



ISBA Professional Conduct Advisory Opinion

Opinion No. 17-01
March 2017

Subject: Confidentiality; Impaired Client

Digest: The question of whether the disclosure of confidential information is necessary to prevent reasonably certain death or substantial bodily harm is a factual issue.

References: Illinois Rules of Professional Conduct 1.6(c) and 1.14
Restatement (Third) of the Law Governing Lawyers Sec. 66 (2000)

FACTS

The inquiring attorney has a client who is addicted to heroin and opioids, and also takes cocaine, marijuana and methadone. The client is arrested for possession of a controlled substance, and appears severely impaired during court hearings, but remains silent before the Judge, allowing the attorney to do the speaking. The client is unable to stop consuming heroin and continues to be in violation of bond conditions.

QUESTION

The attorney asks whether, pursuant to Rule 1.6(c) of the Illinois Rules of Professional Conduct, he must reveal his client's addictions to the Court in order to prevent reasonably certain death or substantial bodily harm to his client.

ANALYSIS

As alluded to in the inquiry, Illinois Rule 1.6(c) provides:

“A lawyer shall reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to prevent reasonably certain death or substantial bodily harm.”

We begin by noting that the Illinois Rule is drawn in mandatory terms; i.e., the lawyer shall reveal information under the circumstances therein stated, while the comparable ABA Model Rule;

i.e., Rule 1.6(b)(1), is drawn in discretionary terms, providing that the attorney may reveal confidential information under the same circumstances as are set forth in the Illinois Rule. Thus, whether mandatory under the Illinois Rule or discretionary under the ABA Model Rule, the threshold for disclosure of confidential information under the two Rules is the same, that being whether an attorney reasonably believes that the revealing of such information is necessary to prevent reasonably certain death or substantial bodily harm.

As recognized in the Restatement (Third) of the Law Governing Lawyers §66(2000), the question of whether the disclosure of otherwise confidential information is necessary to prevent reasonably certain death or substantial bodily harm is intensely fact sensitive. Moreover, in deciding whether death or substantial bodily harm is reasonably certain to occur, Comment [6] to Illinois Rule 1.6 (c) recognizes that such harm is reasonably certain to occur if it will be suffered immediately or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat.

To this effect, the Restatement has recognized various factors to be considered in deciding whether the disclosure of confidential information is necessary to prevent reasonably certain death or substantial bodily harm, including the following:

1. The degree to which it appears likely that the threatened death or serious bodily harm will actually result in the absence of disclosure;
2. The irreversibility of the consequences once the act has taken place;
3. Whether victims may be unaware of the threat or may rely on the lawyer to protect them;
4. The lawyer's prior course of dealing with the client; and
5. The extent of adverse effect on the client that might result from disclosure contemplated by the lawyer.

Examples given by the Restatement or the Comments to Rule 1.6 as to whether disclosure is necessary to prevent reasonably certain death or substantial bodily harm include the following:

1. Comment [6] to Illinois Rule 1.6(c) states that a lawyer who knows that a client or other person has accidentally discharged toxic waste into a town's water supply must reveal this information to authorities if there is a present and substantial risk that a person who drinks the water will contract life threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.

2. The Restatement states that a lawyer representing a defendant in a personal injury action who learns from a consulting physician that the plaintiff has a life threatening medical condition of which the plaintiff is unaware, and which can be repaired through surgery, may under the ABA discretionary Rule, reveal such condition to the plaintiff.
3. The Restatement also sets forth that a lawyer whose client reveals that he has set a mechanical device to burn down a building in which people are living has the discretion under the ABA Rule to reveal such facts, even though this may result in criminal charges against his client.
4. On the other hand, the Restatement concludes that a lawyer who learns that his client has unknowingly used a component in the manufacture of its products resulting in a slight statistical chance that a user may suffer serious bodily harm, but only in a highly unlikely combination of circumstances, does not under the ABA Rule have the discretion to warn the public of such slightly increased risk of harm.

Applying the above guidance to the present inquiry, we are of the view that the inquiring attorney is not in all instances obligated under Rule 1.6(c) to reveal confidential information as to the existence of his client's addiction to heroin and opioids, even though such addictions may at some unknown time in the future result in death or serious bodily harm. While admittedly serious, and not to diminish the possible danger to the client's safety and well-being caused by the client's addictions and usage, we cannot conclude that the lawyer's knowledge of a client's addictions, without more, always results in a mandatory obligation to disclose such information in order to prevent reasonably certain death or substantial bodily harm. We do not believe the dictates of Rule 1.6(c) to go so far.

Moreover, while Comment [6] to the Rule recognizes that the risk of reasonably certain death or substantial bodily harm need not in all instances be immediate, the Comment goes on to state that there must at the least be a present and substantial threat that the person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. In the present instance, while the client's addictions, especially to heroin, present a risk that at some unknown time in the future the client may, like every person suffering from such an addiction, suffer the ills foreseen by the Rule, such danger is sufficiently remote in time and uncertain of occurrence as to render us unable to say that it presents the present and foreseeable threat of reasonably certain death or substantial bodily harm as would be required to call the Rule into play. Thus, we are of the belief that the mandate of disclosure under Rule 1.6(c) is not presently applicable to this situation.

This is not to say, however, that the attorney would never have a possible obligation under the Rule to reveal the client's addiction and usage. As stated, the question of whether the circumstances in any given situation may require reporting under Rule 1.6(c) is an intensely fact sensitive inquiry. To this effect, if the attorney has additional information in a given instance reflecting an increased danger of death or substantial bodily harm, beyond the risk inherent in the client's being an addict, such as a history on the part of a client to attempt suicide or to cause bodily injury to himself, or the existence of believable threats by the client to do himself injury, such considerations may result in a different conclusion as to the reasonableness of a belief on the part of an attorney that the revealing of otherwise confidential information is necessary to prevent reasonably certain death or substantial bodily harm. However, on the facts stated in the present inquiry, we do not believe that the attorney's knowledge of the client's addictions and usage, without more, creates a reasonable belief on the part of an attorney that intervention is necessary to prevent reasonably certain death or substantial bodily harm so as to require disclosure under Rule 1.6(c).

We are somewhat comforted in our conclusion that mandatory disclosure is not required under the present circumstances by the fact that Rule 1.6(c) is not the only Rule under which help for the addictive client may be obtained. To this effect, while the attorney's present inquiry is specifically premised on the requirements of Rule 1.6(c) and to the attorney's possible mandatory obligation thereunder to reveal his client's addictions, the provisions of Rule 1.14, dealing with a client who is of diminished capacity, may also come into play and may provide an easier and in many instances a more readily available avenue for assisting such a client than that provided by Rule 1.6(c). Without going into a lengthy discourse of the provisions of Rule 1.14, suffice it to say that it provides that an attorney who has a client whose capacity to make adequately considered decisions in connection with a representation is diminished, whether because of minority, mental impairment or some other reason, shall, as far as reasonably possible, maintain a normal client-lawyer relationship with the client. (Rule 1.14(a)). However, the Rule goes on to state that a lawyer having a client who has diminished capacity, who is at risk of substantial physical, financial or other harm unless action is taken, and who cannot adequately act in the client's own interest, may (not shall) take reasonably necessary protective action, including consulting with individuals or entities that have the ability to take actions to protect the client and, in appropriate cases, seek the appointment of a guardian ad litem, conservator or guardian. (Rule 1.14(b)) The Rule further recognizes that while information relating to the representation of a client with diminished capacity is protected by the confidentiality provisions of Rule 1.6, the lawyer, when taking protective action pursuant to Rule 1.14(b), is impliedly authorized under Rule 1.6(a) to reveal information about the client to the extent reasonably necessary to protect the client's interests (Rule 1.14(c)).

Thus, an attorney having a client whose drug or other conditions create a reasonable belief on the part of the attorney that the client is of diminished capacity should take into account the

provisions of Rule 1.14, and that the attorney may have the right under such Rule, even absent the existence of an obligation to report under Rule 1.6(c) and despite the confidentiality provisions of Rule 1.6, to obtain help for the client under Rule 1.14. We thus recommend that the inquiring attorney review the provisions of Rule 1.14 with a view to whether it provides an additional avenue for obtaining relief for his addictive client.

CONCLUSION

Accordingly, we conclude that an attorney having knowledge of a client's drug addiction and usage does not in all instances, and in the absence of further aggravating circumstances increasing the certainty of death or serious bodily harm, have an obligation under Rule 1.6(c) to reveal such information. We reiterate, however, that the determination of the attorney's obligation under the mandatory provisions of the Rule is intensely fact sensitive, and may in some circumstances rise to the level of requiring action under the Rule to prevent reasonably certain death or substantial bodily harm. Additionally, even absent the existence of a mandatory reporting obligation under Rule 1.6(c), the lawyer may have steps available to protect his client if the client is of diminished capacity under the provisions of Rule 1.14.

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