

When A Client Threatens Suicide: The Duty Not To Disclose

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Last month in Chicago, lawyers met at the American Bar Association's annual meeting to consider proposals to amend Model Rule 1.6 to permit a lawyer to reveal client confidences "to the extent the lawyer reasonably believes necessary to prevent reasonably certain death or substantial bodily harm." Supporters of the proposed change argued that the privacy of clients would not be abused, while opponents claimed the proposal would undermine lawyers' loyalty to their clients. The debate did not consider whether a lawyer has a duty to disclose a client's intent to commit suicide. The issue of client suicide acquires special meaning as the ABA continues its discussion of the proposed changes to Model Rule 1.6.

Suicide is no longer a crime in New York. If it were still defined as a crime, ABA Model Rule 1.6 in its present form would permit disclosure:

A lawyer may reveal such information [relating to representation of a client] 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;...MR 1.6(b).

In New York, DR 4-101(C)(3) permits a lawyer to reveal "The intention of a client to commit a crime and the information necessary to prevent the crime." Thus, because suicide is not a crime, a lawyer does not presently have the option to disclose.

The Dilemma Illustrated

About twenty years ago we (one of us) received a phone call from a friend who had previously been a client in a commercial matter. She stated, "I am going to kill myself within the next hour and I have enough pills to do it." After several minutes of tense conversation, she hung up. Her voice and what she said gave us true cause for alarm and emergency action. Repeated efforts to reach her by telephone were unsuccessful. This led to a report of attempted suicide at the police precinct near her apartment. We met the police in the lobby of her building and rushed to the sixteenth floor of the building, where the police drilled through the door of an apartment. We were on the wrong floor and had entered the wrong apartment. We went to the floor below and knocked on the door.

The friend appeared and informed us she had no intention of committing suicide. The police insisted she accompany them to Bellevue, where she was involuntarily hospitalized for several days. Our friend never spoke to us again and may have filed a complaint with the disciplinary authorities. Fortunately her sixteenth floor neighbors did not sue.

At first blush, our efforts to save a human being from death would appear to be supported by NYSBA Ethics Opinion 486 and by Judge Albert M. Rosenblatt's reasoning in *People v. Fentress*, 103 Misc. 2d 179, 425 N.Y.S. 2d 485 (Co. Ct. Dutchess Co. 1980). Opinion 486 answered in the affirmative the general question: should a lawyer disclose his client's intent to commit suicide? But the opinion cautioned that the decision "...must depend on the particular circumstances present, taking into account policies respecting the protection of human life and the prevention of suicide." The opinion concluded, "Where possible, the lawyer should encourage and assist the client to seek needed help. The lawyer may thus, and generally should, take appropriate action to keep the client from committing suicide and, for this purpose, may reveal the client's suicidal intent to others."

In *Fentress*, Judge Rosenblatt stated, "The ethical oath of secrecy must be measured by common sense." In a thoughtful opinion citing numerous sources, Judge Rosenblatt found that an attorney-client relationship arose between the attorney and a friend who was about to commit suicide so long as the friend believed he had contacted the attorney to obtain legal advice. The judge cited Professor Monroe Freedman, "At one extreme, it seems clear that a lawyer should reveal information necessary to save a life. If the ethical duty exists primarily to protect the client's interests, what interest can there be superior to the client's life itself?"

Disclosure Not A Viable Option

Opinion 486 and *Fentress* notwithstanding, the decision to disclose a client's intent to commit suicide would not appear to be an option in New York. As we have noted, suicide is not a crime in New York. (See, N.Y. Penal Law Article 120 and L. 1919, ch. 214; Former Penal Law Sec. 2301; *Meacham v. NYSMBA*, 120 N.Y. 235, 242). Therefore, a New York lawyer may not rely on the provisions of DR 4-101(C)3, permitting disclosure of a crime in order to report an imminent suicide. Nor may the lawyer rely on any of the other exceptions to the prohibitions against disclosure contained in DR 4-101(C).

The changes in MR 1.6 now being debated by the ABA would probably permit disclosure of the client's intent to commit suicide. The proposed changes draw on language in the Restatement of the Law Governing Lawyers, Third. The Restatement authorizes the lawyer to reveal client confidences "to prevent reasonably certain death or serious bodily harm," even if the lawyer obtains the information as the result of a non-criminal act of the client. Thus, under the Restatement, a lawyer would be able to disclose a client's intent to commit suicide even if suicide is not a crime (Restatement of the Law Governing Lawyers, 3rd, Sec. 66, Comment b), although the language lacks enough precision to instill confidence.

Until, and, perhaps, even if, the Restatement's position is adopted in New York, the proper position for the attorney confronted with evidence or statements indicating a client's "intention" to commit suicide is to keep the facts confidential. And, once established, the attorney-client relationship should be presumed to continue unless clearly and demonstrably terminated.

Professor Freedman, Judge Rosenblatt and NYSBA's Opinion 486 all focus on the importance of saving a life. Of course, life is paramount. But there are many instances in the law when we do not expect a lawyer to disclose, however great the risk to life. What does a criminal lawyer do when he learns about the past homicides of his client from their confidential communications and believes that the client may murder again? Does he have any choice except to devote all his energy and his skills to his client's acquittal? And

what about the corporate lawyer who learns from confidential communications that his client's product has the potential to kill or maim many individuals?

A Lawyer's Quandary

A lawyer must make two large assumptions before he can presume to intervene to prevent his client's suicide under the current state of law. First, he must believe his personal views of life and death and his predictive powers are more important than his duty under the Code. In effect, he must decide to play God. Second, he must recognize that disclosure may result in great suffering, discomfort and inconvenience to a client who has turned to him only for solace and guidance. He must also ignore the potential consequences to himself—his intervention may only result in his being fired and, perhaps, in a complaint under the New York Code.

But there are other concerns which should cause a lawyer to think twice before rushing to disclose. One basic issue is: what constitutes "reasonable belief" that the client will actually commit suicide. A person on the precipice between life and death is unlikely to consult a lawyer. In most instances, a client's threats of suicide may reasonably be viewed as less immediate and, therefore, less frightening and compelling than a physical act of self-injury. Given the attorney/client context for communication, the client's statements alone are usually likely to be less alarming than the phone call one of us received from our friend.

Communications between lawyer and client have a meaning they have in no other context. The special nature of these communications requires that a lawyer not attempt to assign any "hidden" meaning or form any unwarranted judgments. Few lawyers are trained as psychologists or are sufficiently sensitive to the mental problems of others to claim predictive skills. The client's statement, "I will commit suicide" is not sufficient to warrant action of any kind by the lawyer. A lawyer may be tempted to make a "confidential" phone call to the client's parents or loved ones to alert them to the "potential" suicide, but this can backfire rather than help.

Clients say things to lawyers they might not normally say because they understand that the communications are private and that the confidentiality cannot be waived except by them. This fact makes it unwise for the attorney to infer "intent" and difficult to conclude that a statement is truly predictive of a threatened act. In this context, we may note that psychiatrists' predictions of violence are no better than random selection. See, Ennis, B.T. and T.J. Litwack, Psychiatry and the presumption of expertise: Flipping Coins in the courtroom, 62 California Law Review 693. (1974). See in general, Horowitz and Willging, The Psychology of Law Integrations and Applications, (Little Brown, 1984). Even in instances where there may be additional confirmation of a statement of intent (e.g. knowledge that a client is stockpiling pills given to him by a sympathetic relative) the lawyer should refrain from stepping outside the limits of confidentiality to act upon his own assessment of a complicated and ambiguous human dilemma.

The key to the traditional client-attorney relationship is unlimited trust. The relationship is founded on the explicit premise of confidentiality and non-interference except in response to the client's express requests. A lawyer is privileged to hear many intimate matters that others do not. As our friend Professor Freedman reminds us: A lawyer's loyalty "connotes a concern with impairing the lawyer-client relationship of trust and confidence....(such) loyalty, like zeal, pervades the lawyer-client relationship."

Freedman, M., Understanding Lawyer 's Ethics, Matthew Bender Legal text Series (1990). Because of that trust, a person who manifests the emotional anguish that may lead to suicide may listen more carefully to the advice of the lawyer to seek professional help or other assistance. Also, the client may be encouraged to persevere by the lawyer who understands his role as confidant.

The relationship in which the client is the principal and the lawyer the agent often "empowers" the client. When the client's anguish is respected, his sense of autonomy may be enhanced at the same time as the lawyer's judgment is more respected. The lawyer can then proceed as a human being who is being asked for help and whose advice will be considered carefully. He may be permitted to ask, for example, whether the client is under medical care or has consulted a psychologist or social agency. The threat of self-destructive behavior can then be assessed by the appropriate "experts." In any event, the lawyer can strongly suggest that the client contact the social agencies and specialists that are most appropriate. Having gained and preserved the client's trust and confidence, the lawyer may actually be the only instrument for preserving a life — especially if he has been non-judgmental.

On the other hand, there is no surer way to destroy a client's trust and confidence than to use the client's confidences in a way he did not anticipate and probably did not want. Unexpected disclosure of a threat of suicide may literally push the client over the edge. In any event, there is no assurance that the lawyer's intervention will help the client. A lawyer cannot provide perpetual twenty-hour surveillance of his client's actions (nor will the current public psychiatric system offer more than a short period of oversight). And the client now has a lawyer's betrayal to add to his incentives to perish rather than persist.

Of course, the lawyer may be confronted with a suicidal act which leaves no room for delay or equivocation. If a client slits his wrist during a matrimonial conference or points a loaded gun at his own head in the lawyer's presence, there is no time for hesitation. As any decent and reasonable human being would be, the lawyer is bound to call for help, whatever the consequences to himself and whatever the result to the client. Such acts are clearly not non-verbal attorney/client communications, but take the situation into different territory.

Suicide is not a crime in New York and under its applicable ethical rules, a lawyer may not disclose apparent or inferred "intentions" to commit suicide. If a lawyer violates these strictures, he will probably lose a live client and could face disciplinary action.

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