

July 2016

Attorneys in Doubt

James E. Starrs

Follow this and additional works at: <http://scholarship.law.stjohns.edu/tcl>



Part of the [Ethics and Political Philosophy Commons](#)

Recommended Citation

James E. Starrs (2016) "Attorneys in Doubt," *The Catholic Lawyer*: Vol. 8: No. 2, Article 7.

Available at: <http://scholarship.law.stjohns.edu/tcl/vol8/iss2/7>

This Article is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in The Catholic Lawyer by an authorized administrator of St. John's Law Scholarship Repository. For more information, please contact cerjanm@stjohns.edu.

ATTORNEYS IN DOUBT

JAMES E. STARRS*

IN THE CONFRONTATION of competing issues, the actual practice of law, the attorney becomes an adept interpreter or he does not thrive at all. It is the peculiar function of this art of interpretation to illumine the legal standards by which the conduct of others shall be governed. This incessant travail after criteria seemingly would equip the attorney most handsomely to meet the measure of those problems of individual conscience and professional ethics which, all too often, arise to perplex him. There is much, however, in the newspaper columns of late, in the reports of disciplinary proceedings and in the forthright discourse of the practitioner himself, to belie this suggestion.

Why, then, is it that attorneys are ill-prepared to interpret or define their own ethical issues with the same competence that marks their analysis and solution of other persons' legal problems? This ill-preparedness, be it accepted, inheres not alone in an inability to perceive or to resolve matters of professional conscience but, more commonly, in a discomfiture in their presence. Concededly, the explanation for much of this uneasiness is too psychologically deep-rooted to be dislodged by any amount of persuasion here. Perhaps, notwithstanding, the causes of much of the apparent insouciance of many active practitioners to issues of professional ethics can be discerned from the narration and discussion of a *cause célèbre* which very nearly muddied the Probate Court of Cook County, Illinois, recently.¹

Attorneys *A* and *B* were consulted by a nonresident, *X*, with respect to the probate of the allographic will of Max Roeder which had been drafted and signed by another nonresident, *Y*, and the principal beneficiary of which was the mother of nonresident *Z*. Upon hearing the narrative of *Y* as to the circumstances under which he was asked to draw the will, *A* and *B* immediately recognized the startling similarity between the drafting of Max Roeder's will and another allographic will which these same attorneys had probated a year earlier for *X* and *Z*. This previous will, of Kirstine Jepsen, in which the principal beneficiary

* A.B., LL.B., St. John's University; LL.M., New York University. Assistant Professor of Law, DePaul University Law School.

¹ In the Matter of Estate of Max Roeder, No. 614, Probate Court, Cook County, Ill., 1960. Be it known in advance that my comments are in no wise intended to reflect discredit upon the attorneys who were involved in this matter and that the Probate Court of Cook County has completely exonerated them of any impropriety.

was the mother of *X*, had been written by *Z*, and witnessed by *Y*. Both Jepsen and Roeder were, according to the statements of the scriveners of their wills, physically unable to draft their own wills. This was due, in the case of Jepsen, to a fall which necessitated the bandaging of her arms and, as to Roeder, to the infirmity of age and illness. Indeed, Jepsen and Roeder, both foreign-born, were living in the familyless atmosphere of a rooming or boarding house when they directed that their will be written. In both, the scribe was almost a stranger to the deceased, whereas all persons beneficially interested in the probate of the wills were mutual friends of long standing.

The immediate reaction of attorneys *A* and *B* was that these similarities were too extraordinary to be mere coincidences. Consequently, they interrogated their clients in a rigorous and penetrating fashion in order to discover the truth of the matter. Their clients, however, did not falter under the cross-examination and, instead, convincingly reaffirmed their prior recitals. Still in doubt, *A* and *B* referred the Roeder will to a qualified examiner of questioned documents and sent *Y*, the draftsman of the Roeder will, for a polygraph examination. Although the report as to the will itself was favorable, the polygraph report indicated that *Y* had not told the truth in response to three significant questions. Shortly thereafter, attorneys *A* and *B*, by letter to *X* and *Z*, terminated their representation of them in the matter of the Roeder will.

The involvement of attorneys *A* and *B* was not yet at an end for they were notified by *X* and *Z* that their letter of withdrawal had not been received. Some time later *A* and *B* received an unsolicited re-

port from an out-of-state lie detector agency which confirmed the truth of *Y*'s statements concerning the Roeder will. At this juncture, *A* and *B* realized that their predicament had worsened since the nine-month period for filing claims in the Roeder estate was about to expire. They feared that, if their inaction barred what might be the legitimate claim of *Z*, they could be subjected to a suit to recover the third of a million dollars thus lost.

Therefore, *A* and *B* directed *X* and *Z* to attorneys *C* and *D*, experienced counsel in probate matters, and thoroughly advised substituted counsel of the patchwork of circumstances, including, particularly, all of their reservations and doubts as to the validity of the Roeder will. Only after attorneys *C* and *D* decided to accept the case was the fraud of *X*, *Y*, and *Z* and others in the Jepsen and Roeder estates publicly revealed. At no time prior to this disclosure did any of the attorneys apprise the Probate Court of Cook County of their uncertainty as to the legitimacy of these wills.

The central concern in this factual setting is readily perceived and easily stated. Should attorneys *A* and *B* have disclosed their doubts concerning the lawfulness of the Roeder and Jepsen wills and their clients' conduct with respect to them to the Probate Court of Cook County? Unfortunately, the answer is not similarly apparent, nor are the relevant criteria necessary for its determination immediately ascertainable, nor for that matter, are they logically reconcilable once revealed. But more of that hereafter.

As Vinogradoff² has explained, an individual's activity within society is bounded by various rules of conduct. The attorney

² VINOGRADOFF, *COMMON SENSE IN LAW* 16-18 (3d ed. 1959).

is by no means exempt. Of them, the "conventional standard" or code of ethics, rules of morality and legal duties, all urge their respective, and as we shall see, at times contradictory, mandates upon the behavior of an attorney. Thus, each attorney is aware of the binding force of the canons of professional ethics in his own jurisdiction.³ Each also realizes that, apart from the canons themselves, the courts have levied upon the attorney other obligations, independently demanded for the security of the legal order, *e.g.*, the privilege of professional secrecy. Fewer attorneys, however, appreciate and, if they do, acquiesce in the unwritten commands of another order, the moral one.⁴

But one ramification of these interlocking rules for the governance of attorneys is the very real possibility that problems of conscience may be appraised and determined according to different standards. This, of course, will lead inevitably to disparate resolutions of identical problems, a probable concomitant of which will be the attorney's being at sea in the face of any issue of right professional conduct. That uncertainty, in its turn, may manifest itself in professional apathy toward such problems in general and popular cynicism toward the legal profession, with the resultant loss of that indispensable confidence between attorney and client which these rules, in large measure are designed to encourage.

In proof of the reasonable probability of

³ See generally BRAND, *BAR ASSOCIATIONS, ATTORNEYS AND JUDGES* (1956, Supp. 1959).

⁴ Possibly this is attributable to the belief of attorneys that the sanction value of moral strictures is more remote than that of the legal or ethical order. Note the acid comments of Curtis, *The Ethics of Advocacy*, 4 *STAN. L. REV.* 3 (1951).

these propositions, observe the operation of these variant rules upon the factual pattern presented. From any perspective, the problem may ultimately be delimited as one of secrecy for confidential communications between attorney and client. As Dean Wigmore would have it, the privilege between attorney and client obtains:

- (1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, [and] (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.⁵

However, it has long been recognized that the privilege does not exist where the client seeks legal advice to assist him in the commission of some crime or tort.⁶ In truth, this is not so much an exception to the rule of privilege as express recognition that no privilege attaches in that instance, for

In order that the rule may apply there must be both professional confidence and professional employment, but if the client has a criminal object in view in his communications with his solicitor one of these elements must necessarily be absent. The client must either conspire with his solicitor or deceive him. If his criminal object is avowed, the client does not consult his adviser professionally, because it cannot be the solicitor's business to further any criminal object. If the client does not avow his object he proposes no confidence, for the state of facts, which is the foundation of the supposed confidence, does not exist.⁷

⁵ 8 WIGMORE, *EVIDENCE* § 2292 (McNaughton rev. 1961).

⁶ *Id.* at § 2298; Gardner, *The Crime or Fraud Exception to the Attorney-Client Privilege*, 47 *A.B.A.J.* 708 (1961).

⁷ *Queen v. Cox*, 14 *Q.B.D.* 153, 168 (1884).

Furthermore, the courts have consistently verbalized a distinction between revelations concerning past criminal or tortious conduct and crimes or torts yet in the offing.⁸ In general, as to the former, no disclosure will be compelled. Judicial thinking is, however, quite to the contrary as to crimes or torts in futuro.⁹ In light of the particular factual setting in which attorneys *A* and *B* were involved, it is necessary, further, to be reminded of the dual nature of an attorney's function. An attorney, in axiomatic terms, is truly not only the advocate and protector of his client but also of justice itself. The practical dilemma, therefore, is to which value is the greater allegiance due.

Assume, for the nonce, that attorneys *A* and *B* were convinced that *X*, *Y*, and *Z* had perpetrated a fraud upon the probate court in the probate of the Jepsen will and that they intended to do so again with the Roeder will. On this hypothesis, what would the law ask of them? According to the relevant principles as outlined, their obligation would appear to be unambiguous, namely, to maintain secrecy in the Jepsen matter but to disclose, when required by the court, the details of the Roeder will.

Our analysis, however, must go behind untested rules. Why is it that these attorneys must not utter the words which will unearth their clients' past wrongs? Wigmore,¹⁰ in voicing what would appear to be the sentiment of the courts,¹¹ argues in es-

sence that the culpable client is as equally deserving of legal representation as the innocent one, a possibility which would become very remote if the attorney were required to disclose his client's admissions of prior wrongdoing. This might very well be so in the case of the client who is being prosecuted for the crime at the time the admission of guilt occurs. In fact, Wigmore's position was stated in answer to Bentham's strong indictment¹² of attorneys who fail to inform upon a client they are then defending against the charge with which the disclosure is concerned. Indeed, such was the situation which confronted Charles Phillips, Esq.¹³ in his celebrated defense of Courvoisier for the murder of Lord Russell in 1840, when, on the second day of the trial, Courvoisier gave his attorney incontrovertible proof of his guilt. Here Wigmore's arguments may more understandably justify a failure to disclose than under the circumstances which, in our supposition, convinced attorneys *A* and *B* of the past wrong of their clients.

In addition, Wigmore¹⁴ considers the revelation of past wrongdoing to be an act of treachery, not lightly to be condoned nor assumed by "any honorable man."¹⁵ This position, of course, assumes that the dishonor lies in an attorney's renunciation of an implied promise to retain confidences

⁸ *SEC v. Harrison*, 80 F. Supp. 226, 230 (D. D.C. 1948); *Gebhardt v. United Rys.*, 220 S.W. 677, 679 (Mo. Sup. Ct. 1920).

⁹ See *Clark v. United States*, 289 U.S. 1 (1933).

¹⁰ 8 WIGMORE, *op. cit. supra* note 5, at § 2291.

¹¹ *Gebhardt v. United Rys.*, 220 S.W. 677 (Mo. 1920).

¹² Set forth in 8 WIGMORE, *op. cit. supra* note 5, at § 2291.

¹³ This case is discussed at length in SHARWOOD, *A COMPEND OF LECTURES ON THE AIMS AND DUTIES OF THE PROFESSION OF THE LAW* 41, & app. I (1854). For an even more remarkable actual situation, see ALLEN, *ASPECTS OF JUSTICE* 239 (1958).

¹⁴ 8 WIGMORE, *op. cit. supra* note 5, at § 2291.

¹⁵ Even those who are presumptively dishonorable have such a code of honor. SUTHERLAND, *THE PROFESSIONAL THIEF* 12 n.4 (1937).

which his relation to the client "naturally invites."¹⁶ Who is to say, however, that the invitation to confide such affairs exists at all? The probabilities are that one acting in defense of a person accused of crime might extend that implicit invitation, but the same cannot be said of other occasions, particularly when one recalls that even Wigmore agrees¹⁷ that there is no dishonor in disclosing prospective wrongdoing.

In sum, this sense of treachery argument bears unmistakable reference to the popular abhorrence of the informer, be he paid or not. How, indeed, can it be dishonorable for an attorney to inform upon his client when the ethical directive to attorneys is to "expose without fear or favor before the proper tribunals corrupt or dishonest conduct in the profession . . .,"¹⁸ even when that knowledge was gained in confidence?¹⁹

Or is it rather that the basis for this refusal to disclose past wrongs is the same as that which justifies the existence of the attorney-client privilege in the first place? The *raison d'être* for the privilege has been expressed by Lord Brougham²⁰ in felicitous language:

¹⁶ 8 WIGMORE, EVIDENCE § 2291 (McNaughton rev. 1961).

¹⁷ *Id.* at § 2298.

¹⁸ Canon 29, American Bar Association Canons of Professional Ethics.

¹⁹ W.N. CROMWELL FOUNDATION, OPINIONS OF THE COMMITTEES ON PROFESSIONAL ETHICS OF THE ASS'N OF THE BAR OF THE CITY OF NEW YORK AND THE NEW YORK COUNTY LAWYERS' ASS'N 555 (1956). *Contra*, AMERICAN BAR ASSOCIATION, OPINIONS OF THE COMMITTEE ON PROFESSIONAL ETHICS AND GRIEVANCES 406 (1957).

²⁰ *Greenough v. Gaskell*, 1 Mylne & Keene 98 (1833), cited in SNYDER, GREAT OPINIONS OF GREAT JUDGES 323, 328 (1883).

But it is out of regard to the interests of justice, which cannot be upholden, and to the administration of justice, which cannot go on without the aid of men skilled in jurisprudence, in the practice of the courts, and in those matters affecting rights and obligations which form the subject of all judicial proceedings. If the privilege did not exist at all, everyone would be thrown upon his own legal resources; deprived of all professional assistance, a man would not venture to consult any skillful person, or would only dare to tell his counselor half his case. . . .

But this contention, in effect, merely restates Wigmore's first argument and, as such, is susceptible to the same riposte.

In the legal order, then, it is arguable whether knowledge of past wrongs must be forever locked in the memory of an attorney as a general rule of practice in all cases. The proper limit of such secrecy may be that implicitly enunciated by Wigmore, *i.e.*, whenever the attorney discovers the incriminating details as a consequence of his defense of the client for the crime to which the inculpatory statements relate, no disclosure shall be required.

On the other hand, little doubt exists in the abstract with respect to the duty to disclose future wrongdoing,²¹ especially where that wrong pertains to the integrity of the judicial process. Yet, how shall one apply a rule requiring disclosure of contemplated wrongs when, in a concrete instance like the present, to abide by it is to publicize past wrongs? The inherent problem cannot be masked by the fact that the

²¹ *In re Selser*, 15 N.J. 393, 105 A.2d 395 (1954) (continuing crime concept); *Petition of Sawyer*, 229 F.2d 805 (7th Cir. 1956); *Abbott v. Superior Court*, 78 Cal. App. 2d 19, 177 P.2d 317 (1st Dist. 1947); *Matthews v. Hoagland*, 48 N.J. Eq. 455, 21 Atl. 1054 (Ch. 1891).

past crime in this situation might lawfully be discoverable. And, were that the rule, how could one conceal the unconsummated wrong, since they are essentially continuing wrongs?

Attorneys *A* and *B*, however, were not convinced of their clients' guilt. Theirs was but an unresolved doubt. What, then, should they have done? The decisions²² indicate that courts, in appraising the need for disclosure, will be less concerned with the subjective belief of the attorneys than with the objective impression which the circumstances create. In other words, if the entire factual panorama, aliunde the communications between attorney and client, establishes to the court a prima facie case of unlawful use of the attorney-client relation, then disclosure will be compelled. Mr. Justice Cardozo described a prima facie case as one which gives color to the charge of wrongdoing.²³ An early Massachusetts case²⁴ explained it as something more than a mere suspicion of guilt. Whatever the precise meaning, it would appear that if *A* and *B*, knowing all the details, conclude that there is reasonable doubt of their clients' guilt, certainly the court, deprived of such essential information in its appraisal, could not reasonably be expected to do otherwise. In such event, no disclosure would be mandated, apart from the issue of past or future wrong.

Unlike the legal norms circumscribing the attorney-client privilege, which rules, operating at the behest of the court, either

prohibit the attorney's voluntary disclosure of confidential communications or compel disclosure, the Canons of Professional Ethics make demands of an attorney's professional conscience independent of, and sometimes inconsistent with, the legal dictate. In general, it is the function of the canon to isolate the lawyer class from others in society by imposing certain duties upon its members not binding upon other individuals in society.²⁵ Of these obligations, the duty to refrain from revealing the confidences of a client has been said to be "one of the duties that distinguishes a lawyer from a layman."²⁶ If this be so, then one might anticipate, as its corollary, that the unique status of a lawyer, as champion alike of client, court, law and justice, might occasionally impress upon him a duty to disclose his client's secrets. In fact, the canons themselves bespeak such a responsibility.²⁷

To resolve the imbroglio of attorneys *A* and *B* according to ethical standards, one must perforce refer to Canon 37 of the Canons of Professional Ethics which declares, in pertinent part:

It is the duty of a lawyer to preserve his client's confidences. . . .

If a lawyer is accused by his client, he is not precluded from disclosing the truth in respect to the accusation. The announced intention of a client to commit a crime is not included within the confidences which he is bound to respect. He may properly make such disclosures as may be necessary to prevent the act or protect those against whom it is threatened.

²² SEC v. Harrison, 80 F. Supp. 226 (D.D.C. 1948); State v. Barrows, 52 Conn. 323 (1884); Atlanta Coca-Cola Bottling Co. v. Goss, 50 Ga. 637, 179 S.E. 420 (1935); Nadler v. Warner Co., 321 Pa. 139, 184 Atl. 3 (1936).

²³ Clark v. United States, 289 U.S. 115 (1933).

²⁴ Highbee v. Dresser, 103 Mass. 523, 526 (1870).

²⁵ VINOGRADOFF, COMMON SENSE IN LAW 18 (3d ed. 1959).

²⁶ ARCHER, ETHICAL OBLIGATIONS OF THE LAWYER 36 (1910).

²⁷ Canon 37 of the American Bar Association Canons of Professional Ethics is construed as liberally as the preamble permits.

Yet Canon 37, like all the canons, must be read in light of the preamble which asserts:

No code or set of rules can be framed, which will particularize all the duties of the lawyer in the varying phases of litigation or in all the relations of professional life. The following canons of ethics are adopted by the American Bar Association as a general guide, yet the enumeration of particular duties should not be construed as a denial of the existence of others equally imperative, though not specifically mentioned.

In short, the canons are to be interpreted in the spirit of the policy they were designed to effectuate, *i.e.*, professional behavior guided by sound and uniform principles of right conduct.

A careful perusal of the opinions on matters of professional ethics rendered by the Committee on Professional Ethics and Grievances of the American Bar Association²⁸ and the Committees on Professional Ethics of the Association of the Bar of the City of New York and the New York County Lawyers' Association²⁹ bears decided witness to the liberal interpretation to which Canon 37 has been subjected. A cursory appraisal of Canon 37 would make the need for such analysis evident. "The announced intention," it is said, "of a client to commit a crime is not included within the confidences which he is bound to respect." Was this exception meant to exclude announced admissions of *past* guilt? And what about disclosures concerning future *torts*? What is the significance of the word "announced"? Does it indicate that when the attorney discovers that his client contemplates the commission of a future

crime from sources other than the client himself, he may not disclose that information or does it rather mean that Canon 37 does not prohibit disclosures when such knowledge is thus gained?

With almost unflagging consistency, the opinions on ethics of the American Bar Association Committee on Professional Ethics and Grievances have invoked the mandate of Canon 37 to recommend against disclosure of confidences when to do so would reveal a client's past crime.³⁰ In reaching these decisions, the committee has not discussed the inquiries either on their own individual merits or in depth, but instead has been content to cite Canon 37, almost as if it were impenetrable dogma.

In Opinion 23,³¹ we do, however, find the cryptic statement that "it is in the public interest that even the worst criminal should have counsel. . . ." Yet, if counsel discloses the whereabouts of a client who, while awaiting trial on a criminal charge, jumps bail, is the client thereby denied counsel when charged with the crime of bail jumping? Certainly not—separate crimes and separate occasions of defense are involved. Or is it rather that an attorney who makes such a disclosure will be prevented thereafter from exerting his best efforts in behalf of his client, since the client will no longer repose trust in him? This argument, of course, merely reverts to the timeworn adage: no duty not to disclose—no confidence; no confidence—no legal representation; no legal representation—no administration of justice.³²

²⁸ AMERICAN BAR ASSOCIATION, *op. cit. supra* note 19.

²⁹ W.N. CROMWELL FOUNDATION, *op. cit. supra* note 19.

³⁰ Opinions 155 and 156 are exceptions. See AMERICAN BAR ASSOCIATION, *op. cit. supra* note 19, at 322, 324.

³¹ *Id.* at 99.

³² The classic rationale was given in Opinion 91 as follows: "The reason for the rule lies in

And what, you ask, is fatal in this process of reasoning? Just this: the argument rests squarely upon a pure speculation, *i.e.*, absent a duty not to disclose, clients will not unreservedly entrust their secrets to their attorneys. This supposition, to my mind, concedes much too much practical efficacy to the ethical duty imposed by Canon 37. Whatever the power of the evidentiary privilege against disclosure to induce confidence, no attorney who has represented more than one person accused of crime would be likely to urge that the ethical duty of Canon 37 either was known to or so impressed his client that an intimate bond of trust magically arose to waft away the shroud of secrecy. On the contrary, confidence is "a plant of slow growth" springing rather from "the perception, by others, of your purity and elevation of character, your modest, manly, sedateness of habits and demeanor, your thorough knowledge of business, your incorruptible integrity. . . ." ³³

Moreover, if a disclosure of past crimes will diminish the confidence between attorney and client, then a similar diminution should result from the disclosure of the "announced intention of a client to commit a crime." Or is it that a different and more imperious value demands protection against future crimes than exists as to past crimes? If so, let it be said. The objection is not so much to the lack of a reason for the rule but to the failure to subject the rule to the type of penetrating analysis which lawyers

the fact that it is essential to the administration of justice that there should be perfect freedom of consultation by client with attorney without any apprehension of a compelled disclosure by the attorney to the detriment of the client." *Id.* at 202.

³³WARREN, MORAL AND PROFESSIONAL DUTIES OF ATTORNEYS 200 (2d. ed. 1851).

otherwise require. When instinctive acceptance is substituted for intellectual skepticism, it is no wonder that attorneys look askance at the Canons of Professional Ethics.

The opinions on professional ethics of the American Bar Association Committee and the New York City and New York County Committees do not establish with certainty whether the "announced intention" exception of Canon 37 embraces future torts as well as future crimes. In Opinion 155 of the American Bar Association Committee,³⁴ any contemplated unlawful act is said to be subject to disclosure but that statement was dictum only, if a digression in such an opinion may be so characterized, and Opinion 287³⁵ refused to adhere to the decision in Opinion 155. Furthermore, the language of Opinion 202,³⁶ again dictum, would limit Canon 37 to future crimes only. However, Opinion 53 of the New York County Committee,³⁷ declared that a collusive agreement to secure the running of the statute of limitations may be exposed.

The conclusion is inescapable, after evaluating all the American Bar Association Committee's interpretations of Canon 37, that, in their understanding, only an announced intention to commit a future crime may be disclosed. One may doubt that a future crime, for the purposes of Canon 37, is distinguishable from a future tort or, for that matter, any future unlawful act, if the value supporting the future crime exception is some general notion like

³⁴AMERICAN BAR ASSOCIATION, *op. cit. supra* note 19, at 322.

³⁵*Id.* at 609.

³⁶*Id.* at 406.

³⁷W.N. CROMWELL FOUNDATION, *op. cit. supra* note 19, at 542.

the attorney's obligation to society and its members.

Under these constructions of their ethical duty, attorneys *A* and *B* might, in good conscience, keep their doubts silent concerning *X*, *Y* and *Z*'s past conduct in the probate of the Jepsen will. So too, with respect to the Roeder will, if the "announced intention" exception of Canon 37 bears its literal meaning and if no other canon otherwise prevails. In Opinion 268 of the American Bar Association Committee,³⁸ the inquiry presented facts indicating that attorney *C*, after advising client *X* that he failed to meet the residence requirements for a divorce suit, learned that attorney *D* was bringing a divorce suit for client *X*, in which client *X* had misstated these jurisdictional facts. The committee determined that attorney *C* must preserve the confidences of client *X*, but, although it could have done so under Canon 37, did not predicate its opinion on the unannounced nature of attorney *C*'s information. However, Opinion 84 of the New York County Committee³⁹ takes a contrary stand on essentially similar facts.

The words "announced intention" recollect those early decisions in which it was asserted that the evidentiary privilege of attorney-client did not obtain when a future crime or tort was in contemplation at the moment of the attorney-client relation, whether or not that contemplation was announced.⁴⁰ That view has recently been

³⁸ AMERICAN BAR ASSOCIATION, *op. cit. supra* note 19, at 557.

³⁹ W.N. CROMWELL FOUNDATION, *op. cit. supra* note 19, at 559.

⁴⁰ *United States v. Bob*, 106 F.2d 37 (2d Cir.), cert. denied, 308 U.S. 589 (1939); *Standard Fire Ins. Co. v. Smithhart*, 183 Ky. 679, 211 S.W. 441 (1919).

discredited.⁴¹ The Canon 37 exception may be but its uninterred vestige. Thus may the word "intention" be explained. "Announced," it may be, is its modifier since only those matters communicated by the client to his attorney are within the purview of Canon 37.⁴²

Even though Canon 37 may not itself permit disclosure, some other canon or policy may do so. When conflicts among the canons arise, which canon shall control? In the eyes of the American Bar Association Committee, Canon 37 transcends all other canons, even though the result may be a failure to disclose a past perjury of one's client,⁴³ past misdeeds of a fellow attorney,⁴⁴ or a future fraud upon the court.⁴⁵

These opinions must be read in conjunction with Opinion 250⁴⁶ which came to the astounding conclusion that, in order to protect an attorney's right to his fee, disclosure of confidential communications is permissible in a suit against the former client to recover the fee. One must, when confronted by such blatant incongruity, grudgingly admit the point of Felix Cohen's jibe that ". . . legal ethics centers about the problem of how to secure a larger income for lawyers."⁴⁷ Fortunately, the judicial deci-

⁴¹ See *In re Koellen's Estate*, 167 Kan. 676, 208 P.2d 595 (1959).

⁴² AMERICAN BAR ASSOCIATION, *op. cit. supra* note 19, at 617. *Cf.*, AMERICAN BAR ASSOCIATION, *op. cit. supra* note 19, at 99.

⁴³ *Id.* at 617 (Canons 41, 29, 22 notwithstanding).

⁴⁴ *Id.* at 406 (Canon 29 notwithstanding). *Contra*, W. N. CROMWELL FOUNDATION, *op. cit. supra* note 19, at 555.

⁴⁵ AMERICAN BAR ASSOCIATION, *op. cit. supra* note 19, at 557.

⁴⁶ *Id.* at 498. *Contra*, W. N. CROMWELL FOUNDATION, *op. cit. supra* note 19, at 76, 278, 531.

⁴⁷ COHEN, MODERN ETHICS AND THE LAW IN THE LEGAL CONSCIENCE 18 (1960).

sions are of a mind that the attorney's duty to the court supersedes his duty to his client, when they come into conflict.⁴⁸

No uniformly warm endorsement for the infusion of moral precepts into the law has been decreed by legal scholars.⁴⁹ The canons of ethics do, however, signify that the lawyer's duty in its last analysis is inextricably bound to "the strictest principles of moral law."⁵⁰ To some these principles of moral law are ultimately derived from the natural law which denotes a natural right of speech.⁵¹ In that view, if the communicator were not able to demand silence of the confidant, to whom he entrusts his secrets, then the natural right of speech would be gravely abridged. Such a fundamental right is expressly recognized by the Turkish Constitution of 1961 in which it is declared that "every individual is entitled to the right of free communication. The privacy of communication is essential. . . ."⁵² This duty to maintain professional secrecy has also been attributed to the dictates of commutative and legal justice, by which secrecy is demanded for the good of the individual and the good of the community.⁵³

Moralists, however, do impose certain

⁴⁸ *State ex rel. Neb. State Bar Ass'n v. Niklaus*, 149 Neb. 859, 33 N.W.2d 145 (1948); *In re Carroll*, 244 S.W.2d 474 (Ky. Ct. App. 1951).

⁴⁹ A recent exponent of the wall of separation theory is Carrington, *The Moral Quality of the Criminal Law*, 54 Nw. U.L. Rev. 575 (1960).

⁵⁰ Canon 32, American Bar Association Canons of Professional Ethics.

⁵¹ Regan & Macartney, *Professional Secrecy and Privileged Communications*, 2 CATHOLIC LAWYER 3, 4 (1956) citing AQUINAS, *SUMMA THEOLOGICA*, II-II, q. 70, art. 1, ad. 2.

⁵² TURKISH CONST. art. 17 (1961).

⁵³ Regan & Macartney, *supra* note 51, at 4; PRÜMMER, *HANDBOOK OF MORAL THEOLOGY* 135 (1957); MCHUGH AND CALLAN, *MORAL THEOLOGY* §2414 (1960).

very limited conditions upon the retention of entrusted secrets between attorney and client.⁵⁴ In the case of consummated wrongs, the attorney is under no moral obligation to inform on his client, since in justice the client has a right to reputation, even though that be an inaccurate portrayal of his character.⁵⁵ The legal order, it is worth noting, has not been so ardent a guardian of the private right to an evil reputation nor even of the private right to a good reputation where the disclosure of alleged past improprieties is challenged.⁵⁶

Others assert that a climate of informing is detrimental to the well-being of society.⁵⁷ This is a particularly intriguing observation when compared to Section 584 of the Illinois Criminal Code of 1959 which had long declared one an accessory after the fact who, knowing that a crime had been committed, conceals such knowledge from a magistrate.⁵⁸ The new criminal code couples an "intent to prevent the apprehension of the offender" with such concealment, freeing an attorney of a potential clash of duties.⁵⁹

The moral obligation of secrecy may be liberated by the "urgent necessity of . . . public or private good,"⁶⁰ which may arise, for our purposes, from a threatened harm to the community, or to an innocent third person. Legal justice, it is said, compels disclosure when the security of the

⁵⁴ Connery, *The Right to Silence*, 39 MARQ. L. REV. 180, 185 (1956).

⁵⁵ Regan & Macartney, *supra* note 51, at 4; MCHUGH AND CALLAN, *op. cit. supra* note 53, at §2409; Connery, *supra* note 54, at 187.

⁵⁶ See PROSSER, *TORTS* 607 (2d ed. 1955) for a description of absolute and qualified privileges in the law of civil defamation.

⁵⁷ Connery, *supra* note 54, at 187.

⁵⁸ ILL. REV. STAT. ch. 38, §584 (1959).

⁵⁹ ILL. REV. STAT. ch. 38, §31-5 (1961).

⁶⁰ PRÜMMER, *op. cit. supra* note 53, at 135.

community is grievously in jeopardy. Charity to one's neighbor, on the other hand, obliges one to reveal intended serious harm to an individual. In both cases, however, the issue becomes one of the degree of gravity required for disclosure.

Such notable disagreement has been reflected by moralists in the attempted solution of this problem that it is unclear whether the possibility of perjury by clients *X*, *Y* and *Z* would constitute a sufficiently aggravated harm to society and to the rightful beneficiaries of the Roeder will to obligate disclosure.⁶¹ In any event, attorneys *A* and *B* would not be morally bound to disclose when, in conscience, they entertained doubts not only as to their obligation to disclose but as to the conduct of their clients as well, particularly in light of the reasonable but ineffective efforts they expended to dispel these doubts.⁶²

The problem of disclosure confronting attorneys *A* and *B* merely exemplifies the fact that, and the manner in which, the daily pursuits of an attorney may be caught up by the kaleidoscope of law, ethics and morality. Although varying shades of complexity grip each dilemma,

⁶¹ Regan & Macartney, *supra* note 51, at 8 for authorities pro and contra.

⁶² PRÜMMER, *op. cit. supra* note 53, at 64. But an English barrister, in advising law students and young attorneys, says that, "if you are not sure whether something should be disclosed or not, disclose it." CECIL, BRIEF TO COUNSEL 92 (1958).

the ultimate inquiry remains the same. To which order, be it legal, ethical, or moral (not that there is any necessary inconsistency among them), shall the attorney conform his conduct? The impact of that contest upon the attorney's conscience is a reminder that "there is no worse torture than the torture of laws."⁶³

Yet the statement of one issue but puts the situation in perspective. Other equally troublesome problems clamor for recognition and resolution. What are the relevant norms of the legal, ethical and moral orders? Are these norms altered by the tides of divergent circumstances? Are they consistent among themselves or, in fact, is it desirable that they be so? The multiplication of uncertainties serves only as an introduction to the core of the dilemma. To its solution must be applied the accomplished interpretative skills of the attorney, not least among which is an appraisal of the contrapuntal relationship of the attorney to society and to the larger dictates of justice itself. In fine, "it is always something to see where the difficulty lies, although it should be insuperable. . . ."⁶⁴ And it should be some solace to the attorney to appreciate that "uncertainty is the lot of every branch of thought and knowledge when verging on the ultimate."⁶⁵

⁶³ Bacon, *Of Judicature*, 2 THE WORLD OF LAW 566 (1960).

⁶⁴ Bentham, *The Influence of Time and Place in Matters of Legislation*, Ch. 2, 1 WORKS 171, 178.

⁶⁵ CARDOZO, PARADOXES OF LEGAL SCIENCE 135 (1928).