Utah Ethics Opinions

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95. USB EAOC Opinion No. 95

Utah State Bar

Ethics Advisory Opinion Committee

Opinion No. 95

Approved October 27, 1989

Issue: May a lawyer disclose a client's threats to commit suicide to another who might help prevent it, even though the client's communication is privileged and confidential and otherwise falls within the scope of the attorney-client relationship?

Opinion: If it is in the best interests of a client, an attorney who reasonably believes the client is contemplating imminent suicide may disclose a suicide threat to another who may help prevent it.

The Ethics Advisory Opinion Committee wishes to avoid any suggestion that a lawyer is obligated in any way to make such a disclosure. The lawyer should disclose the information only when to do so would help the client get help, such as medical assistance.

Analysis: The factors that favor allowing a lawyer under exigent circumstances to disclose otherwise confidential information of a client's threat or expression of serious intent to commit suicide are compelling. In 1987 suicide was the eighth leading cause of death in the United States, third among adolescents, and second among university and college students. (fn1)

Certain inherent characteristics of the suicidal individual also seem to indicate a need to encourage disclosure. Often the suicidal individual is experiencing a feeling of intense ambivalence, i.e., a very strong wish to die counterbalanced by an equally strong wish to live. The literature seems to indicate that most suicidal persons are undecided about living or dying and they "gamble with death," leaving it to other to save them. (fn2)

In addition to the ambivalence suggested by the literature, the desire for death seems to be often, although not uniformly, temporary and reversible. Lastly, attempted suicide, or the expression of the desire to commit suicide-e.g., "I want to die"-may actually be a cry for help and the neurotic expression of the need for help or feelings of desperation. (fn3)

Although it has expressed it in quite different ways historically, society has always manifested a strong interest in preventing suicide. The association between suicide and criminality began as early as the Seventh Century in England. In 1562, an English Court held suicide a punishable felony because it offended nature, God, and the King. (fn4) Ironically those who failed in their attempt to take their own lives were subject to being hanged by the state, although the frequency of such occurrence is unknown. (fn5)

In America until recently suicide was a criminal offense in most jurisdictions, often characterized as a crime of moral turpitude. Recently, however, almost all states, Utah among them, have decriminalized suicide and attempted suicide. The apparent rationale behind the movement to decriminalize is based upon the apparent lack of deterrent effect, along with prosecuting authorities' and coroner's juries' reluctance to pronounce a suicide or attempted suicide sane and, therefore, punishable. The literature indicates that the third and probably most plausible explanation of decriminalization rests in the belief that most suicides are caused by mental illness. (fn6)

The expression of society's concerns over protecting against suicide as embodied by state and governmental exercise of its powers has been clearly enunciated by the courts. The first and most sweeping aspect of state interest in preserving life is in the interest of preservation of the value of societal life. In the suicide context, courts have emphasized that "the preservation of life has a high social value in our culture and suicide is deemed a `grave public wrong.' " (fn7)

In addition to the protection of societal life, the state's interest in life preservation also extends to the protection of each individual from harm, even self-inflicted harm, by virtue of the *parens patriae* doctrine. This power is employed by the state in the suicide context in order to protect the individual suffering from mental illness from selfinduced harm on the theory that the individual is, at that time, incapable of protecting him or herself. Mentally ill suicidal individuals are perceived as having lost their capacity for rational decision, and the state assumes, therefore, the power of such decision, which it exercises in favor of life. (fn8)

There is very little that can be said in favor of not encouraging a lawyer from suspending the strict requirements of confidentiality in order to serve the interests of preserving life. The high degree of value that society seems to have placed historically, and at present, on

the value of preserving life demands that as lawyers, servants within the system of justice and government, and as human beings, the Rules of Professional Conduct and Ethical Considerations allow that expressions of genuine suicidal intent be subject to disclosure. The Committee does not believe that such an exception to the requirements of confidentiality would have a deleterious effect upon the attorney-client relationship or deter open and free communications between attorney and client.

Some of the reported ethics opinions are founded upon the ABA Model Rule 1.14 relating to a client under a disability. This rule allows a lawyer to "take protective action with respect to a client, (only) when the lawyer believes that the client cannot adequately act in the client's own interest." This rule has unfortunately not been adopted in Utah and thus may not be relied upon at the present time.

Others of the ethics opinions are based upon Rule 1.6 of the Rules of Professional Conduct, adopted by the Utah State Bar, the relevant portions of which are set forth as follows:

(a) A lawyer shall not reveal information relating to representation of a client except as stated in paragraph (b), unless the client consents after disclosure.

(b) A lawyer may reveal such information to the extent the lawyer believes necessary:

(1) to prevent the client from committing a criminal or fraudulent act that the lawyer believes is likely to result in death or substantial bodily harm, or substantial injury to the financial interest or property of another; . . .

As previously pointed out, Utah has decriminalized suicide, and neither suicide nor attempted suicide are punishable under the criminal law. However, opinions of other bar associations that have dealt with the situation have uniformly held that, although suicide or attempted suicide are not criminal, they have in other respects always been deemed to be *malum in se* and treated as unlawful and criminal and, therefore, subject to disclosure. An opinion of the ABA states as follows:

Ethics committees in two states have dealt with this problem. In Opinion 486 (1978), the Committee on Professional Ethics of the New York State Bar Association concluded that while suicide had been decriminalized in New York and DR 4101(C)(3) [similar to the Utah Rule of Professional Conduct 1.6(b)(1)] did not literally apply, the overriding social concern for the preservation of human life permitted the lawyer to disclose the information. The New York committee pointed out that the decriminalization of suicide in the state was not intended to effect any basic change in underlying common law and statutory provisions reflecting deep concern for the preservation of human life and the prevention of suicide. Accordingly, the committee analyzed an announced intention to commit suicide in the same manner as proposed criminal conduct under DR 4101(C)(3). Addressing the same issue in Opinion 7961 (1979), the Committee on Professional Ethics of the Massachusetts Bar Association determined that although neither suicide nor attempted suicide was in itself punishable under the criminal law of Massachusetts, both have in other respects been deemed to be malum in se and treated as unlawful and criminal. That committee cited the New York State Bar Association Opinion 486 and reached the same conclusion.

We believe that in light of the following language of EC712 relating to proper conduct in dealing with the client with a disability, these Committees reached the proper conclusion: "Any mental or physical condition of a client that renders him incapable of making a considered judgment on his own behalf, casts additional responsibilities on his lawyer . . . . If the disability of a client and the lack of a legal representative compel the lawyer to make decisions for his client, the lawyer should consider all circumstances then prevailing and act with care to safeguard and advance the interests of his client . . . ."

This concept is also recognized in the ABA proposed Model Rules of Professional Conduct: "A lawyer may seek the appointment of a guardian or take other protective action with respect to a client, only when the lawyer reasonably believes that the client cannot adequately act in the client's own interest."

The inquirer may justifiably conclude that his client is unable to make a considered judgment on this ultimate life or death question and should be permitted to disclose the information as a last resort when the lawyer's efforts to counsel the client have apparently failed. This interpretation is limited to the circumstance of this particular opinion request and should not be relied upon to permit the disclosure of any other information in any other situation. (fn9)

In view of the compelling interest in disclosing a suicide threat to authorities, it is believed that the better course of action is to free the attorney from the strict requirement of the Rule 1.6(b)(1), with the caveat (fn10) that circumstances should be such as to cause a reasonably prudent attorney to deem the situation to be exigent in nature and of sufficient gravity to require the attorney in the exercise of his professional judgment to make such a disclosure, and that the preferable recipient of such disclosure should be a Court or other authorities who might help prevent it as opposed to family members or other third parties.

With respect to the question of an attorney's potential tort

liability if he fails or refuses to disclose information of the nature set forth, such is a question of law and beyond the scope of the Committee. (fn11) The Committee wishes to avoid any suggestion that a lawyer is obligated in any way to make such a disclosure. The lawyer should disclose the information only when to do so would help the client get help, such as medical assistance.

Footnotes

1. *The Role of Law in Suicide Prevention: Beyond Civil Commitment-Bystander Duty to Report Suicide Threats*, 39 Stanford Law Review 929 (1987).

2. The issue is somewhat complicated by the fact that there are a certain number of "false positives" reported. False positives are created by people who would not, in fact, attempt suicide, but indicate that they would. This points up the fact that there are two different populations with quite different characteristics among those who attempt suicide. The goal of the suicidal patient is to die. On the other hand, suicide attempters do not necessarily plan to commit suicide, although they might well do so in error. Their goal is to survive and to impact others with whom they have personal relationships in order to modify those relationships. The fact that they often succeed beyond their actual desire, however, merely substantiates whatever preventative rationale exists. *Legal Liability for a Patient's Suicide*, 14 J. Psychiatry & L. 409 (1986).

3. 39 Stanford L. Rev. at 938-39.

4. *Hales v. Petit*, 1 Plowden 253, 261, 75 Eng. Rep. 387, 400 (Q.B. 1562).

5. 39 Stanford L. Rev. at 931.

6. *Id.* at 932.

7. *Von Holden v. Chapman*, 450 N.Y.S.2d 623, 626 (N.Y. Sup. Ct. 1982).

8. 39 Stanford L. Rev. at 936.

9. American Bar Ass'n, Informal Op. 83-1500, June 24, 1983.

10. Inasmuch as a lawyer is not schooled to detect the warning signals of a client who may seriously intend to commit suicide, the issue presented requires considerable caution. A doctor, psychiatrist or other health worker is presumably trained to detect and be sensitive to outward symptoms which would be consistent with suicidal ideation. Doctors, psychiatrists and other such mental health professionals may very well have duties and obligations, the failure to which might be deemed the proximate cause of a patient's suicide, thus leading to potential liability. Consequently, such mental health professionals are more likely to maintain contemporaneous notes relating to impressions of the mental and emotional condition of a patient than a lawyer would of a client.

11. It seems fairly clear from the reported cases that in most usual circumstances it would be very unusual to find any nexus between a lawyer's breach of duty and the client's suicide. Certainly there is no affirmative duty imposed by law on any bystander, let alone a lawyer receiving information in a confidential privileged setting, to report the expression of intent to commit suicide. Unless the lawyer commits an affirmative act that might subject any person, not just a lawyer, to liability for the commission of suicide by another, it is very unlikely that a meritorious cause of action could be maintained. An attorney's alleged negligence in representing a client in a criminal prosecution, and the suicide of that client following his alleged wrongful conviction and incarceration, has been held to be too attenuated (lack of proximate cause) to impose legal liability on an attorney. *McLaughlin v. Sullivan*, 461 A.2d 123, (N.H. 1983); see also 41 A.L.R.4th 343.

Rule Cited:

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