that this is the client's intent." If Client B were to show the lawyer a detailed map of the bank's layout, the gun he plans to use in the robbery, or airplane tickets for a flight to Hong Kong, it would be hard for the lawyer to claim that he acted reasonably in withholding disclosure.

Two final points need to be made in connection with Subsection (C)(3)'s future crime exception. First, disclosure is always permissive. Unlike the rules of lawyer conduct in some jurisdictions, such as New Jersey, the Code does not mandate disclosure. A lawyer is always free not to exercise the discretion that Subsection (C)(3) allows. (If a lawyer is licensed in more than one jurisdiction and the rules on disclosure are not identical, the lawyer should consult DR 1-105 for guidance on the choice of law).

Second, in deciding whether to exercise this discretion in a particular case, a lawyer should consult Ethical Consideration 4-7. It identifies a number of factors that the lawyer should consider in deciding whether to disclose the confidential communication. They include the seriousness of the harm likely to be inflicted if the crime is not prevented, the likelihood and imminence of the crime, whether there is another feasible way to prevent the potential injury, whether the client has attempted to use the lawyer's services in connection with the contemplated criminal conduct, and how the lawyer came to possess the information respecting the client's intention to commit a future crime.

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