

When A Prison Inmate Threatens Suicide

BY BRAD RUDIN & BETSY HUTCHINGS

Criminal defense and prisoners' rights lawyers face a vexing ethical dilemma when confronted with a communication indicating that an inmate intends to commit suicide. On the one hand, counsel has an obligation under DR 4101 to maintain the confidentiality of the communication, while on the other, he has a profound interest in preventing the death or injury of another human being. These two principles come into conflict whenever counsel is forced to conclude that disclosure of the confidential information is necessary to prevent the inmate from harming himself. Resolution of the conflict is particularly difficult in the case of a prisoner/client because of the reduced opportunities for intervention imposed by the principles of client confidentiality.

The Suicidal Inmate and Diminished Capacity

Inmates are uniquely at risk for suicide because of the stress of prison life as well as the high rate of mental illness prevailing in correctional institutions. See, American Psychiatric Association, *Psychiatric Services in Jails and Prisons: A Task Force Report of the American Psychiatric Association*, 2d ed., at 14 (noting that suicide rates in correctional institutions are higher than among the general population); American Psychiatric Association, *Practice Guidelines for the Treatment of Psychiatric Disorders: Compendium 2004*, at 863. ("Psychological autopsy studies have consistently shown that more than 90% of persons who die from suicide satisfy the criteria for one or more psychiatric disorders.")

According to a 2004 report by the Correctional Association of New York *Mental Health in the House of Corrections* - eleven per cent of the prison population is on the mental health caseload. This large number of mentally ill inmates in the New York prison system means that lawyers involved in the criminal justice system are dealing with a population constantly at risk for suicide. Seventy percent of the inmates who committed suicide while in New York State custody had a history of mental illness. Human Rights Watch, *Ill Equipped: U.S. Prisons and Offenders with Mental Illness*, Ch. XIII, *5, <http://www.hrw.org/reports/2003/usa1003/22.htm> . In New York State, suicide accounts for 6.6% of all deaths among inmates in the custody of the Department of Correctional Services. State of New York, Department of Correctional Services, *Inmate Mortality Report 19992002*, June 2003, at 2.

Because psychiatric disorder is a recognized risk factor for suicide, lawyers responding to threats of suicide are frequently dealing with persons who suffer from diminished capacity. The suicidal inmate may be a person suffering from the impulsivity characteristic of antisocial personality disorder. See, American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders*, 4th ed., at 706 (listing the diagnostic criteria). Or he may be a person suffering the cognitive impairment and feelings of worthlessness associated with a major depressive episode (see, id., at 356), or a person whose contact with reality is broken by the delusions and hallucinations typical of schizophrenia (see, id., at 312). In any event, the suicidal inmate is likely to exhibit seriously impaired decision making capacity. This imposes additional responsibilities on counsel.

The Scope of Protected Confidentiality

Intervention in behalf of the inmate is especially difficult in New York because of the limitations in the New York Code of Professional Responsibility. The Code does not offer clear guidance to a lawyer who must respond to a suicide threat. Unlike the ABA's Model Rule 1.6(b)(1), which permits disclosure to prevent a criminal act that is likely to result in "imminent death or substantial bodily harm," the exceptions listed in New York's DR 4101(C) do not include suicide threats, though they do give the lawyer the option to disclose a client's intent to commit a crime (DR 4101(C)(3)).

But the absence of language permitting disclosure of a suicide threat does not mean that counsel is compelled to remain silent in all circumstances of imminent suicide. Counsel must be sensitive to circumstances permitting intervention.

DR 4101 extends only to information "gained in the professional relationship." See, DR 4101[A]. "Gained in" may be viewed as "during" and "because of." R. Simon, *Simon's New York Code of Professional Responsibility Annotated*: West: 2004, at 441. "... [F]actual information obtained before a representation begins ... falls outside of the reach of DR 4101[A]." *Id.* Therefore, an inmate's communication with counsel is not protected in the absence of an attorney client relationship. When a suicide threat is communicated in a letter sent to a law office with no previous professional contact with the person making the threat, for example, the communication is not protected.

The absence of a clearly stated request for legal advice (as when the inmate only alludes to a possible suicide) also takes a communication out of the confidentiality rule. Disciplinary Rule 4101(A) defines a confidence as "... information protected by the attorney client privilege under applicable law." As the Court of Appeals has stated: "For the privilege to apply when communications are made from client to attorney, they 'must be made for the purpose of obtaining legal advice and directed to an attorney who has been consulted for that purpose.'" *Rossi v. Blue Cross and Blue Shield of Greater New York*, 73 NY2d 588, 542 NYS2d 508, 510511 (internal citation omitted).

In an opinion consistent with *Rossi*, the NYSBA Ethics Committee has stated that when a person's communication to counsel is unrelated to legal advice "we have no difficulty in finding the lawyer free to take whatever steps he deems appropriate to prevent his client from attempting suicide, including disclosure of his client's intentions." Ethics Opinion 486 (NYSBA), 1978 WL 14149, at *1.

Implied Exceptions to the Confidentiality Rule

As support for its opinion, the Ethics Committee invoked the future crimes exception contained in DR 4101(C)(3), *supra*. Considering the State's great interest in preventing suicide, the NYSBA ethics committee stated: "We find this fact to be determinative; and, it compels us to treat an announced intention to commit suicide in a manner similar to that which would obtain in the case of proposed criminal conduct under DR 4101(C)(3)." NY Eth. Op. 486, *supra*, at *2.

But attempted suicide is not a crime it was decriminalized by the Legislature a half century before the promulgation of the Code of Professional Responsibility in 1970. To contend that attempted suicide should be treated as a crime is to stretch the exceptions in DR 4101(C)(3) beyond any fair reading.

Further, NYSBA Opinion 486 would confine the option to disclose a prisoner's suicidal intent to those situations where counsel "reasonably believes" that this measure is necessary to protect the client. NY Eth. Op. 486 at *3. This places counsel under the burden of responding to a daunting and elusive standard.

Instead of overextending the scope of the 4101(C)(3) exceptions, it would be more useful to justify the disclosure of suicidal intentions on the recognition of an inmate's diminished capacity. A communication of suicidal intent should be construed as allowing counsel to consider whether the inmate is suffering from diminished capacity. However, in light of existing research about suicide, a conclusion of diminished capacity is not always appropriate. For this reason, counsel must determine on a case by case basis whether departure from the confidentiality rules is warranted by the client's mental state. [See, N. Andreasen, M.D. & D. Black, M.D., *Introductory Textbook of Psychiatry*, 3d ed., American Psychiatric Publishing 2001, at 555 ("A small number of persons committing suicide appear to have no evidence of mental or physical illness.").]

When the inference can reasonably be drawn that a client suffers from diminished capacity, counsel should be able to substitute his authority for the authority normally allocated to the client. The need for a reallocation of authority when "any mental or physical condition ... renders a client incapable of making a considered judgment on his or her own behalf" is promulgated by EC 712, which recognizes that this "casts additional responsibilities on the lawyer." Where a guardian is not available to protect the interests of the impaired client, "the lawyer should consider all circumstances and act with care to safeguard and advance the interests of the client." *Id.* As EC 711 recognizes, a lawyer's responsibilities "may vary according to the intelligence, experience, mental condition or age of a client"

These principles are consistent with the guidelines set forth in the Restatement of the Law (Third) Governing Lawyers: "When a client's disability prevents maintaining a normal client lawyer relationship and there is no guardian or other legal representative to make decisions for the client, the lawyer may be justified in making decisions with respect to questions within the scope of the representation that would normally be made by the client." *Restatement*, American Law Institute: 2001, § 24, Comment d, at 191.

Depending on the circumstances, the reallocation of authority should extend to the lawyer's discretion to waive the protection of the confidentiality rules, a choice that ordinarily belongs to the client. (See, DR 4-101(C)(1), allowing counsel to make disclosures with the consent of the client after full disclosure.)

Of course, counsel must exercise reasonable judgment in determining when the disclosure of protected information is advisable. Considering whether counsel in a social services agency may give advance warning that he will disclose protected communications about a client's intent to kill himself or another, the ethics committee of the Association of the Bar of the City of New York stated: "It would generally be inappropriate . . . for a lawyer to decide invariably to reveal client confidences whenever she is permitted to do so, rather than taking relevant factors into account in making an individual decision." NYC Eth. Op. 19972, WL 1724482, at * 9.

In a particular case, the lawyer's decision will be based on the content of the client's communication and other information about the client's mental state. For example, if an inmate with no known mental health history warns, "I will kill myself if the appeal that you file is denied," disclosure would not seem

appropriate. The communication seems less a sign of diminished capacity than an exhortation to counsel to prepare effective papers.

But where the inmate has a known history of mental illness (or manifests untreated psychiatric symptoms) and the communication threatening suicide appears to present an immediate danger, counsel may properly draw the inference that the client suffers from diminished capacity. Under those circumstances, counsel may make the minimum disclosure necessary to protect the inmate's life.

Support for the reallocation of authority when "any mental or physical condition...renders a client incapable of making a considered judgment on his or her own behalf" is found in EC 712, which provides that such circumstances "cast additional responsibilities on the lawyer."

Necessary Disclosure

When counsel makes the decision to make an unconsented disclosure of an inmate's suicide threat, care must be taken to avoid the release of unnecessary information that may be adverse to the client's interests. As EC 47 states, ". . . a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to the purpose." If the lawyer suspects that disclosure will be adverse to the client's interests, it may be appropriate to avoid disclosure of the suicide threat and, instead, intervene with the mental health staff of the correctional institution to ask that a competent staff member examine the inmate as quickly as possible.

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