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It is one of the lawyer's proudest possessions and sternest obligations that he is the recipient and preserver of his client's secrets. These confidences embrace admissions of conduct merely shameful or foolish; business secrets of value; and frank disclosure of past criminal conduct of which the client is or may stand charged. But none may be disclosed by the lawyer.

The system is not without its strains. It takes a measure of discipline to maintain silence about interesting conduct. It seems fair to say that a good deal of conversation is laden with talk about others. If spiteful, we are inclined to label it gossip, if not, then merely good anecdotal discourse. Every lawyer must have experienced some measure of frustration in saying nothing with reference to someone about whom he knows everything or remaining silent on business matters when his knowledge, if disclosed, would give him the appearance and prestige of an insider. However, it is when the disclosure is about criminal conduct that the strain is the worst and the lawyer's duty becomes not only irksome but paradoxical.

It becomes paradoxical precisely because the lawyer, whether he takes the case or not, is bound to silence and must maintain it even though the state falters in its attempt to establish what he knows to be true. Indeed, if he is counsel for the accused it is his duty to demand acquittal because of this lack which he could supply. There is hardly a more singular duty attached to any profession. The lawyer is at odds with not only the interests of all like-minded (by hypothesis, non-criminal) people, but with his own private interests. The criminal preys not only on society as a corporate entity, but each member thereof, which by definition, includes the lawyer.

Paradoxical as the problem is seen to be, the response of most

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lawyers is uniform. The disclosure by the accused of a fact usable by the prosecution is inviolate in the lawyer's hands. And, it is safe to say that many a lawyer has aided his client's acquittal by his non-disclosure of a pivotal fact of which the jury has remained ignorant. Whether this phenomenon is good for society has been mooted for centuries. Certainly the practice has had its detractors. Not the least of these was Jeremy Bentham, educated for the Bar himself, who, after noting the argument that if the lawyer were to be compelled to make disclosure of these confidences, the client would cease to repose these confidences in him said:

> [Not] reposed? Well: and if it be not, wherein will consist the mischief? The man, by the supposition is guilty; if not, by the supposition there is nothing to betray: . . . . the client cannot have anything to fear. . . . That it will often happen in the case supposed no such confidence will be reposed is natural enough: . . . What, then, will be the consequence? That a guilty person will not in general be able to derive quite so much assistance from his law advisor . . . as he may do at present.[1]

It is in the criminal sphere that the strain is especially apparent. In civil litigation it is possible (absent an invocation of the fifth amendment or similar immunity) to examine the client-opponent and to ascertain the important truths. In criminal prosecutions that is impossible. Thus in civil litigation the lawyer, possessed of his client's secrets, may take comfort, if any is needed, in the fact that had the opponent asked the right questions, he would now know what the lawyer knows. The lawyer's nondisclosure of secrets has not aided in a miscarriage of justice.

The preceding discussion has been based upon one central fact. Our system of justice, both criminal and civil, is bottomed upon the practice of litigants conducting their disputes by the use of impersonal champions. For good or ill this is the choice of the common law world. The thrust of this study will be directed toward confidence keeping activities not related to the actual trial of disputes and those activities which arguably exceed the lawyer's duty.

The central question, assuming a duty of allegiance expressed by silence, is: about what facts and for what purpose must this silence be kept? In short, what are the parameters of the lawyer's obligations of confidence keeping.

1. J. BENTHAM, *Improper Exclusions—Lawyer and Client*, in 7 THE WORKS OF JEREMY BENTHAM 473 (Bowring's Ed. 1838-1843).

As always, it is easy to define the clear middle ground. As always, it is difficult to delineate the subtle case by case boundaries as silence shades into chicanery or, charitably, downright foolishness on the part of counsel. The clear middle ground is the communication containing the gravamen of the crime itself. Society has declared it is the privilege and the duty of the lawyer to remain silent upon this even though crime goes unpunished. This, the choice reads, is the desirable course. It goes beyond the passivity of the closed legal mouth and demands that the same mouth which cannot disclose what it knows must demand acquittal because society, in the form of the state, does not know as much.

What then is the problem? What dimensions does it take? How, considering the vital choice of society, can it be overstepped? It must be remembered that although the lawyer cannot disclose his client's secrets, neither can he let his client perpetrate a fraud on the court by lying. The privilege of lying is forbidden the client. The privilege of silence is one of his most precious rights. Should the former occur the lawyer must disclose the existence of falsehood to the court.[2] By inference, the least of his duties consists in telling the court that a lie has been told, the most is to disclose the ostensible truth now that the client has taken other ground.[3]

By most lay standards society's choice is little less than suicidal. Certainly no other organism provides its enemy with an armoured gladiator. It might well be asked if this is not enough. The answer by at least some of the bar is to be found in the negative. Whether their position is a defensible one or not is now under consideration.

Perhaps one of the most blatant overextensions of the duty of counsel is to be found in the Virginia case of *In re Ryder*,[4] a disciplinary proceeding against Ryder who took from his bank robber client's safety deposit box and placed in his own a quantity of supposedly stolen money and a sawed-off shotgun which he suspected had been used in the bank robbery. The court distinguished between the in-

2. The oath of the Attorney in Oklahoma provides that he shall "[Do] no falsehood or consent that any be done in court, and that if he should know of any he will give knowledge thereof to the Judges of the Court or some one of them, that it may be reformed; . . ." OKLA. STAT. tit. 5, § 2 (1971).

3. ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. 287 (1953). However, this opinion seems to say that it is only the disclosure of the truth gained other than from the client that is permissible. If gained from the client the lawyer is to make known that the truth is not being told and then withdraw from the case.

4. 263 F. Supp. 360 (E.D. Va. 1967), *aff'd*, 381 F.2d 713 (4th Cir. 1967).

violability of private papers and the fact that neither the fourth nor the fifth amendment prohibit the proper search and seizure and subsequent use of the fruits or the instrumentalities of crime. It went on to hold that the money was the fruit of the crime and that the weapon was illegal in anyone's possession and therefore illegal in Ryder's. His penalty was eighteen months suspension from the practice.

The lawyer has been seen, by definition, to be the antagonist of society, in the spheres defined. However, to secrete evidence which the government might find, and legally use against his client describes a degree of identification with his client that far exceeds his privilege of silence. He has now gone over from the passive to the active in his representation. His stance is properly characterized as obstructionist rather than merely one of non-cooperation. On appeal the court correctly described Ryder's actions as making him an "active participant in a criminal act, ostensibly wearing the mantle of the loyal advocate, but in reality serving as accessory after the fact."[5]

A case which exhibits what might be termed confusion as to the nature of the lawyer's role in society is *Hughes v. Meade*.[6] Hughes, a lawyer, was contacted by a person who asked if the lawyer could be instrumental in getting stolen property back to the police. Hughes then called the police and asked if they wanted to recover stolen property without involving Hughes in an investigation. Upon an affirmative answer a box containing a stolen typewriter was put on the lawyer's porch by a person he deliberately did not see. He refused to answer as to the identity of his caller. The court, relying on the reasoning of *NLRB v. Harvey*,[7] characterized him as an "agent or conduit for the delivery of property which was completely unrelated to legal representation." The court went on to say, "While repose of confidence in an attorney is something much to be desired, to use him as a shield to conceal transactions involving stolen property is beyond the scope of his professional duty and beyond the scope of the privilege."[8]

The Washington case of *State ex rel. Sowers v. Olwell*[9] lays bare the lawyer's dilemma. Here, defendant was charged with killing de-

5. *In re* Ryder, 381 F.2d 713 (4th Cir. 1967).
6. 453 S.W.2d 538 (Ky. Ct. App. 1970).
7. 349 F.2d 900 (4th Cir. 1965). Although not definitely established, it seemed likely that the lawyer's sole office was to hire a private detective to get information for his client. If so, the court said, this involved no lawyering skills and the identity of the client would not be privileged.
8. 453 S.W.2d at 542.
9. 64 Wash. 2d 828, 394 P.2d 681 (1964).

cedent with a knife. Defendant's attorney came into possession of the knife. At the coroner's inquest he refused to acknowledge that he had the knife but did allow it to be established that if he had a knife he had gotten it in the attorney-client relationship. He refused to obey a subpoena duces tecum directing him to surrender the knife. Although he gained reversal of the contempt citation on the invalidity of the subpoena, the court said:

> 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 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.[10]

The court goes on to point out that the state should shield from the jury the fact that the knife was received from defendant's attorney, reasoning that by allowing the prosecution to recover such evidence, the public interest is served, and by refusing the prosecution an opportunity to disclose the source of the evidence, the client's privilege is preserved and a balance is reached between these conflicting interests.

Other examples of professional overreaching have not reached the gravity of court action, but were approved in ethics opinions. An attorney representing a deserting husband, negotiated a settlement with the Overseer of the Poor in a city in New Jersey upon which his client defaulted. After ascertaining that his client could be arrested and extradited from New York, he sought and received an opinion that it was

10. 394 P.2d at 684-685.

proper for him to refuse to divulge his client's address in New York upon request of the New Jersey authorities.[11]

Another attorney for a losing defendant in a civil action refused to disclose the location of his client whom plaintiff's attorney sought to serve in supplementary proceedings to collect the judgment. He was vindicated by an ethics opinion.[12] A similar opinion from the same body defined as ethical the refusal to furnish the whereabouts of his client although the request followed upon the repudiation of a settlement negotiated by counsel and the severing of the attorney-client relationship for that reason.[13]

It seems to this writer that the foregoing ethics opinions are wrong. It is little short of astonishing that such views should be adopted in ethics opinions. It would seem that the ethical views propounded by the eminent lawyers who responded to the inquiries are an amalgam of a distorted, but nonetheless honest view of the traditional attorney identification with client, and the traditional American dislike of a tattletale. It would seem that either explanation or defense of these actions to laymen would be impossible. The office of the attorney is to advise his clients, and represent them in court, if need be. It seems difficult to assert that his duty or privilege involves concealing the location of a client, or former client, whom it is sought to bring within the embrace of the courts for the resolution of a dispute between the client and his antagonist.

This would seem all the more so in the case noted above where the office of the attorney had apparently been exhausted. He had represented his client with respect to his duty toward his deserted family. Having done so, he had performed the high function of a lawyer. Being unable to protect him from an adverse result at law, he has descended to the level of aiding the deserting, and convicted, husband in avoiding the due process of the law.

All this is even more strange because of the uniformity of cases which hold that a lawyer cannot refuse to divulge the identity of his client nor the fact of representation.[14] These cases, to the extent that

11. OPINIONS OF THE COMMITTEES ON PROFESSIONAL ETHICS OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK AND THE NEW YORK COUNTY LAWYERS' ASSOCIATION, 1956, OPINION No. 196 (1931) [hereinafter cited as NEW YORK COUNTY].

12. NEW YORK COUNTY, OPINION No. 97 (1928-29).

13. NEW YORK COUNTY, OPINION No. 98 (1928-29).

14. *E.g.*, Behrens v. Hironimus, 170 F.2d 627 (4th Cir. 1948); U.S. v. Pape, 144 F.2d 778 (2d Cir. 1944); Mauch v. Commissioner, 113 F.2d 555 (3d Cir. 1940); *But cf. Ex parte* McDonough, 170 Cal. 230, 149 P. 566 (1918).

they contain satisfactory discussion proceed upon the basis that so long as the lawyer is not made to disclose the subject of communication, nor the purpose of the communication, then in no way does his client suffer by having his name divulged.

Perhaps the most striking of the cases forcing disclosure of the client's name is *People ex rel. Voglestein v. Warden.*[15] Here, fifteen defendants were brought before the grand jury, charged with violation of gambling laws. Voglestein appeared for all fifteen. Eleven pleaded guilty and disclaimed hiring Voglestein. Voglestein admitted he represented only one of the remaining four defendants but refused to state his name. In the contempt proceeding that followed the court reviewed the law with respect to the attorney-client privilege and then, citing authority pointed out that the rule has always been that the lawyer must indicate who his client is in order to establish that there does exist an attorney-client relationship saying, "Otherwise no lawyer could ever be questioned as to any fact, since he might always claim he had learned it from a client whose very existence he need not show.[16]

Feeling compelled to address the problem of self-incrimination the court likened disclosure in this case to criminal cases where the accused is required to put on various articles of clothing, speak, stand, walk, and do other non-testimonial acts which may aid in establishing guilt. The court seemed to be saying that out of the several possible defendants, the person who actually hired the lawyer should not have the benefit of anonymity when there is one who knows who the real defendant is.

The court characterized the cases discussed as tending to incriminate the defendants involved and analogized the compelled disclosure in the case before it as harmful to the client but less harmful than extension of the privilege would be to the orderly administration of justice.

The conviction was sustained on another ground as well. Noting that the attorney-client relationship does not protect confidences where the attorney is being used in furtherance of an illegal scheme, the court found suspicion of just such a state of facts and said that secrecy should be broken even if the lawyer is the ignorant dupe of the criminal defendant.

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15. 150 Misc. 714, 270 N.Y.S. 362 (Sup. Ct. 1934), *aff'd mem.*, 242 App. Div. 611, 271 N.Y.S. 1059 (1934).

16. 270 N.Y.S. at 368.

And finally the court said:

> The identity of an employer or client who retains a lawyer to act for him or for others in a civil or criminal proceeding should not be veiled in mystery. The dangers of disclosure are shadowy and remote; the evils of concealment are patent and overwhelming. As between the two social policies competing for supremacy, the choice is clear. Disclosure should be made if we are to maintain confidence in the bar and in the administration of justice.[17]

What perhaps can properly be described as the other side of the coin is the dilemma confronting the attorney in *Baird v. Koerner*.[18] Baird, a tax lawyer, consulted with accountants and lawyers for taxpayers who were uneasy about past tax payments to the Federal government. He advised them to make an anonymous payment to the government. Baird sent the money by a cashier's check, and later refused to disclose on whose behalf he was operating. He was vindicated when the court took note of the fact that a disclosure of those who had employed him would reveal the identity of the persons paying the tax.

The court posed to itself a rhetorical question as follows: "[Could] the government require every tax attorney to reveal the name of those clients who had consulted the attorney with respect to possible taxes payable, so that the government could institute an investigation of all such taxpayers?"[19] It answered its own question in the negative. It said that the names of clients are useful to the government for but one purpose and that is to ascertain which ones think they are delinquent. The court envisages an immediate check on all those persons that have consulted the tax lawyer to see if they have skeletons in their closets which might result in tax prosecutions.

It seems fair to say that *Baird v. Koerner* is in direct conflict with the first reason enunciated in *People v. Warden*. It would appear that the dilemma is squarely before us with these opposing views. No dilemma would seem to be posed with respect to a lawyer's silence during the course of trial upon a subject vital to the opposition. As has been said, this is a decision society has long since taken.

It is the opinion of this writer that a lawyer who shields the location of his client in order that his client may escape process, especially after an adverse result at trial, has clearly overstepped the bounds of

17. 270 N.Y.S. at 371.
18. 279 F.2d 623 (9th Cir. 1960).
19. *Id.* at 630.

propriety. And, viewed superficially there is certainly nothing wrong with the disclosure by the lawyer of the identity of his client.

This study ends on a note of perplexity. It seems that the Bar faces two questions. The first of the questions is one of little moment as compared to the second. What should be the position of the law with respect to the lawyer acting as the intermediary between the criminal element and law enforcement as in the case posed above where the lawyer acted as a depositary for stolen goods? It would seem that this is a worthwhile social action. Should it be an action that only a lawyer can do? Should a lawyer lend his confidentiality to such an action? Certainly, there is nothing in the training of a lawyer that fits only him for such service, however well intentioned he may be. Should the lawyer tender his services in this regard? It is submitted that as a matter of dignity of the Bar the answer should be in the negative.

The latter question is the question posed by the difference between the approaches of *People v. Warden* and *Baird v. Koerner*. What was made clear in *Warden* was left implicit in *Baird*. If we are to retain our accusatorial system of justice, if we are to place the burden of proof of guilt on the shoulders of the state, if we are to allow those accused of crime, both guilty and innocent, a champion, then are we not forced to give the lawyer the confidentiality of the identity of his client? The *Baird* case is particularly apt for posing such a question. Certainly, most people who consult tax lawyers have tax problems, often criminal problems. If the lawyer must disclose the names of his worried clients will this not alert the taxing authorities to a select body for investigation? Rather than random audit, or random investigation, will not investigation center almost entirely on those people who have consulted lawyers whose expertise lies in the field of advising troubled taxpayers?

Are we not faced with the question posed by Bentham so long ago? The concluding sentence of Bentham's analysis read in full states: "That a guilty person will not in general be able to derive quite so much assistance from his law advisor *in the way of conserting a false defence*, as he may do at present."[20] In Bentham's distorted view, the purpose of consultation was to contrive a false defense. In what seems to be the correct view the value of the seal on the lawyer's lips is that he may demand acquittal for insufficient proof even though he is possessed of information which would make the proof sufficient.

20. *See* note 1 *supra* (emphasis added).

The social utility of Bentham's rationale is as good today as when it was first enunciated. Society is the better off for the apprehension of criminals. The choice posed by *People v. Warden* and *Baird v. Koerner* must be answered in the light of the societal choices taken by a system of jurisprudence which does not force a criminal defendant to incriminate himself; refuses search warrants except upon satisfactory proof of justifiable suspicion, and the like. What has been said about tax agents checking the status of worried taxpayers consulting tax counsel is equally applicable to prosecuting officials checking to see what if anything is worrying those people who consult criminal lawyers. Dare we move, even a small step away from our accusatorial system of jurisprudence? Does not such a step lead to the erosion of freedom which accompanies inquisatorial powers?