

Dear Ms. Daly:

I will not be present at the February 11 public hearing, but I submit these thoughts regarding one aspect of the attorney-client privilege.

It is a scandal that 1.6 permits an attorney to disclose confidential information to collect a fee, defend a civil suit, avoid bar discipline, or escape criminal prosecution and punishment, BUT we are forbidden to disclose a confidence that will keep any other innocent/falsely-accused person out of jail.

Massachusetts' version of 1.6 requires a lawyer to reveal confidential information "...to prevent the wrongful execution or incarceration of another." The ABA Model Rules should be amended to do likewise.

I suggest you adopt the language of the Massachusetts rule or something similar, such as:

A lawyer must reveal information when a client or another admits to having committed a crime for which another person has been or later comes to be wrongfully charged by a criminal indictment or information.

Comment

Subdivision (c) is intended to apply when the lawyer's client or another person who consults the lawyer admits to having committed a crime for which an innocent person has been or is later charged by a criminal indictment or information. Since charging documents are based on probable cause and a good faith belief by the prosecution that a conviction can be obtained, for the lawyer to remain silent would increase the likelihood of an innocent person's conviction and incarceration, a result that would be a manifest injustice and corruption of the very foundation of our law and society. The attorney in possession of such information has an affirmative duty to disclose that information to the court with jurisdiction over the criminal case in which the innocent person has been charged.

The attorney-client confidence is intended to assist a client's legal representation, but it is far from absolute, as other provisions of this rule and Rule 3.3 make clear. Especially in light of some of the other exceptions (e.g. to collect a fee or to defend against a bar complaint or a criminal charge filed against the attorney), the attorney-client confidence loses its validity where it results in the prosecution or conviction of the innocent.

In the alternative, the task force should recommend that the Model Rules be amended to delete (b)(5), the subsection that permits attorneys to disclose confidential information to benefit attorneys.

Randolph

Randolph Braccialarghe

Professor of Law

NSU Law Center

3305 College Avenue

Davie, FL 33314-7721

(954) 262-6169 * (800) 541-6682 x 6169

