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## LEGAL ETHICS: CONFIDENTIALITY AND THE CASE OF ROBERT GARROW'S LAWYERS\*

### *Slayer's 2 Lawyers Kept Secret of 2 More Killings*

*Lake Pleasant, N. Y., June 19 [1974]—Two lawyers for a man on trial here for murder did not disclose for six months that they had seen the bodies of two other people killed by their client because, they said, they were bound by the confidentiality of a lawyer-client relationship.*

*The court-appointed attorneys said today that their client had told them where to find the bodies of two missing women. They photographed the bodies, they said, but did not report the discoveries to authorities searching for the murder victims.*

*The lawyers also said they had kept their discovery from the father of one of the women, who had visited them in the hope that they could shed some light on the disappearance of his 20-year-old daughter.*

*"The information was so privileged—I was bound by my lawyers' oath to keep it confidential after I found the bodies," said Francis Belge, one of the two lawyers representing Robert Garrow. Mr. Garrow, a 38-year-old mechanic for a Syracuse bakery, is accused of fatally stabbing Philip Dombleski, an 18-year-old Schenectady student who was camping in the Adirondacks last July.\*\**

In the United States, the right to practice law is conferred by the state.<sup>1</sup> "Membership in the bar is a privilege burdened by conditions,"<sup>2</sup>

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\* A primary document cited throughout this Comment is "The Code of Professional Responsibility," promulgated by the American Bar Association in August, 1969. ABA, CODE OF PROFESSIONAL RESPONSIBILITY AND CODE OF JUDICIAL CONDUCT (1974) [hereinafter cited as the CODE]. This document was adopted by the New York State Bar Association as its own code of ethics, effective January 1, 1970. N. Y. JUDICIARY LAW, Appendix (McKinney Supp. 1970). The CODE consists of a Preamble [hereinafter so cited], Canons [hereinafter so cited], Ethical Considerations [hereinafter cited as "EC," followed by identifying number], and Disciplinary Rules [hereinafter cited as "DR," followed by identifying number]. Former Canons of ethics [hereinafter cited as "Former Canon" followed by identifying number], are cited repeatedly in the annotations to the present CODE, and may be found in H. DRINKER, LEGAL ETHICS 309-25 (1953). Interpretations of the CODE by the American Bar Association Committee on Professional Responsibility are known as Formal and Informal Opinions [hereinafter so cited]. Opinions are collected in ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS (1967). (Some informal opinions are not bound; they are collected in loose-leaf, by chronological order).

\*\* N. Y. Times, June 20, 1974, at 1, col. 2 (city ed.).

1. See Rules of the New York State Bd. of Law Examiners, N.Y.C.R.R. § 6000 (1973); cf. *In re Cooperative Law Co.*, 198 N.Y. 479, 92 N.E. 15 (1910); *New York County Lawyers' Ass'n v. Dacey*, 54 Misc. 2d 564, 282 N.Y.S.2d 985, *aff'd in part, modified in part on other grounds*, 28 App. Div. 2d 161, 282 N.Y.S.2d 984 (1st Dep't 1967); N.Y. JUDICIARY LAW §§ 90, 53, 467 (McKinney 1968); N.Y. CIV. PRAC. LAW art. 94 (McKinney 1963). See also N.Y. JUDICIARY LAW § 460 (McKinney 1968).

2. *In re Rouss*, 221 N.Y. 81, 84, 116 N.E. 782, 783, *cert. denied*, 246 U.S. 661 (1917). See also *Kraushaar v. LaVin*, 181 Misc. 508, 42 N.Y.S.2d 857 (Sup. Ct. 1943).

one of which is that a lawyer's primary duty lies to the institutions and procedures which comprise the legal system.<sup>3</sup> A lawyer is called an "officer of the court"<sup>4</sup> and is, as such, "an instrument or agency to advance the ends of justice."<sup>5</sup> The lawyer's fidelity to the ends of justice involves two professional responsibilities. On the one hand, he owes the duty of "good faith and honorable dealing to the judicial tribunals before whom he practices his profession."<sup>6</sup> On the other, he is an advocate on behalf of his client, to whose interests he owes "entire devotion."<sup>7</sup> This dual loyalty may at times result in tension, for "while the attorney owes a duty to the law to see that justice is done, his role in the adversary system requires service to his client which at times borders on the obstruction of justice."<sup>8</sup>

One such service is the lawyer's duty to preserve the confidences and secrets of his clients.<sup>9</sup> Clients traditionally have expected their lawyers to hold their personal affairs in strictest confidence, and almost all attorneys recognize an obligation to be discreet about their clients' business. However, the rules of confidentiality are not merely customary; they are justified in history, and by reasons intimately connected with and essential to the adversary system of law.<sup>10</sup> The adversary process stands upon the premise that the systematic attainment

3. See *People ex rel. Karlin v. Culkin*, 248 N.Y. 465, 162 N.E. 487 (1928); *cf. In re Kelly*, 243 F. 696, 705 (D. Mont. 1917).

4. *People ex rel. Karlin v. Culkin*, 248 N.Y. 465, 470-71, 162 N.E. 487, 489 (1928); see *Ex parte Garland*, 71 U.S. (4 Wall.) 333, 378 (1886); *Bowles v. United States*, 50 F.2d 848, 851 (4th Cir. 1931); *People v. Gorman*, 346 Ill. 432, 444, 178 N.E. 880, 885 (1931).

5. *People ex rel. Karlin v. Culkin*, 248 N.Y. 465, 471, 162 N.E. 487, 489 (1928). N.Y. JUDICIARY LAW § 90(2) (McKinney 1968) holds that an attorney may be censured, suspended, or disbarred for "any conduct prejudicial to the administration of justice."

6. *People ex rel. Attorney Gen. v. Beattie*, 137 Ill. 553, 574, 27 N.E. 1096, 1103 (1891).

7. Former Canon 15. See also *Stockton v. Ford*, 52 U.S. (11 How.) 232, 246-48 (1850). An attorney owes "total devotion" to the interests of his client. EC 2-33; see *State Bar Ass'n v. Connecticut Bank & Trust Co.*, 145 Conn. 222, 234, 140 A.2d 863, 870 (1958); *Laughlin v. Boatmen's Nat'l Bank*, 163 S.W.2d 761, 765-66 (Mo. 1942); *In re Thomasson's Estate*, 346 Mo. 911, 918, 144 S.W.2d 79, 83 (1940).

8. Note, *Professional Responsibility and In re Ryder: Can an Attorney Serve Two Masters?*, 54 VA. L. REV. 145, 147 (1968).

9. It is "undoubtedly the law that a communication by a party to his attorney to aid him in conducting . . . litigation is privileged." *LeLong v. Siebrecht*, 196 App. Div. 74, 76, 187 N.Y.S. 150, 151-52 (2d Dep't 1921); see *King v. Ashley*, 179 N.Y. 281, 72 N.E. 106 (1904); *Williams v. Fitch*, 18 N.Y. 546, 551 (1859); *In re Eno*, 196 App. Div. 131, 187 N.Y.S. 756 (1st Dep't 1921).

10. In our legal system, the role of the lawyer as partisan advocate appears, not as a "regrettable necessity," but as an "indispensable part of a larger ordering of affairs." *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A.J. 1159, 1161 (1958). See also *Randall, Our Professional Responsibility: Lawyers Make Freedom a Living Thing*, 43 A.B.A.J. 315 (1957).

of justice is best accomplished by having the arguments and facts on each side of a justiciable controversy investigated and presented with maximum zeal by opposing counsel, for decision by the court and jury.<sup>11</sup> For the system to operate properly, it is necessary that an advocate have "all the facts."<sup>12</sup> Thus, it is thought to be necessary that a client be free to consult his attorney without apprehension of disclosure of his secrets by the attorney.<sup>13</sup> The general rule is that "A [l]awyer [s]hould [p]reserve the [c]onfidences and [s]ecrets of a [c]lient."<sup>14</sup>

Lawyer-client confidentiality began as an evidentiary privilege, the history of which is well known.<sup>15</sup> In Roman times, a slave was incompetent to bear witness against his master.<sup>16</sup> Cicero, when prosecuting the Roman governor of Sicily, regretted that he could not summon the latter's *patronus*, Hortensius,<sup>17</sup> and the matter received statutory regulation in the Acilian law on bribery of 123 B. C.<sup>18</sup> By the fourth century, advocates and attorneys were completely incompetent as witnesses in cases in which they were involved.<sup>19</sup> In England, by the time of Elizabeth I, the evidentiary privilege against disclosure

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Our legal system provides for the adjudication of disputes governed by the rules of substantive, evidentiary, and procedural law. An adversary presentation counters the natural human tendency to judge too swiftly in terms of the familiar that which is not yet fully known; the advocate, by his zealous preparation and presentation of facts and law, enables the tribunal to come to the hearing with an open and neutral mind and to render impartial judgments.

EC 7-19. See also H. DRINKER, *LEGAL ETHICS* 76 (1953); Formal Opinion 23 (1930); Randall, *supra* note 10, at 1160-61.

12. "The observance of the ethical obligation of a lawyer to hold inviolate the confidences and secrets of his client not only facilitates the *full development of facts essential to proper representation* of the client but also encourages laymen to seek early legal assistance." EC 4-1 (emphasis added).

13. "That all such confidential communications between an attorney and his client are privileged from disclosure has been upheld by the Courts from a very early period in the . . . administration of justice." United States v. Funk, 84 F. Supp. 967, 968 (E.D. Ky. 1949) (citations omitted); see, e.g., Schwimmer v. United States, 232 F.2d 855, 863 (8th Cir.), *cert. denied*, 352 U.S. 833 (1956); see Blackburn v. Crawfords, 70 U.S. 175, 192-94 (1865).

14. Canon 4.

15. See Root v. Wright, 84 N.Y. 72 (1881); Bacon v. Frisbie, 80 N.Y. 394 (1880); Flight v. Robinson, 3 Beav. 22, 36 (Ch. 1844); 1 S. PHILLIPS, *A TREATISE ON THE LAW OF EVIDENCE* 134 (1868).

16. See generally W. BUCKLAND, *A TEXT-BOOK OF ROMAN LAW* 623, 662 (1921).

17. Cic. in *Ver.*, Act ii, 8, 24.

18. A. GREENRIDGE, *THE LEGAL PROCEDURE OF CICERO'S TIME* 484 (1971). The *Lex Acilia* is in most Roman source books, and is translated in HARDY, *ROMAN LAWS AND CHARTERS* 10-24 (1912).

19. See Radin, *The Privilege of Confidential Communication Between Lawyer and Client*, 16 CALIF. L. REV. 487, 488 (1928).

of confidential information by attorneys appears to have been unquestioned.<sup>20</sup>

According to Wigmore,<sup>21</sup> the original exclusion inured solely to the attorney, as a "point of honor." This doctrine was accepted until the last quarter of the eighteenth century,<sup>22</sup> when a new theory, which "looked to the necessity of *providing subjectively for the client's freedom of apprehension* in consulting his legal advisor,"<sup>23</sup> sought to remove the risk of disclosure by the attorney even at the hands of the law.<sup>24</sup> Under the original theory, the privilege did not protect the client himself, for the "'point of honor' was not his to make."<sup>25</sup> Furthermore, under the original theory the protection of the lawyer was as to information received relevant to the litigation at bar only, and "[w]hen the cause is ended, [the attorney] is then only to be considered with respect to his former employer, as one man to another; and then the breach of trust does not fall within the jurisdiction of [a] court . . ."<sup>26</sup> Finally, under the original theory, the privilege could be waived by the attorney, since "the Court can't determine what is honour."<sup>27</sup> On the other hand, under the modern theory, the evidentiary privilege inures strictly to the client,<sup>28</sup> and may not be ignored except under a waiver granted by the client.<sup>29</sup> Furthermore, under the modern theory, the

20. See, e.g., *Kelway v. Kelway*, 21 Eng. Rep. 47 (Ch. 1580), in which examination of plaintiff's attorney was limited to matters "which shall not be touching the secrecy of the title, or of any other matter, which he knoweth as solicitor only." *Id.* See also *Berd v. Lovelace*, 21 Eng. Rep. 33 (Ch. 1577), in which a solicitor was exempted from examination touching the cause. See generally 8 J. WIGMORE, A TREATISE ON THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 2290 (3d ed. 1940) [hereinafter cited as WIGMORE].

21. WIGMORE, *supra* note 20, at 543.

22. *Id.* § 2286 at 531.

23. *Id.* § 2290 at 543, § 2291.

24. As will be demonstrated, *infra*, the ethical duty against disclosure may be thought to embody portions of the earlier doctrine.

25. WIGMORE, *supra* note 20, at 544.

26. *Annesley v. Earl of Anglesea*, 17 How. St. Tr. 1139, 1240 (Ex. 1743).

27. *Id.*; accord, *Bishop of Winchester v. Fournier*, 2 Ves. Sr. 445, 447, 28 Eng. Rep. 284, 285 (Ch. 1752).

28. *Chirac v. Reinicker*, 24 U.S. (11 Wheat.) 280, 294 (1826); *Schwimmer v. United States*, 232 F.2d 855, 863 (8th Cir.), cert. denied, 352 U.S. 833 (1956); *Abbott v. Supreme Court*, 78 Cal. App. 2d 19, 177 P.2d 317 (1947); *Hunter v. Kenney*, 77 N.M. 336, 422 P.2d 623 (1967); accord, WIGMORE, *supra* note 20, at §§ 2321, 2323.

29. "Unless the client waives the privilege . . ." N.Y. CIV. PRAC. LAW § 4503(a) (McKinney 1963); see *Lanza v. Joint Legislative Comm.*, 3 N.Y.2d 92, 143 N.E.2d 772, 164 N.Y.S.2d 9, cert. denied, 355 U.S. 856 (1957); *Beach v. Oil Transfer Corp.*, 23 Misc. 2d 47, 199 N.Y.S.2d 74 (Sup. Ct. 1960); *Mileski v. Locker*, 14 Misc. 2d 252, 178 N.Y.S.2d 911 (Sup. Ct. 1958); *Castiglione v. State*, 8 Misc. 2d 932, 934, 169 N.Y.S.2d 145, 147 (Ct. Cl. 1957). A communication which is privileged when made remains privileged forever, unless waived by the client. *Mileski v. Locker*, *supra* at 255; *Yordan v. Hess*, 13 Johns. 492 (Sup. Ct. 1816). However, if the privilege is waived, the attorney

scope of the privilege extends beyond communications actually made with respect to a pending suit, and now covers almost all communications between a lawyer and his client.<sup>30</sup>

A distinctive facet of the modern evidentiary privilege is that it protects confidential communications from involuntary—but not voluntary—disclosure by an attorney.<sup>31</sup> It operates to prevent forced disclosure before any tribunal having the power to compel testimony,<sup>32</sup> and only before such tribunal.<sup>33</sup> In addition to courts of law, the privilege prevents disclosure when the lawyer is called as a witness by a grand jury,<sup>34</sup> an administrative agency,<sup>35</sup> or a legislative committee.<sup>36</sup> Thus, the privilege may be asserted only after an attorney is called to testify—or to produce documents of a confidential nature.<sup>37</sup> “In other words, it forbids the disclosure of such evidence by an attorney . . . when examined as a witness.”<sup>38</sup> An attorney may not invoke the evidentiary privilege to justify non-disclosure unless disclosure was re-

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may be compelled to disclose. *See* *Pye v. Hoehn*, 31 Misc. 2d 712, 221 N.Y.S.2d 10 (Sup. Ct. 1961).

30. N.Y. CIV. PRAC. LAW § 4503(a) (McKinney 1963); UNIFORM RULE OF EVIDENCE 26; *see, e.g.*, *Lanza v. Joint Legislative Comm.*, 3 N.Y.2d 92, 143 N.E.2d 772, 164 N.Y.S.2d 9, *cert. denied*, 355 U.S. 856 (1957); *In re Williams' Estate*, 179 Misc. 805, 39 N.Y.S.2d 741 (Sur. Ct. 1942). *See generally* McCORMICK, A. TREATISE ON EVIDENCE 9-100 (2d ed. 1972) [hereinafter cited as McCORMICK]; WIGMORE, *supra* note 20, at §§ 2290-2329.

31. “As a rule of evidence, the lawyer-client privilege . . . operates *only* when the attorney is under compulsion to give testimony or produce evidence.” Note, *The Lawyer-Client Privilege: Its Application to Corporations, The Role of Ethics, and Its Possible Curtailment*, 56 Nw. U. L. Rev. 235, 249 (1961) (emphasis added).

32. *See* WIGMORE, *supra* note 20, at §§ 2252, 2291-92.

33. *See, e.g.*, *State ex rel. Sowers v. Olwell*, 64 Wash. 2d 828, 833, 394 P.2d 681, 684 (1964).

34. *Ex parte Enzor*, 270 Ala. 254, 117 So. 2d 361 (1960); *State v. Schroeder*, 112 So. 2d 257 (Fla. 1959).

35. *Baird v. Koerner*, 279 F.2d 623 (9th Cir. 1960); *In re Richardson*, 31 N.J. 391, 157 A.2d 695 (1960).

36. *United States v. Keeney*, 111 F. Supp. 233 (D.D.C. 1953), *rev'd on other grounds*, 218 F.2d 843 (D.C. Cir. 1954); *Gibson v. Legislative Investigation Comm'n*, 108 So. 2d 729 (Fla. 1958).

37. *Schwimmer v. United States*, 232 F.2d 855 (8th Cir.), *cert. denied*, 352 U.S. 833 (1956), involved a grand jury's investigation of tax evasions, during which it had attempted to subpoena the records of an attorney, who refused to surrender them and was held in contempt.

38. *Lanza v. Joint Legislative Comm.*, 3 N.Y.2d 92, 97, 143 N.E.2d 772, 774, 164 N.Y.S.2d 9, 12 (1957). The privilege also extends to protect the *client* from being compelled to reveal information communicated by him to his lawyer in confidence. “Neither the client nor the counsel may be compelled . . . to produce a document which has the status of a privileged communication . . .” *Bloodgood v. Lynch*, 293 N.Y. 308, 314, 56 N.E.2d 718, 721 (1944). *See also* *Rieser Co. v. Loew's Inc.*, 194 Misc. 119, 81 N.Y.S.2d 861 (Sup. Ct. 1948); *Bolt & Co. v. Gilmore*, 120 Misc. 116, 198 N.Y.S. 616 (Sup. Ct. 1923). The privilege also operates to protect confidential communications from the lawyer to the client. *Buckley v. Vidal*, 50 F.R.D. 271, 275 (S.D.N.Y. 1970).

quested in an official proceeding.<sup>39</sup> But likewise, there can be no violation by an attorney of the evidentiary privilege unless a disclosure (or non-disclosure) claimed as violative occurred in the course of an official proceeding.

However, in addition to this privilege, there is an ethical duty to keep a client's secrets.<sup>40</sup> The evidentiary privilege would be futile, and its purpose of inducing full disclosure by the client largely thwarted, if the attorney were free to make voluntary, out-of-court disclosures of professional confidences against the client's will.<sup>41</sup> The ethical duty is thus necessary to effectuate the policies of confidentiality.

Both the fiduciary relationship existing between lawyer and client and the proper functioning of the legal system require the preservation by the lawyer of confidences and secrets of one who has employed or sought to employ him. A client must feel free to discuss whatever he wishes with his lawyer and a lawyer must be equally free to obtain information beyond that volunteered by his client. A lawyer should be fully informed of all the facts of the matter he is handling in order for his client to obtain the full advantage of our legal system . . . . The observance of the ethical obligation of a lawyer to hold inviolate the confidences and secrets of his client not only facilitates the full development of facts essential to proper representation of the client but also encourages laymen to seek early legal assistance.<sup>42</sup>

While the policies behind the ethical prohibition against disclosure are closely connected to those justifying the evidentiary privilege, the *Code of Professional Responsibility* explicitly notes the distinction between the two:

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39. When there is no evidentiary privilege, for whatever reasons, any attempt to employ it to suppress evidence will be culpable. Note, *supra* note 8, at 150.

40. Canon 4 reads: "A Lawyer Should Preserve the Confidences and Secrets of a Client."

41. Historically, as the legal system increased in complexity and lawyering became more and more a profession, there was perceived a need for uniform regulation of members of the bar. In the Preamble to the CANONS OF ETHICS OF THE NEW YORK STATE BAR ASSOCIATION (1949), it is noted that "it is peculiarly essential that the system for establishing and dispensing Justice be developed to a high point of efficiency and so maintained that the public shall have absolute confidence in the integrity and impartiality of its administration." *Id.* at 2. There is no direct support for the ethical duty in the common law, although it may be thought to have been affirmed indirectly since an attorney may be held liable in tort for abusing his client's confidences. *Cf. In re Boone*, 83 F. 944 (C.C.N.D. Cal. 1897); *Taylor v. Blacklow*, 132 Eng. Rep. 401 (C.P. 1836). Similar to the evidentiary privilege, its ultimate justification is its vitality to the accusatorial process. The ethical duty thereby furthers the discovery of truth in legal proceedings. The duty is enforced by disciplinary actions brought under the CODE. *See, e.g., United States v. Costen*, 38 F. 24 (C.C. Colo. 1889); *In re Abuza*, 178 App. Div. 757, 166 N.Y.S. 105 (1st Dep't 1917); *In re King*, 7 Utah 2d 258, 322 P.2d 1095 (1958).

42. EC 4-1.

The attorney-client privilege is more limited than the ethical obligation of a lawyer to guard the confidences and secrets of his client. This ethical precept, unlike the evidentiary privilege, exists without regard to the nature or source of information or the fact that others share the knowledge. A lawyer should endeavor to act in a manner which preserves the evidentiary privilege; for example, he should avoid professional discussions in the presence of persons to whom the privilege does not extend.<sup>43</sup>

The ethical duty thus is broader than the evidentiary privilege, its prohibition against disclosure applying to situations not covered by the latter rule.<sup>44</sup> For example, while the evidentiary privilege prohibits disclosure of confidential information obtained from the client,<sup>45</sup> the ethical duty requires non-disclosure of all facts learned by a lawyer "by reason of his confidential relationship,"<sup>46</sup> and "without regard to the nature and source of the information."<sup>47</sup> There need be no act of communication,<sup>48</sup> nor is it necessary that the facts be transmitted to the attorney by the client or the client's agent.<sup>49</sup> Under the evidentiary rule, information revealed by the client to the attorney while in the presence of a third party is not privileged;<sup>50</sup> the ethical duty requires silence "without regard to . . . the fact that others share the knowl-

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43. EC 4-4.

44. Therefore, a violation of the evidentiary rule would lead to two disciplinary proceedings, one evidentiary and the other ethical. But a violation of the ethical precept might be wholly unrelated to the evidentiary rule and hence subject the offender only to an ethical proceeding.

45. "To be protected as a privileged communication, information or objects acquired by an attorney must have been communicated or delivered to him by the client, and not merely obtained by the attorney while acting in that capacity for the client." *Sowers v. Olwell*, 64 Wash. 2d 828, 831, 394 P.2d 681, 683 (1964); see *Dupree v. Better Way, Inc.*, 86 So. 2d 425 (Fla. 1956). See also 97 C.J.S. *Witnesses* § 283 (1957); 58 AM. JUR. *Witnesses* § 492 (1948).

46. Formal Opinion 163, at 434 (1936).

47. Formal Opinion 23, at 99 (1930). For a discussion of the extent of the privilege, see WIGMORE, *supra* note 20, at §§ 2317-20; 26 MINN. L. REV. 744 (1942); 88 U. PA. L. REV. 467 (1940); 1943 WIS. L. REV. 424. The ethical duty protects much of the "work product" of an attorney. *Hickman v. Taylor*, 329 U.S. 495 (1947). Information may also be protected under an analogous state discovery rule. See generally Note, *Discovery: Work Product and Good Cause Development Since "Hickman v. Taylor"*, 36 IND. L. J. 186 (1961); Note, *Discovery: Hickman v. Taylor, A Decade Later*, 37 N.D.L. REV. 67 (1961). Indeed, it is not essential that a lawyer-client relationship be established for the canons to operate—the mere possibility of such a relationship suffices. Formal Opinion 287 (1953); Formal Opinion 216 (1941).

48. See Formal Opinion 163 (1936).

49. See Formal Opinion 23 (1930).

50. 58 AM. JUR. *Witnesses* § 492 (1948); see e.g., *In re Estate of Krup*, 173 Misc. 578, 18 N.Y.S.2d 427 (Kings County Ct. 1940). This assumes that the third party has not a lawyer-client—or, perhaps, otherwise privileged—relationship with the client.



edge."<sup>51</sup> The evidentiary privilege prohibits disclosure only when an attorney is faced with official compulsion to disclose; the ethical duty extends to out-of-court, voluntary indiscretions.<sup>52</sup>

In most circumstances, this professional duty is accepted as axiomatic by lawyers and laymen alike. Yet even in its most general form the very existence of such a duty has not been immune from attack, usually on the ground that the protection of communications between lawyer and client may lead to guilty parties avoiding rightful punishment. Jeremy Bentham suggested that lawyer-client confidentiality should be abolished, since it was not needed by an innocent party with a "righteous cause or defence," and since a guilty party should not be given its aid in concerting a false one.<sup>53</sup> While this criticism presupposes absolutes of guilt or innocence, such absolutes being rare indeed in legal affairs,<sup>54</sup> its thrust runs deeper: Does not the existence of the right to confidentiality allow the suppression of evidence highly relevant to—or even determinative of—a fair decision about the respective rights of persons involved in a legal controversy? The answer is affirmative: the rules against disclosure of confidential communications represent *deliberate* tolerance of the suppression of some pertinent information, on the ground that the protection of confidentiality is *vital* to the accusatorial process.<sup>55</sup> As Bentham suggested, it is possible that rightful punishment (or liability) could, in particular instances, be avoided solely because of non-disclosure of confidential information. But this result is acknowledged and accepted under the rules against disclosure; the policy of the rules is to foster lawyer-client confidentiality *in general*, not in particular.<sup>56</sup>

To the furnishing of [expert legal] advice the fullest freedom and

51. EC 4-4.

52. "Both social amenities and professional duty should cause a lawyer to shun indiscreet conversations concerning his clients." EC 4-2.

53. J. BENTHAM, RATIONALE OF JUDICIAL EVIDENCE, bk. IX, pt. IV, ch. V, § 2, in VII THE WORKS OF JEREMY BENTHAM (J. Bowring ed. 1838-43).

54. Bentham's arguments are cited at length in WIGMORE, *supra* note 20, § 2291, at 549-51. Wigmore's detailed refutations follow directly. *Id.* at 552-54.

55. *United States v. United Shoe Mach. Corp.*, 89 F. Supp. 357, 358 (D. Mass. 1950); WIGMORE, *supra* note 20, at § 2291.

56.

To be sure the exercise of the [rules of confidentiality] may at times result in concealing the truth and in allowing the guilty to escape. That is an evil, however, which is considered to be outweighed by the benefit which results to the administration of justice generally.

*People ex rel. Vogelstein v. Warden*, 150 Misc. 714, 717, 270 N.Y.S. 362, 367 (Sup. Ct. 1934). "The individual interest outweighs the public concern in the search for truth." *State v. Kociolek*, 23 N.J. 400, 415, 129 A.2d 417, 425 (1957). See also McCORMICK, HANDBOOK OF THE LAW OF EVIDENCE § 91 (1954); Randall, *supra* note 10.

honesty of communication of pertinent facts is a prerequisite. To induce clients to make such communications, the [rules prohibiting disclosure are] said by courts and commentators to be . . . necess[ities]. *The social good derived from the proper performance of the functions of lawyers acting for their clients is believed to outweigh the harm that may come from the suppression of the evidence in specific cases.*<sup>57</sup>

It is thought that the potential harm which may result from the rules of confidentiality is a fair price to pay for the generally beneficial functioning of the legal system as a whole.

Yet the possibility of abuse is problematic, for what of the lawyer's obligation, as an "officer of the court," to be candid and fair in his dealings with courts and other lawyers?<sup>58</sup> The recognition of a prohibition against the disclosure of the secrets of a client, and the recognition of the essential importance of such a prohibition to the legal system as a whole, does not mean that the prohibition against disclosure is without conditions or exceptions. "The social policy that will prevail in many situations may run foul in others of a different social policy, competing for supremacy."<sup>59</sup> A balancing of social interests is always difficult, and there can be no set of hard-and-fast rules to cover all circumstances. "In fulfilling his professional responsibilities, a lawyer necessarily assumes various roles that require the performance of many difficult tasks. Not every situation which he may encounter can be foreseen . . . ."<sup>60</sup> Some specific situations call for very close decisions by attorneys on the limits of confidentiality.

Consider the following hypothetical situation:<sup>61</sup> A client informs his attorney that he is guilty of killing a police officer who was acting

57. MODEL CODE OF EVIDENCE rule 210, comment *a* (1942) (emphasis added).

58. Former Canon 22 states that "[t]he conduct of the lawyer before the Court and with other lawyers should be characterized by candor and fairness." See, e.g., *In re Glover*, 176 Minn. 619, 223 N.W. 921 (1929) (per curiam); *In re Marron*, 22 N.M. 252, 160 P. 391 (1916); *In re Abrams*, 36 Ohio App. 384, 173 N.E. 312 (1930); *In re McCullough*, 97 Utah 533, 95 P.2d 13 (1939). A lawyer appearing in a pending case must also "advise the court of decisions adverse to his client's contentions that are known to him and unknown to his adversary." Formal Opinion 146, at 415 (1935). See also Note, *The Attorney's Duties of Disclosure*, 31 ST. JOHN'S L. REV. 283, 291-93 (1957).

59. *Clark v. United States*, 289 U.S. 1, 13 (1932).

60. Preamble. See also *Professional Responsibility: Report of the Joint Conference*, *supra* note 10:

No general statement of the responsibilities of the legal profession can encompass all the situations in which the lawyer may be placed. Each position held by him makes its own peculiar demands. These demands the lawyer must clarify for himself in the light of the particular role in which he serves.

*Id.* at 1218.

61. Credit and appreciation must be acknowledged to Professor Adolf Homburger, State University of New York at Buffalo, Faculty of Law and Jurisprudence, for the creation and development of this hypothetical situation.

in the line of duty. He also informs the attorney that he had been called to testify at a preliminary inquiry into the homicide, that in the course of the hearing he perjured himself, and that as a result he is no longer suspected of the murder. On this set of facts, most lawyers would have little difficulty justifying their refusal to turn in their client to the authorities at this point. Suppose, however, that a short time later the attorney learns that another person, if fact innocent of the slaying, has been convicted of the murder of the police officer and is about to be executed for the crime. If the attorney now tells authorities of his client's guilt, he has violated the confidentiality of the lawyer-client relationship. Yet if he does not, an innocent person will lose his life. If the lawyer violates his client's confidence, he may be, technically, subject to a disciplinary proceeding which might lead to disbarment. If he does not, justice will be thwarted. The dilemma is theoretically unsolvable. Of course, as a practical matter, many lawyers would feel compelled by their consciences to prevent the execution of an innocent person, and the profession which would discipline an attorney for such behavior is a profession to which many lawyers would not wish to belong. Yet the theoretical problem remains, and in hard cases the line of ethical behavior is extremely thin. One such case has recently become quite well known. Does the confidentiality of a lawyer-client relationship justify the actions of Robert Garrow's lawyers?

In July, 1974, a jury convicted Robert Garrow of the murder of Philip Dombrowski. Six months earlier, Frank Armani and Francis Belge, Garrow's court-appointed attorneys, had seen the bodies of two other people killed by their client. They had not disclosed this information because, they said, they were bound by the confidentiality of the lawyer-client relationship.

According to press reports, Garrow had told the attorneys where to find the bodies of two missing women. Acting upon information supplied to them by Garrow, Mr. Armani and Mr. Belge, on their own, went out, searched for, and eventually located the bodies. With "crude diagrams of the Mineville area" supplied by Garrow to Mr. Belge, the two attorneys visited the area five times. After extensive searching, they found the body of Susan Petz in a mineshaft. Mr. Armani lowered Mr. Belge by his feet into the mineshaft, and Mr. Belge took pictures of the Petz body.<sup>62</sup> The body of Alicia Haucks was discovered by Mr. Belge

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62. Herald Journal (Syracuse), June 19, 1974, at 42, col. 3. The attorneys subsequently destroyed the diagrams and pictures. The trial transcript of June 17, 1974, contains this entry:

Belge: "If the court please, I took almost six days of tape recordings of the De-

in a Syracuse cemetery. "Garrow couldn't give us a diagram of that one, just a general description. I found the body by squaring off the area with markers."<sup>63</sup>

The attorneys finally revealed the locations of the bodies after Garrow had blurted out in court during his trial for the Dombrowski murder that he had been involved in other slayings. At this point, Mr. Armani and Mr. Belge apparently felt that their client had waived his right to confidentiality by implicating himself in the other killings.<sup>64</sup>

defendant while he was in the Champlain Valley Hospital in Plattsburgh, New York. I did take and make diagrams and maps and so did Mr. Armani and we did—I did—I took photographs of the bodies—and because they were so privileged, that is I was so bound under my lawyer's oath to keep them confidential after I discovered the bodies, despite the fact that I wanted to and Mr. Armani wanted to inform the parents about the bodies, we destroyed them."

*Id.* at 42.

63. Herald Journal (Syracuse), June 19, 1974, at 42, col. 4.

64. It should be noted that neither Mr. Armani nor Mr. Belge were ever requested to reveal their information by any official tribunal. Mr. Armani was asked as to the whereabouts of the missing women by the District Attorney of Onondaga County, at a wake. He was asked by the New York State Police on several occasions, one of which occurred when the police visited Mr. Armani at his offices. The father of Ms. Hauck also requested information. None of these, or any other, requests occurred in any official proceeding.

A great outcry followed the lawyers' revelations. "Citizens," said Onondaga County District Attorney Jon Holcombe, "are in an absolute rage here." L. A. Times, July 2, 1974, § 1, at 1, col. 1. William Hauck, father of one of the slain women, is quoted as saying, "It's hard to believe that they [the attorneys] were acting as officers of the court. The least they could have done was make an anonymous phone call to the police." Post Standard (Syracuse), June 20, 1974, at 2, col. 1. The mother of Ms. Petz, upon learning of the lawyers' actions, exclaimed, "Oh my God . . . oh my God . . . isn't that illegal? I can't imagine anyone living with such a thing; it must be illegal." Times Union (Albany), June 20, 1974, at 7, col. 1. The Times Union noted in an editorial that "[e]thical conduct by legal representatives is a tenet of our form of justice. In this case, it's impossible to imagine that many people—particularly the parents of the slain girls—would consider that justice has been served." *Id.*, June 21, 1974, at 11, col. 3. The most virulent public criticism was in letters-to-the-editors columns. Letter writers expressed "revulsion and abhorrence," "utter disbelief," and "disgust." Herald Journal (Syracuse), July 2, 1974, at 3, col. 4. One writer said that "[i]f this is the lawyer's Code of Ethics to put parents through hell then, it's about time it be changed." *Id.* Another saw the incident as "another deplorable example of behavior by members of this so-called profession." *Id.* Mr. Armani and Mr. Belge were also publicly chastised by members of the "so-called" profession. One defense lawyer, who asked that his name not be published, stated that the withholding of the information was "unconscionable" and that the lawyers "ought to be censured." Times Union (Albany), June 20, 1974, at 7, col. 2. A "leading Minneapolis attorney," again preferring to remain anonymous, was more outspoken: "It's outrageous. They should both be put in jail." L. A. Times, July 2, 1974, § 1, at 15, col. 1.

Mr. Armani summed up the adverse reaction to his and his associate's conduct in this passage from an unpublished address to the Illinois Bar Association, delivered on October 31, 1974:

I want to emphasize that my associate, Mr. Belge and I took [the lawyer's oath] and that to us an oath is a very sacred thing. In retrospect however, when we took this oath neither of us had the slightest idea of the awesome consequences it would someday carry. The taking of this oath and our attempt to

Before Garrow's confession, and the subsequent disclosure by Mr. Armani and Mr. Belge, the lawyers had withheld two pieces of information. The first was Garrow's admission to them that he had committed two other homicides. The second was the exact whereabouts of the bodies of these two other victims, which Mr. Armani and Mr. Belge had discovered by independent investigation.

With respect to the independent investigation, it is somewhat mysterious why the attorneys chose to do so at all; what such an investigation added to their defense, either as a matter of substance or of strategy, is unclear. The question important here, however, is not this, but whether such an independent investigation, as differentiated from a direct communication, affected the ethical positions of Mr. Armani and Mr. Belge. It is suggested that it did not, on the grounds that an independent investigation, albeit mysterious in purpose, is allowable behavior for an advocate.

A defense counsel in a criminal case is under an affirmative duty to investigate the facts of the matter.<sup>65</sup> This obligation extends to investigating the *defendant's version* of the facts,<sup>66</sup> and the "duty to investigate exists regardless of the accused's statements to the lawyer of facts constituting guilt."<sup>67</sup> If an attorney does not fulfill this duty to

live up to it has caused us and our families much anguish and pain . . . . There have been acts of vandalism committed against our properties; we have received threats of death . . . ; our families have been subjected to obscene telephone calls and we have been made to appear by certain news media in a very unfavorable light—I recall one editorial that said that we made the Water-gate conspirators look like 'Sunday School Picnickers.'

However, not all reaction was adverse. James Carter, President of the Albany County Bar Association, declared "there was no ethical and no legal way they [Mr. Armani and Mr. Belge] could have revealed this confidential information, heinous as it may have been." *Times Union* (Albany), June 20, 1974, at 7, col. 1, and "Albany County District Attorney Ralph Smith Jr., agreed that the lawyers had 'no legal obligation' to reveal the whereabouts of the bodies, and 'probably had a legal obligation not to do so,' although he said that the situation 'offends me personally. It's a horrible thing.'" *Id.* Monroe Freedman, Dean of Hofstra Law School, expressed his opinion that the "conduct of the lawyers is absolutely correct. If they had acted otherwise, it would have been a serious violation of their professional responsibility." *TIME*, July 1, 1974, at 68. Warren Wolfson, a Chicago defense attorney, was more blunt: "If lawyers become stool pigeons and informers," he said, "our system of justice is down the drain." *L. A. Times*, July 2, 1974, § 1, at 15, col. 8.

With considerable understatement, Associated Press noted that the lawyers' actions have "focused public attention on the issue of lawyers' ethics." *See Watertown Daily Times*, Sept. 13, 1974, at 11, col. 8. Tom Goldstein, in a column for the *New York Times*, described the area of lawyer-client confidentiality as "increasingly murky." *N.Y. Times*, June 23, 1974, § 4, at 9, col. 1.

65. *See, e.g., Smotherman v. Beto*, 276 F. Supp. 579, 588 (N.D. Tex. 1967).

66. *Kott v. Green*, 303 F. Supp. 821, 823 (N.D. Ohio 1968); *Abraham v. State*, 228 Ind. 171, 91 N.E.2d 358 (1950).

67. A. B. A. PROJECT ON STANDARDS FOR CRIMINAL JUSTICE, STANDARDS RELATING

investigate, he may be cited for providing ineffective assistance.<sup>68</sup> Furthermore, if an attorney does not make a sufficient investigation, a conviction may be set aside on a minimum standard of prejudice.<sup>69</sup> In *McLaughlin v. Royster*,<sup>70</sup> the standard suggested is whether an adequate factual investigation would have enabled counsel to cast reasonable doubt on the government's evidence, or to create a defense. Garrow's lawyers had pleaded a defense of insanity, and the confessions they obtained from their client in open court were presumably part of an attempt to show Garrow's psychological instability. Perhaps Mr. Armani and Mr. Belge felt that this ploy would have been less effective had the events to which Garrow testified not been true, and that the only way to have been sure of the veracity of the testimony was to investigate the facts for themselves.<sup>71</sup>

There is no suggestion that either attorney attempted to hide either body in any way. The *New York Times* quotes Mr. Armani as saying, "I categorically state that I never arranged any bodies or touched any bodies."<sup>72</sup> And although Mr. Belge is alleged to have touched the body of Ms. Haucks,<sup>73</sup> there is no suggestion that he attempted to conceal it in any way. This distinguishes the Garrow situation from the situation which precipitated the well-known case of *In re Ryder*.<sup>74</sup> In that case, an attorney (Ryder) had represented a client suspected in a bank robbery. He had transferred what reasonably appeared to be stolen money, and a shotgun used in the crime from his client's safety deposit box to his own.<sup>75</sup> The District Court of Virginia suspended Ryder for

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TO THE PROSECUTION FUNCTION AND THE DEFENSE FUNCTION § 4.1 (approved draft 1970), commentary at 226-28.

68. *Turner v. Maryland*, 303 F.2d 507 (4th Cir. 1962).

69. See generally *Finer, Ineffective Assistance of Counsel*, 58 CORNELL L. Q. 1077 (1973).

70. 346 F. Supp. 297 (E.D. Va. 1972).

71. An analogy may make this point more clear. An attorney is under an obligation to try to prevent a client from giving perjured testimony. To prevent perjured testimony, a lawyer must at the outset know what is true. A client likely to perjure himself is also likely to lie to his lawyer. Therefore, to attempt to prevent his client from committing the fraud of perjury on the court, the attorney must independently investigate to determine to the best of his ability the true state of affairs in the situation.

72. July 4, 1974, at 23, col. 3.

73. In a memorandum of law submitted April 26, 1975, in the case of *People v. Belge*, Indictment No. 75-55, Index No. 75/123 (Onondaga County Court, N.Y., filed Feb. 13, 1975), Mr. Belge states that "[t]he Grand Jury . . . heard . . . that the defendant [Mr. Belge], after the discovery of the body [of Ms. Hauck] . . . since the body was separated because of some varmints or animals, took the skull of the deceased and placed it next to the rest of the remains." *Id.* at 6.

74. 263 F. Supp. 360 (E.D. Va. 1967). For an excellent discussion of lawyer-client confidentiality in general, and *In re Ryder* in particular, see Note, 54 VA. L. REV. 145 (1968).

75. 263 F. Supp. at 363.

eighteen months.<sup>76</sup> The court of appeals affirmed, holding that "[i]t is an abuse of a lawyer's professional responsibility *knowingly to take possession of and secrete* the fruits and instrumentalities of a crime."<sup>77</sup> But what if Ryder had just gone to his client's safety deposit box and looked at the contents to be sure his client was telling the truth? The court notes that "[i]t was Ryder, not his client, who took the initiative in transferring the incriminating possession [sic] of the stolen money and shotgun . . . . Ryder's conduct went far beyond the receipt and retention of a confidential communication from his client."<sup>78</sup> But it is not the fact that the attorney took affirmative action upon which the case turns. The *fact* that an attorneys acts on his own is not per se unethical, and it is many times required. In Ryder's case, it was the *type* and *content* of his action which violated Ryder's professional responsibilities.<sup>79</sup>

While it is true that not all information is protected by the rules of confidentiality,<sup>80</sup> with respect to the question whether the knowledge of the locations of the bodies was protected against disclosure there appears to be nothing peculiar about this type of information which would exempt it from the operation of the rules.<sup>81</sup> In *State v. Sullivan*,<sup>82</sup> the Washington Supreme Court spoke directly to the issue. That case was an appeal from a jury verdict of guilty on the charge that Mrs. Irene Sullivan had murdered her husband.<sup>83</sup> At the trial, Mrs. Sullivan's attorney was called as a state witness, and testified that he had told au-

76. *Id.* at 370.

77. 381 F.2d 713, 714 (4th Cir. 1967) (emphasis added).

78. 263 F. Supp. 360, 365 (E.D. Va. 1967).

79. It has been noted that the ethical duty protects the confidentiality of all facts learned by a lawyer "by reason of his confidential relationship" and "without regard to the nature and source of the information." Notes 46-47 *supra* & accompanying text. Nor is it material that the information here withheld by Mr. Armani and Mr. Belge was not directly connected to the specific subject-matter of their representation of Garrow: So long as the mere possibility of a lawyer-client relationship exists (*see* note 47 *supra*) it is not essential to the protection of confidences of a client that the client's remarks be relevant to the advice sought. Formal Opinions 287 (1953) & 274 (1946). *See also* WIGMORE, *supra* note 20, at § 2302; UNIFORM RULE OF EVIDENCE 26(3)(c) (evidentiary privilege). There is no question that a lawyer-client relationship existed between Garrow and his attorneys.

80. For example, "[a] lawyer may reveal . . . [t]he intention of his client to commit a crime and the information necessary to prevent the crime." DR 4-101(C)(3); *see* Formal Opinion 314 (1965).

81. It is suggested as incontrovertible that disclosure of this information "would be likely to be detrimental to the client." DR 4-101(A). Moreover, an attorney is forbidden to disclose information obtained by him from his client when such information could be the basis for another suit against the client. *In re Williams' Estate*, 179 Misc. 805, 39 N.Y.S.2d 741 (Sur. Ct. 1942).

82. 60 Wash. 2d 214, 373 P.2d 474 (1962).

83. *Id.*

thorities where the body of Mr. Sullivan was buried.<sup>84</sup> The court held that this testimony violated Washington's statute defining lawyer-client privilege,<sup>85</sup> and that the testimony was prejudicial enough to warrant reversal of the conviction.<sup>86</sup> There is an obvious distinction between *Sullivan* and the Garrow case, for in *Sullivan* the behavior cited was not the disclosure itself but subsequent testimony about that disclosure. But the court is clear about just what information was protected by lawyer-client confidentiality: it was "that defendant had told defense counsel where she had buried her husband's remains."<sup>87</sup> A more important distinction is that the stated ground for reversal in *Sullivan* was not disclosure, but prejudice.

The prosecuting attorney could have had only one intent and purpose when he called defense counsel as a state witness: to prejudice the jury by giving it an opportunity to draw the inescapable inference that defendant had told defense counsel where she had buried her husband's remains. This was privileged under the statute, and it was prejudicial error to force [the attorney] to testify concerning it.<sup>88</sup>

But again, the court was clear on just what was protected, and explicitly expressed its unconcern that the attorney had not testified directly to the content of communications with his client:

We believe it immaterial that the lawyer, when called upon to testify, was questioned concerning what he told others, but was not questioned concerning the confidential communication of his client to him. If the former must be *obviously* based upon the latter, the client's privilege prohibits the attorney from testifying.<sup>89</sup>

If information is confidential, it is unethical for an attorney to divulge it. It would compound the error to allow an attorney who has already disclosed his client's secrets then to testify to them in court. And it would be absurd to contend that a "limitation" of such testimony to what the attorney *had already* divulged would make any difference

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84. *Id.* at 217, 373 P.2d at 475.

85. *Id.* WASH. REV. CODE ANN. § 5.60.060(2) (Supp. 1974) provides in part: "An attorney or counselor shall not, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon in the course of professional employment." In New York, the parallel statute reads in part: "Unless the client waives the privilege, an attorney . . . shall not disclose, or be allowed to disclose such communication . . ." N.Y. CIV. PRAC. LAW § 4503(a) (McKinney 1963).

86. 60 Wash. 2d at 226, 373 P.2d at 481.

87. 60 Wash. 2d at 218, 373 P.2d at 476.

88. *Id.*

89. *Id.* (emphasis in original).



whatever to the plight of a client whose rights to confidentiality have been violated. Finally, it is obvious that had there been no right of confidentiality, there could have been no prejudice from the disclosure. Clearly, a revelation by a client to his lawyers concerning the whereabouts of his victims' remains is the kind of information encompassed by the rules of confidentiality.

But a further question arises: Subdivision (1) of section 4200 of the New York State Public Health Law provides that "[e]xcept in the cases in which a right to dissect it is expressly conferred by law, every body of a deceased person within this state shall, be decently buried or incinerated within a reasonable time after death."<sup>90</sup> This section was transferred to the Public Health Law from section 2211 of the former New York Penal Law of 1909.<sup>91</sup> An "historical comment" to section 4200 states that "[a] violation or interference with these rights continues to be a misdemeanor," and the matter receives statutory regulation in section 12(b) of the Public Health Law: "A person who willfully violates any provision of this chapter . . . is punishable by imprisonment not exceeding one year, or by a fine not exceeding two thousand dollars or by both."<sup>92</sup> Accordingly, a willful and intentional act of secreting bodies, or of permitting bodies to remain concealed, involves a direct and continuing interference with the rights of interment, and in New York, such interference is a class "A" misdemeanor.<sup>93</sup> Furthermore, Public Health Law, section 4143, in essence, requires that anyone knowing of the death of a person without medical attendance, shall report the same to the proper authorities.<sup>94</sup> Under the provisions of Public Health Law, section 12(b),<sup>95</sup> a deliberate violation of this section is also a class "A" misdemeanor.<sup>96</sup> A charge that Mr. Armani and Mr. Belge violated or interfered with the rights of burial, and that they failed to give proper notice of a death, appears different from a charge that they failed to disclose a conversation wherein their client admitted committing a crime. Thus, the question presented is whether or not

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90. N.Y. PUB. HEALTH LAW § 4200 (McKinney 1971).

91. N.Y. PUB. HEALTH LAW § 4200 (McKinney 1971).

92. N.Y. PUB. HEALTH LAW § 12-b(2) (McKinney 1971).

93. N.Y. PENAL LAW § 55.10(2)(b) (McKinney 1975).

94. N.Y. PUB. HEALTH LAW § 4143 (McKinney 1971) reads, in relevant part: Deaths without medical attendance; registration

1. In case of any death occurring without medical attendance, it shall be the duty of the funeral director, undertaker, or any other person to whose knowledge the death may come, to give notice of such death to the coroner of the county, or if there be more than one, to a coroner having jurisdiction, or to the medical examiner.

95. See note 92 *supra*.

96. See note 93 *supra*.

an attorney may be insulated by the Code from the consequences of committing a crime—whether a duty of confidentiality is a sufficient defense for a lawyer accused of violating the law.

The question may be answered in the affirmative. The privileges and duties of confidentiality often operate to exempt from revelation facts which an attorney otherwise would be expected to disclose. "The privileged communication may be a shield or defense as to crimes."<sup>97</sup> The well-known Washington case of *State ex rel. Sowers v. Olwell*<sup>98</sup> provides helpful insight. In that case, an attorney was cited for contempt for his refusal to comply with a demand and a subpoena duces tecum that he produce at a coroner's inquest a knife allegedly in his possession but belonging to his client. The client was a suspect in connection with the stabbing death of another man. The attorney relied on the lawyer-client privilege for his refusal to comply with the subpoena or to give any testimony as to whether the knife was in his possession. The appellate court ruled that the knife in the attorney's possession was protected by the lawyer-client privilege if the securing of the knife by the attorney was the direct result of information communicated to the attorney by the client. The court found that the knife had in fact been secured as a result of such communication, and it therefore held that the attorney's refusal to testify at the inquest was not contemptuous.<sup>99</sup>

In Washington, as in most jurisdictions, it is a crime intentionally to "delay or hinder the administration of the law" by failing to produce material evidence which has been "properly" demanded.<sup>100</sup> In the absence of a privilege against disclosure of confidential communications, failure to comply with a subpoena duces tecum would not only be contemptuous,<sup>101</sup> but might also involve an attorney in the crime of obstruction of justice. Thus, because of the existence of lawyer-client confidentiality, the attorney in *Olwell* was insulated from the consequences of actions which otherwise would have been criminal.<sup>102</sup>

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97. *Gebhardt v. United Ry.*, 220 S.W. 677, 679 (Mo. 1920).

98. 64 Wash. 2d 828, 394 P.2d 681 (1964).

99. *Id.*

100. WASH. REV. CODE § 9.69.070 (1961). *See also* WASH. REV. CODE § 9.69.060 (1961), relating to the obstruction of justice for the refusal to reveal material information. In New York, the analogous statutes are N.Y. PENAL LAW § 215.40 (McKinney 1970) (tampering with physical evidence); N.Y. PENAL LAW § 195.05 (McKinney 1970) (obstructing governmental administration); and, N.Y. PENAL LAW § 205.50 (McKinney 1970) (hindering prosecution).

101. WASH. REV. CODE § 36.24.050 (1963).

102. *See also* *Ellis-Foster Co. v. Union Carbide & Carbon Corp.*, 159 F. Supp. 917 (D.N.J. 1958), in which lawyer-client confidentiality barred discovery under FED. R. CIV. P. 34.

In view of this, what, then, is the meaning of Disciplinary Rule 4-101(C)(2), which reads, "[a] lawyer may reveal: [c]onfidences . . . when . . . required by law or court order"?<sup>103</sup> Clearly, a subpoena duces tecum is a court order which embodies a requirement of law, and yet, just as clearly the *Ollwell* court allowed an attorney to disregard it. The solution offered by the Washington court is not very helpful: "On the basis of the attorney-client privilege, the subpoena duces tecum issued by the coroner is defective on its face because it requires the attorney to give testimony concerning information received by him from his client in the course of their conferences."<sup>104</sup> Thus, the attorney did not run foul of DR 4-101(C)(2) by withholding evidence he was required by law to produce; since the evidence was privileged, the subpoena demanding it was "defective on its face" and hence lacked the force of law. But this does not solve the problem. The only significant distinction between this "defective" subpoena and any other one is that here the evidence sought was protected by lawyer-client confidentiality. To say that a demand for information or evidence protected by lawyer-client confidentiality is not a lawful demand does not answer the question, it avoids it.

Subsequently, despite its finding that the evidence was protected by lawyer-client confidentiality, the court articulated the principle that the protection afforded by the privilege was not without limitation:

We do not, however, by so holding, mean to imply that evidence can be permanently withheld by the attorney under the claim of the attorney-client privilege. Here, we must consider the balancing process between the attorney-client privilege and the public interest in criminal investigation. We are in agreement that the attorney-client privilege is applicable to the knife held by appellant, but do not agree that the privilege warrants the attorney, as an officer of the court, from withholding it *after being properly requested to produce the same*. The attorney should not be a depository for criminal evidence (such as a knife, other weapons, stolen property, etc.), which in itself has little, if any, material value for the purposes of aiding counsel in the preparation of the defense of his client's case. Such evidence given the attorney during legal consultation for information purposes and used by the attorney in preparing the defense of his client's case, whether or not the case ever goes to trial, could clearly be withheld for a

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103. See also DR 7-102(A)(3), which provides that "a lawyer shall not conceal or knowingly fail to disclose that which he is required by law to reveal," and EC 7-27, which provides that "because it interferes with the proper administration of justice, a lawyer should not suppress evidence that he or his client has a legal obligation to reveal."

With regard to the permissive nature of DR 4-101(C)(2), as indicated by the use of the word "may," see note 113 *infra*.

104. 394 P.2d 681, 684 (Wash. 1964).

reasonable period of time. It follows that the attorney, after a reasonable period, should, as an officer of the court, on his own motion turn the same over to the prosecution.<sup>105</sup>

It is apparent here that the court was referring to the evidentiary privilege only; it neglected to consider the ethical duty. Absent a waiver by the client, the ethical duty prohibits disclosure of confidential information *forever*.<sup>106</sup> Furthermore, the court's holding that possession of the knife was privileged, but that the privilege did not warrant the attorney, "as an officer of the court, from withholding it after being properly requested to produce the same," is, if read literally, either question-begging or nonsense. If the court uses "properly" to indicate a situation in which an attorney must reveal his information or turn over his evidence, then the question of privilege has been avoided, for the statement means simply that unprivileged information is not privileged.<sup>107</sup> Moreover, in such a case the statement is superfluous. For if an attorney has a duty to reveal his evidence, the duty exists from the time the lawyer acquires the evidence, and he should not wait until "after" he has been requested to produce, or until the expiration of a "reasonable time." On the other hand, if "properly" means that a procedurally correct demand for information or evidence has been made (*i.e.*, that a subpoena duces tecum was drawn and served with due regard for the legal requirements of such a document), then the court's holding that such a request or demand abrogates the privilege is nonsense, for it is exactly this sort of protection that is the essence of the evidentiary protection for confidential communications.<sup>108</sup> If the question posed is whether lawyer-client confidentiality may protect from disclosure information or evidence otherwise required by law or court-order to be disclosed, then the answer is that in many cases it does. If it did not, there would be no such thing as lawyer-client confidentiality.<sup>109</sup> On this interpretation, DR 4-101(C)(2) is either in-

105. *Id.* (emphasis supplied).

106. *Mileski v. Locker*, 14 Misc. 2d 252, 178 N.Y.S.2d 911 (Sup. Ct. 1958); *Yorden v. Hess*, 13 Johns. 492 (Sup. Ct. 1816).

107. Similarly, the court's holding that subpoena was "defective" if it demanded confidential information meant merely that privileged information is privileged.

108.

An attorney has the duty to protect the interests of his client. He has a right to press legitimate arguments and to protest an erroneous ruling.

*Gallagher v. Municipal Court*, 31 Cal. 2d 784, 796, 192 P.2d 905, 913 (1948). "There must be protection, however, in the far more frequent case of the attorney who stands on his rights and combats the order in good faith and without disrespect believing with good cause that it is void, for it is here that the independence of the bar becomes valuable." Note, 39 COLUM. L. REV. 433, 438 (1939).

109. See generally Note, 46 YALE L. J. 703 (1937).

consistent with the entire notion of lawyer-client confidentiality (since it would undercut the very basis of the rules), meaningless (if the protection of confidentiality may be asserted in the face of a court order or requirement of law on the ground that no such order or legal requirement can be considered "lawful" if it requests confidential information), or superfluous (if it states merely that when disclosure is required, disclosure is required.)

Fortunately, it may be possible to construe DR 4-101(C)(2) to avoid these problems. Such an interpretation would limit the applicability of this Disciplinary Rule to situations in which a *preexisting*, specifically directed court order or legal obligation mandates disclosure. For example, when a defendant in a criminal case is admitted to bail, "he is not only regarded as in the custody of his bail, but he is also in the custody of the law, and admission to bail does not deprive the court of its inherent power to deal with the person of the prisoner."<sup>110</sup> A defendant who jumps bail is guilty of an escape, which is a separate offense for which he may be punished.<sup>111</sup> Suppose, now, that a client has jumped bail, and subsequently informs his attorney of his whereabouts. Failure to disclose the client's whereabouts under these circumstances would aid the client in escaping trial on the crime for which he was indicted, but would likewise aid him in evading prosecution for the additional offense of bail jumping. When this situation was presented to the American Bar Association Committee on Professional Responsibility, it was their opinion that "under such circumstances the attorney's knowledge of his client's whereabouts is not privileged, and that he may be disciplined for failing to disclose that information to the proper authorities . . ."<sup>112</sup> A pre-existing, specifically directed legal requirement (that *this* defendant show up for trial) permitted the attorney to disclose information required for its fulfillment. This concept can be extended to situations in which can be implied an agreement by the client to abide by the terms of a contemplated court order or legal requirement.

When an attorney representing a defendant in a criminal case applies on his behalf for probation or suspension of sentence, *he represents to the court, by implication at least, that his client will abide by the terms and conditions of the court's order.* When that attorney is later advised of a violation of that order, it is his duty to advise his client of

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110. Formal Opinion 155 (1936).

111. In New York, bail jumping is either a class A misdemeanor or a class E felony. N.Y. PENAL LAW §§ 205.35, 205.40 (McKinney 1970).

112. Formal Opinion 155 (1936).

the consequences of his act, and endeavor to prevent a continuance of the wrongdoing. If his client thereafter persists in violating the terms and conditions of his probation, it is the duty of the attorney as an officer of the court to advise the proper authorities concerning his client's conduct. Such information, even though coming to the attorney from the client in the course of his professional relations with respect to other matters in which he represents the defendant, is not privileged from disclosure.<sup>113</sup>

From the conclusion that many exercises of the rights of confidentiality involve behavior otherwise unlawful, it does not follow that any unlawful behavior may be shielded by confidentiality: no one would suggest, for example, that an attorney should be allowed

113. Formal Opinion 156 (1936) (emphasis added). *But see* DR 7-102(B)(1): "A lawyer who receives information clearly establishing that: His client has, in the course of the representation, perpetuated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal, *except when the information is protected as a privileged communication.*" (emphasis supplied). The italicized portion is an amendment introduced into the Code in 1974. As of this writing, it has not been adopted in New York. The New York State Bar Association, Special Committee to Review the Code of Professional Responsibility, released a Report on April 8, 1975 [hereinafter cited as April Report], one portion of which reads, in part, as follows:

We do not believe that the language added by the American Bar Association satisfactorily resolved the conflict between the lawyer's obligation not to permit himself to be used by a client to help the client perpetuate a fraud upon either a person or tribunal. We believe that his obligation should be the same whether the information regarding the fraud comes from the client, and would be covered by the attorney-client privilege, or comes from some other source in the course of professional employment by the client, and thus would be a "secret" under DR 4-101(A) . . . .

In our view, a lawyer who becomes aware of a fraud committed by his client in the course of the lawyer's representation of the client should be required to call upon his client to rectify the fraud, if the fraud relates to the subject matter of the lawyer's representation. If, however, the client refuses or is unable to rectify the fraud, we believe that withdrawal from representation should be mandatory. . . . We believe that to require disclosure of the client's fraud, absent a legal requirement or a court order compelling such disclosure, would tend to undermine the willingness of clients to seek timely legal advice. Rectification of fraud damage is, we believe, far more likely to result where such advice is sought . . . . [W]e also favor broadening the clause to cover not only past frauds . . . but also continuing or intended frauds.

*Id.* at 6-7. The Committee goes on to say that:

[t]he term 'fraud' is, we believe, and should be, limited to conduct which involves an element of scienter, deceit, or an intent to mislead. The fact that certain other conduct may be characterized as 'fraudulent' by statute or administrative rule would not necessarily be determinative of the lawyer's obligations under the Code.

*Id.* at 8-9. The rule is stated in the permissive, as indicated by its use of the word "may." The interpretation suggested in the text, in connection with Formal Opinions 155 and 136, intimates the possibility that in its limited application the rule mandates disclosure. However, as indicated by the body of controversy surrounding this aspect of the rule, the point is still open. *See* April Report, *supra*, at 4-5.

to commit homicide as a part of his advocacy. Of course, it is difficult to conceive of a situation in which such an act would be a direct consequence of the preservation of a client's secrets. This distinguishes the situation from that faced by Mr. Armani and Mr. Belge. Their otherwise unlawful act was the failure to report the whereabouts of two cadavers. One theory under which they may be exempted from the legal consequences of such behavior is that the very information which the statute required to be revealed was communicated to them in confidence by their client. Thus, they could not comply with the statutory duties without violating the confidentiality of the lawyer-client relationship. Another, better, theory involves an examination of the social policies and values which attach to otherwise unlawful behavior sought to be protected by confidentiality: one reason why murder cannot be condoned as a function of advocacy is that the sanctity of life far outweighs any conceivable social benefit gained by its extinction. A final resolution of the problems posed by the actions of Mr. Armani and Mr. Belge ultimately depends on the outcome of a balancing of the social values of their alternatives.<sup>114</sup>

The social interest attaching to burial of the dead should not be underestimated.

Civilization from the earliest days has provided for the burial of the dead. History deals with the tombs of the antediluvian worthies, Abel, Seth, Noah, and Ham. Sheikh Mohammed grew rich by representing to the passing public the tomb of an ass as that of a noted saint. Even animals have recognized the beneficence of such a custom. It is recorded that when Paul the Hermit died, two lions issued from the desert to dig his grave, uttered a long howl of mourning over his body and then departed.

The general tendency of mankind has always been to bury the dead out of the sight of the living. Amongst the ancients an unburied body was held to be disgraced and the spirit was unhappy until a kindly stranger, at least, threw a few handfuls [sic] of earth on the corpse. Long before the Pilgrim Fathers began to worry, work, freeze and sweat upon our shores, the common law of England gave to every person the right to be buried in his parish church yard . . . In the United States, neglect to bury a dead body by any one whose duty it is to bury it, and having sufficient means to do so, is a misdemeanor.<sup>115</sup>

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114. "The recognition of a privilege does not mean that it is without conditions or exceptions. The social policy that will prevail in many situations may run afoul in others of a different social policy, competing for supremacy." *Clark v. United States*, 289 U.S. 1, 13 (1932).

115. *In re Tierney*, 88 Misc. 347, 349, 151 N.Y.S. 972, 974 (Sur. Ct. 1914). *See also Patterson v. Patterson*, 59 N.Y. 574 (1875); *Cercelli v. Wein*, 60 Misc. 2d 345,

The acute sensitivity of the courts in New York to any interference with the rights of survivors with respect to the body of a decedent is illustrated by this statement from *Gratton v. Baldwinsville Academy*:<sup>116</sup> "Even assuming . . . that the plaintiff's mother was deprived of the right to view her child for some three or four minutes, brief though the period of deprivation may have been, while the power to do so was in the hands of the school board authorities . . . it still would be sufficient for a court to grant damages for such denial."<sup>117</sup> And in *People v. Ackley*,<sup>118</sup> the appellate division affirmed a judgment of conviction for a violation of former Penal Law, section 2211, stating that "[d]efendant . . . was found guilty of acts that would grieve and shock relatives and outrage the public in failing to inter several corpses entrusted to him for burial."<sup>119</sup>

On the other hand are the rules and theories of lawyer-client confidentiality, with their strengths and weaknesses. In New York, as in most other jurisdictions, it is the policy to assume that factual information communicated by or through a client to his attorney is protected by the rules of confidentiality.<sup>120</sup> Indeed, a communication should be regarded as confidential where it possibly is so.<sup>121</sup> The presumption of confidentiality indicates that confidentiality is considered an important and integral part of our legal system, and that confidences may be revealed *only* in very extreme situations. For example, while it is normally the duty of an attorney to disclose perjury which has been committed, he cannot make the disclosure if the perjury is committed by his client, and he learns of it by means of a confidential communication from his client.<sup>122</sup> Perjury is a serious offense, and perpetrates fraud on a court, which an attorney is specifically bound to

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303 N.Y.S. 316 (Civ. Ct. 1969); *Weingast v. State*, 44 Misc. 2d 824, 254 N.Y.S.2d 952, (Ct. Cl. 1964).

116. 49 Misc. 2d 329, 330 (Sup. Ct. 1966).

117. *Id.*

118. 270 App. Div. 958, 62 N.Y.S.2d 771 (3d Dep't), *aff'd*, 296 N.Y. 731, *cert. denied*, 330 U.S. 846 (1946).

119. *Id.* at 958, 62 N.Y.S.2d at 771.

120. *Ford Motor Co. v. O. W. Burke Co.*, 59 Misc. 2d 543, 546, 299 N.Y.S.2d 946, 949 (Sup. Ct. 1969); *accord*, *United States v. Aluminum Co. of America*, 193 F. Supp. 251 (N.D.N.Y. 1960).

121. See MICHIGAN BAR ASSOCIATION COMMITTEE ON PROFESSIONAL RESPONSIBILITY, Opinion 118; ETHICS COMMITTEE OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, Opinion 308. [Copies of these opinions are available from the respective Bar Associations.]

122. Formal Opinion 287 (1953); Informal Opinion C-778 (1964). It was further held that the lawyer should insist that his client confess; if the client refuses to do so, the lawyer should attempt to withdraw from the case.



prevent.<sup>123</sup> Yet, if an attorney learns on the basis of confidential information, that a client has perjured (or is perjuring) himself, his ethical duty is deliberately to ignore the requirements of law in favor of the preservation of the confidences. Even admitting that the right to burial is fundamental to society, it hardly seems reasonable to expect an attorney to violate a client's confidence to secure it.

Moreover, it is to their credit that Mr. Armani and Mr. Belge sought and received a waiver of confidentiality from their client, and then did reveal the locations of the other victims. Only the client may waive his right to confidentiality,<sup>124</sup> and until a waiver has occurred, the duty against disclosure is absolute.<sup>125</sup> Garrow did not waive confidentiality until he testified in open court to his involvement in the slayings of the two women.<sup>126</sup> Almost immediately thereafter, Mr. Armani and Mr. Belge revealed the locations of the bodies to authorities. Consequently, if the information retained by the lawyers was protected under the duty of non-disclosure of confidential information, then the attorneys were prohibited by their professional responsibilities from revealing the information until its confidentiality had been waived by their client, and this is exactly what happened.

In addition, the theory of confidentiality is bolstered by several

123. Former Canon 41. *See also* Former Canons 29, 32, 16, 15; N.Y. PENAL LAW §§ 210.00—210.50 (McKinney 1970) (perjury).

124. *Lanza v. Joint Legislative Comm.*, 3 N.Y.2d 92, 143 N.E.2d 772, 164 N.Y.S.2d 9, *cert. denied*, 355 U.S. 856 (1957); *Beach v. Oil Transfer*, 23 Misc. 2d 47, 100 N.Y.S.2d 74 (Sup. Ct. 1960); *Mileski v. Locker*, 14 Misc. 2d 252, 178 N.Y.S.2d 911 (Sup. Ct. 1958); *Castiglione v. State*, 8 Misc. 2d 932, 169 N.Y.S.2d 145 (Ct. Cl. 1957).

125. *Republic Gear Co. v. Borg-Warner Corp.*, 381 F.2d 551 (2d Cir. 1967); *Fox v. 44 Cigar Co.*, 90 N.J. 483, 101 A. 184 (1917); *Yorden v. Hess*, 13 Johns. 492 (Sup. Ct. 1816).

126. A client's own testimony on direct examination is equivalent to a waiver. *People v. Patrick*, 182 N.Y. 131, 175, 74 N.E. 843, 857 (1905). Garrow's defense was insanity. As a matter of trial strategy, Garrow's attorneys elicited from him what amounted to confessions to the slayings of two other women. The following excerpts from the trial transcripts exemplify the events at the trial on June 17, 1974:

Q: (By Belge): Do you remember . . . how she died?

A: (By Garrow): Yes . . . she was strangled with a rope . . . I think I told you it was a rope or something like a wire that I picked up . . .

Q: [D]id you leave the body right there?

A: Yes. Yes, I did.

Record at 16.

A: [T]hat is after that girl, you know, I pushed her down the mineshaft . . .

Record at 29.

There is no question but that Garrow, himself, understood that his communications with his lawyers were protected by the lawyer-client relationship. The *New York Times* reported that Mr. Belge had advised Garrow that "I could not reveal the information unless I got his permission." *N.Y. Times*, June 20, 1974, at 1, col. 2. The *Schenectady Gazette* reported that until their disclosure on June 19, neither Mr. Armani nor Mr. Belge had ever told authorities that they had found a body or bodies. *Schenectady Gazette*, June 21, 1974, at 34, col. 5.

interpretations of provisions of the Constitution of the United States. In a criminal proceeding, the duty of a defense counsel not to disclose facts confidentially received, stems partly from the presumption of innocence which follows the accused throughout his trial. Under no circumstances does the attorney have an obligation to assist in the preparation of his adversary's case. The burden of proof is solely on the prosecutor, the accused having an absolute right to remain silent.<sup>127</sup> The thrust of the fifth amendment<sup>128</sup> is that "prosecutors are forced to search for independent evidence instead of relying upon proof exacted from individuals by force."<sup>129</sup> The sixth amendment<sup>130</sup> guarantees that a defendant in a criminal action "need not stand alone against the state at any stage,"<sup>131</sup> and has been interpreted to guarantee to an accused the assistance of counsel both in and out of court.<sup>132</sup> Taken together, these constitutional provisions work in conjunction with the rules of confidentiality. If a client consults counsel in confidence, his fifth amendment right against self-incrimination would be futile were the attorney to testify to incriminating confidential information.<sup>133</sup>

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127. *Escobedo v. Illinois*, 379 U.S. 478 (1964); *see Tehan v. United States ex rel. Shott*, 382 U.S. 406, 415 (1966); *Rogers v. Richmond*, 365 U.S. 534, 540-41 (1961). The state obviously cannot impose a self-reporting statute upon the criminal himself. Not only is such a statute impractical, but the self-incrimination clause of the fifth amendment is an impenetrable barrier to such a plan. *Marchetti v. United States*, 390 U.S. 39 (1968); *Grosso v. United States*, 390 U.S. 62 (1967). Clearly, Garrow's involvement in the deaths of Ms. Hauck and Ms. Petz precluded any possibility of punishing him for not reporting those deaths.

128. U.S. CONST. amend. V, provides in part: "No person . . . shall be compelled in any criminal case to be a witness against himself . . ."

129. *United States v. White*, 322 U.S. 694, 698 (1943). Another reason for the existence of the privilege against self-incrimination is said to be that coerced evidence is unreliable. *Miranda v. Arizona*, 384 U.S. 436, 445-58 (1966).

130. U.S. CONST. amend. VI, provides in part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."

131. *United States v. Wade*, 388 U.S. 218, 226 (1967).

132. *Id.*; *Massiah v. United States*, 377 U.S. 201 (1964); *see Stovall v. Denno*, 388 U.S. 293 (1967); *Gilbert v. California*, 388 U.S. 263 (1967); *Miranda v. Arizona*, 384 U.S. 436 (1966); *Escobedo v. Illinois*, 379 U.S. 478 (1964); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *cf. Powell v. Alabama*, 287 U.S. 45 (1932).

133. The fifth amendment right against self-incrimination has been thought of as personal to the defendant, and hence the question arises whether it may be asserted vicariously by the attorney. The paradigmatic situation would be one in which no ethical duty against disclosure exists, but a communication is protected to safeguard an accused's right against self-incrimination. In *United States v. Judson*, 322 F.2d 460 (9th Cir. 1963), a subpoena duces tecum demanded the production of bank statements and checks. Such items, because of their negotiability, were held not protected by lawyer-client privilege. However, they were held to be protected by the client's right against self-incrimination. The court saw no objection to the fact that the defendants' fifth amendment rights had been raised on their behalf by their attorney, stating that the issue was

the effective exercise of the [fifth amendment] privilege by one who is clearly en-

And effective assistance of counsel requires that a client be willing to confide in his attorney, and he will not do this unless he is assured that his communications will be held in confidence.<sup>134</sup> Had Mr. Armani and Mr. Belge prematurely divulged the information received by them in confidence from Garrow, they in fact would have negated their client's constitutional guarantees under the fifth and sixth amendments.<sup>135</sup>

Lawyers are a necessary part of our legal system. Few who have not been trained in law could hope to cope with our complicated system of justice. In criminal actions, the state has armies of experts, and other resources, upon which to call for the preparation and presentation of the best case possible against an individual accused of a crime. The state can generally present its case in the best possible way; that is, the presentation of the state's case is accomplished by the partisan advocacy of skilled attorneys. Against the amassed resources and expertise of the state stands an individual accused of a crime, who faces the very real possibilities of the most severe formal punishments imposed by our society. Because he lives in a system of law, the individual has the right to defend himself against the charges brought against him. But because he is generally not a lawyer, this right would be illusory were an individual required to defend himself without assistance against the expertise of his opponent, the state. Therefore, we require that the state prove its charges "beyond a reasonable doubt," according to the law, and within the boundaries of strict safeguards for individual defendants. One of the most important of these safeguards

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titled to it. We are called upon only to consider the method whereby the privilege-holder makes known his desire to assert the privilege . . . .

*Id.* at 463; see *Grant v. United States*, 227 U.S. 74, 79-80 (1912); *Schwimmer v. United States*, 232 F.2d 855 (8th Cir.), *cert. denied*, 352 U.S. 833 (1956); *In re House*, 144 F. Supp. 95, 100 (N.D. Cal. 1956). See also *Maness v. Meyers*, 95 S. Ct. 584 (1975).

134. The court in *Coplon v. United States*, 191 F.2d 749, 760 (D.D.C.), *cert. denied*, 342 U.S. 926 (1951), relied in part on the sixth amendment to hold that a defendant was entitled to be protected against "surreptitious interception of her telephone conversations with her counsel." See also *Glasser v. United States*, 315 U.S. 60 (1942); *United States v. Venuto*, 182 F.2d 519 (3d Cir. 1950).

135. See generally *Maness v. Meyers*, 95 S. Ct. 584 (1975), in which it was sought to hold a lawyer in contempt for his refusal to reveal certain confidential information acquired from his client, and for advising his client to plead his fifth amendment rights against self-incrimination:

This court has always broadly construed its protection to assure that an individual is not compelled to produce evidence which later may be used against him as an accused in a criminal action. . . . The protection does not merely encompass evidence which may lead to criminal conviction, but includes information which would furnish a link in the chain of evidence that could lead to a prosecution, as well as evidence which an individual reasonably believes could be used against him in a criminal prosecution . . . .

*Id.* at 592.

is the right of an individual who is accused of a crime to be assisted by counsel. The right to counsel is not a sham. An attorney is partisan; he is, to a large extent, a "hired gun" who devotes his skills as a lawyer to the presentation of his client's case in the most favorable light—just as his opponents do for their client, the state.

The adversary process of law has been devised and developed as the best method for the orderly administration of justice, for the fairest ordering of the legal relationships of individuals within our society. Lawyer-client confidentiality may be abused. If it is, the adversary system fails in its primary quest, the attainment of justice. Fortunately, such abuse is rare, though perhaps inevitable. Guilty parties have gone free, and innocent parties have undoubtedly been convicted because the confidentiality of the lawyer-client relationship has been improperly manipulated. So long, however, as such abuse remains only infrequent, and the high ethical standards of the legal profession are maintained, it may be that occasional and individual distortions of the adversary process are tolerable as a price we must pay for the complexity of our legal system. For it may be that the existence of lawyer-client confidentiality is necessary if our legal system is to continue to be viable at all.

Max Lerner has noted that Mr. Armani and Mr. Belge "were not motivated by self-interest, or any fat fee."<sup>136</sup> They were silent "out of a belief that the confidential lawyer-client relation is at the heart of their job . . . . Otherwise how can a client—especially a wretched one—place any trust in the man he picks or who is picked to defend him?" While it happened that their silence had a "gruesome result," "[o]n balance, the trust achieved through silence weighs heavily on the scales of social interest—more heavily even than a parent's needless heartbreak."<sup>137</sup>

#### POSTSCRIPT

On February 13, 1975, Francis R. Belge was indicted by an Onondaga County Grand Jury, accusing him of violating section 4200(1) and section 4143 of the New York Public Health Law.<sup>138</sup> On August 1, 1975, in an eight-page decision, Onondaga County Judge Ormand N. Gale dismissed the indictment.<sup>139</sup>

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136. New York Post, June 24, 1974, at 33, col. 4.

137. *Id.*

138. *People v. Belge*, Indictment No. 75-55, Index No. 75/123 (Onondaga County Ct., Feb. 13, 1975).

139. *Id.* (Onondaga County Ct., filed Aug. 1, 1975).

In his opinion, Judge Gale "weigh[ed] the importance of the general privilege of confidentiality . . . against the inroads of such a privilege on the fair administration of criminal justice. . . ." <sup>140</sup> He stated:

The effectiveness of counsel is only as great as the confidentiality of its client-attorney relationship. If the lawyer cannot get all the facts about the case, he can only give his client half of a defense. This, of necessity, involves the client telling his attorney everything remotely connected with the crime.

Apparently, in the instant case, after analyzing all the evidence, and after hearing of the bizarre episodes in the life of their client, they [Mr. Armani and Mr. Belge] decided that the only possibility of salvation was in a defense of insanity. For the client to disclose not only everything about this particular crime but also everything about other crimes which might have a bearing upon his defense, requires the strictest confidence in, and on the part of, the attorney. <sup>141</sup>

As against the "trivia of a pseudo-criminal statute" <sup>142</sup> attorney-client confidentiality must prevail. The grand jury, said Judge Gale, was "grasping at straws." <sup>143</sup>

Also pertinent is a new opinion from the New York State Bar Association Committee on Professional Ethics. <sup>144</sup> The Committee ruled that that it would be improper for a lawyer representing a client who is

140. *Id.* at 7.

141. *Id.* at 5.

142. *Id.* at 7.

143. *Id.* at 8. Also encouraging is the decision by Hamilton County Judge George W. Marthen. *In re Armani & Belge* (Hamilton County Ct., filed July 3, 1975). In granting additional compensation, Judge Marthen said:

The Court is not hesitant to point out that counsel for the Defendant [Garrow] devoted extraordinary energy and talent to the defense in this case. The disclosure upon trial that the Defendant admitted to his counsel, in an early stage of their representation, that he had committed three other murders and could direct them to the locations of the bodies of two of his victims, whose deaths had not theretofore been confirmed, rocked not only the news media but the foundation of our system of criminal justice. Who can imagine the anguish of these attorneys, fathers themselves, at having to carry inviolate this confidence knowing full well the agonies endured by the parents of the missing girls? Who can appreciate the torment, after the disclosure was made public, suffered by them as a result of the poisoned pens and poisoned tongues of the self-righteous? Who, indeed, in the legal profession can truly and objectively look back from the comfortable chair of the Monday morning quarterback and say, 'I would have done thus and so in spite of the ethic of confidentiality which I am sworn to uphold.'? Indeed, who can understand the anguish of having to defend oneself months later against charges of criminal wrongdoing where one has acted in the highest tradition of the legal profession?

*Id.* at 5-6.

144. New York State Bar Association Committee on Professional Ethics, Opinion # 405 (August 15, 1975).

charged with the crime of larceny to divulge to the authorities confidential information obtained from the client as to the location of the stolen property. The Committee said:

DR 4-101(C) (3) appears to be applicable to the confidential disclosure made by the client to his lawyer of the location of the stolen property since it reveals the commission of a crime that is continuing. It may be fairly assumed that such confidential disclosure implicitly expresses the client's intention to continue committing the crime. However, this provision is permissive and not mandatory. Accordingly, the answer to the question is that the attorney has no affirmative obligation to reveal to the authorities the location of the stolen property.

But the important question that arises is whether it would be a proper exercise of discretion for the lawyer to reveal to the authorities the location of the stolen property. Under the circumstances, it would be improper for the attorney to disclose this confidential information without the consent of his client.

Inherent in the disclosure of this confidence of the client is the serious risk of exposing the client as the possessor of the stolen property. In this connection, it should be noted that the act of concealment when committed by the thief, though a separate crime, is normally incident to the crime of larceny. It is this reality that has permitted the inference to be drawn from the unexplained recent and exclusive possession of stolen property that the possessor stole the property. Evidence of the concealment, therefore, would be evidence of the larceny.

Should the attorney reveal the location of the stolen property, he would, in effect, be assuming a role adverse to the interests of his client and repugnant to the confidential relationship between lawyer and client. In essence, he would be disclosing confidential information as to the crime of larceny that is charged against his client. In other words, he would be doing indirectly what he could not do directly as a matter of law, as well as ethical obligation.<sup>145</sup>

JEFFREY FRANK CHAMBERLAIN

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145. *Id.* at 2-3.

