

FORMAL OPINION NO. 96 \*

An inquiry has been submitted to the Idaho State Bar and referred to the Professional Ethics Committee on the question:

Is it a violation of the Code of Professional Responsibility for a lawyer to disclose, upon request only of a Federal agency, the whereabouts of a client for whom a fugitive arrest warrant has been issued?

The inquiry was made by the lawyer when the client had instructed the lawyer, in the initial interview, that the matters disclosed be kept confidential and when subsequently the FBI requested that the lawyer disclose the information on the whereabouts of his client.

Yes, it is a violation of Canon 4 of the Code of Professional Responsibility to disclose the whereabouts of the client and a violation of the Disciplinary Rules (DR 4-101) to disclose the client's whereabouts.

The inquiry involves Canon 4 and DR 4-101 which provide in relevant parts:

"CANON 4: "A lawyer should preserve the confidences and secrets of a client."

"DR 4-101: Preservation of Confidences and Secrets of a client.

"(A) 'Confidence' is information protected by privilege under law. 'Secret' is information gained through the lawyer-client relationship which the client has asked be kept confidential or the disclosure of which would be detrimental to or embarrassing to the client.

"(B) Except when permitted under DR 4-101, a lawyer shall not knowingly:

- (1) Reveal a cliental confidence or secret.

"(C) A lawyer may reveal:

. . .

- (3) The intention of his client to commit a crime and the information necessary to prevent the crime."

If the fugitive consults a lawyer with respect to his past conduct or needs, there would be no requirement that the lawyer reveal any of the facts relating thereto or his whereabouts. There would be a duty and obligation not to do so.

The lawyer may reveal matters that are within the attorney-client privilege and other matters:

- (a) when permitted by the Disciplinary Rules, or
- (b) when required by law, or
- (c) when ordered by the court, or
- (d) when necessary to prevent a crime.

If the privilege exists, it is a violation of the rules to disclose matters within the privilege, unless required by law, ordered by the court, or when necessary to prevent a crime. Similarly, if the matter is not within the privilege, it would appear that the disclosure would be detrimental to the client and also a violation.

If the matter is one involving the prevention of a crime, or if the attorney is required by law to make a disclosure, or is ordered by the court to make a disclosure, the rules are drafted in such a way as to remove the bar to disclosure.

If the fugitive comes to see the lawyer concerning his rights, the information given to the lawyer would be

privileged. If, however, the client comes to the lawyer to secure advice as to how best he can remain a fugitive, the lawyer has the duty to:

- (a) advise him to turn himself in;
- (b) refuse to represent him if he declines to do so; and
- (c) to advise him that the lawyer will reveal his whereabouts to authorities if he persists in his illegal conduct and the matter is brought to his attention again by the client.

The fugitive apparently consulted the lawyer initially about his parole being moved to Idaho from Texas and not for the purpose of ascertaining how he could best remain a fugitive. The disclosure under these circumstances would be a violation of Canon 4 and DR 4-101. However, the committee does not answer questions of law so we do not determine when the attorney-client privilege exists, or when an act is a crime, or when an act is required by law, or is ordered by the court.

The Ninth Circuit case of Baird v. Koerner, 279 F.2d 623 contains this language:

"While it is the great purpose of law to ascertain the truth, there is countervailing necessity of insuring the right of every person to freely and fully confer and confide in one having knowledge of the law, and skilled in its practice, in order that the former may have adequate advice and a proper defense. This assistance can be made safely and readily available only when the client is free from consequences of apprehension of disclosure by reason of the subsequent statements of the skilled lawyer."

DATED this 14th day of March, 1977.

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\*See DR 4-101(A), as amended.