

NACDL ETHICS ADVISORY COMMITTEE

Formal Opinion No. 04-02 (May 10, 2004)

Introduction

The Ethics Advisory Committee of the National Association of Criminal Defense Lawyers has observed discussion on the NACDL List Serv by members as to whether a serious threat of violence by the client against the lawyer is a waiver of confidentiality, creation of a personal conflict of interest, and justification for the attorney's withdrawal. It is our conclusion that it is.¹

A threat of violence and confidentiality and privilege

ABA Model Rule of Professional Conduct 1.6(b) (2003 ed.) provides:

A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

- (1) to prevent reasonably certain death or substantial bodily injury;

To disclose a threat made to oneself, the lawyer has to reasonably believe that the threat is serious and imminent. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 66 (2000) and ABA Model Rules of Professional Conduct Rule 1.6, *Comment* ¶ 6 (2003 ed.), both quoted in NACDL Formal Op. 04-01 (May 10, 2004). In Formal Op. 04-01, we stated that a criminal defense lawyer must disclose a serious threat to kill the prosecutor in a mandatory disclosure jurisdiction, and should disclose a serious threat in a permissive disclosure jurisdiction.

In this situation, the question is more direct: When a client threatens his or her own lawyer with physical violence, is that act a waiver of confidentiality or privilege? And, if so, may the

¹ Also issued today is NACDL Formal Op. 04-01 (May 10, 2004) holding that (1) a serious threat by a client to kill the prosecutor had to be disclosed in mandatory disclosure jurisdictions and may be disclosed in permissive disclosure jurisdictions, (2) the situation created a conflict of interest and the appearance of impropriety, and (3) the lawyers must immediately seek to withdraw without prejudicing the accused.

Formal Op. 04-01 also discusses the difference between required and permissive disclosure jurisdictions.

lawyer report the threat to the police?

Surely a client who threatens his or her lawyer with physical violence does not and cannot expect that communication to remain confidential. Surely also that client does not expect that such a threat is conducive to good lawyer client relations, or even the continuation of the attorney-client relationship. Indeed, it is evidence of a total breakdown of the attorney-client relationship.

An exception to the attorney-client privilege exists under Uniform Rule of Evidence 502(d)(3), “[a]s to a communication relevant to an issue of breach of duty . . . by the client to his lawyer.” A threat of violence made to the lawyer is obviously a “breach of duty . . . by the client to his lawyer.” See *Clark v. United States*, 289 U.S. 1, 15 (1933), involving the crime-fraud exception and client abuse of the relation:

There is a privilege protecting communications between attorney and client. The privilege takes flight if the relation is abused. A client who consults an attorney for advice that will serve him in the commission of a fraud will have no help from the law. He must let the truth be told. . . . When that [prima facie] evidence [of illegality] is supplied, the seal of secrecy is broken. (bracketed material added)

Thus, the attorney has the discretion to disclose the threat to the authorities and make a crime report, if necessary, because the threat is a waiver of confidentiality.

While confidentiality and privilege serve different purposes, confidentiality is broader than privilege. If the threat waives confidentiality, it usually also waives privilege.

Creation of conflict of interest

A threat to the lawyer creates a personal conflict of interest under ABA Model Rule of Professional Conduct 1.7 (2003 ed.) which provides, in pertinent part:

- (a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:
 - (1) the representation of one client will be directly adverse to another client; or
 - (2) there is a significant risk that the representation of one or more clients will be materially limited . . . by a personal interest of the lawyer.

- (b) Notwithstanding the existence of a concurrent conflict of interest under paragraph (a), a lawyer may represent a client if:
- (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
 - (2) the representation is not prohibited by law;
 - (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
 - (4) each affected client gives informed consent, confirmed in writing.

It should go without saying that a threat of bodily harm by a client against a lawyer creates a personal conflict of interest. How can a lawyer represent a client when the lawyer is wondering when he or she will be physically assaulted?

Withdrawal

If a serious threat of violence is made to a lawyer, the lawyer should immediately move² to be relieved under ABA Model Rule of Professional Conduct 1.16 (2003 ed.) without causing any more prejudice than necessary, including reporting the threat to the authorities. The court may inquire into the reasons for the conflict, but, as stated in *Holloway*, an attorney's representation that there is a conflict of interest should be taken at face value so the attorney will not be required to prejudice the accused before the very court that will be trying the case and possibility sentencing the accused:

Additionally, since the decision in *Glasser*, most courts have held that an attorney's request for the appointment of separate counsel, based on his representations as an officer of the court regarding a conflict of interests, should be granted. *See, e. g., Shuttle v. Smith*, 296 F.Supp. 1315 (Vt.1969); *State v. Davis*, 110 Ariz. 29, 514 P.2d 1025 (1973); *State v. Brazile*, 226 La. 254, 75 So.2d 856 (1954); *but see Commonwealth v. LaFleur*, 1 Mass.App. 327, 296 N.E.2d 517 (1973). In so holding, the courts have acknowledged and given effect to several interrelated considerations. An "attorney representing two defendants in a criminal matter is in the best position professionally and ethically to determine when a conflict of interest exists or will probably develop in the course of a trial." *State v. Davis*, *supra*, at

² *Holloway v. Arkansas*, 435 U.S. 475, 485-86 (1978), "defense attorneys have the obligation, upon discovering a conflict of interests, to advise the court at once of the problem."

31, 514 P.2d, at 1027. Second, defense attorneys have the obligation, upon discovering a conflict of interests, to advise the court at once of the problem. *Ibid.* Finally, attorneys are officers of the court, and “when they address the judge solemnly upon a matter before the court, their declarations are virtually made under oath.” *State v. Brazile*, supra, at 266, 75 So.2d, at 860-861. (Emphasis deleted.) We find these considerations persuasive.

Holloway, 435 U.S. at 485-86.