

Advisory Opinion 1988-9

Attorneys Duty Re: Criminal or Fraudulent Acts of Client:

The client has retained an attorney regarding protection of substantially all of client's father's assets, consisting of \$70,000.00 cash. Father is in a V.A. hospital being treated for alcoholism. Client has invested the cash in a personal residence for client's use and in client's name. When attorney met with father, attorney learned that it was father's intention and understanding that he was making a loan and that repayment proceeds would be used by him for his support. Attorney advised father that attorney would prepare and file a mortgage to protect his interest but that he should get independent advice as well. Client has refused to execute the mortgage and ordered attorney to have no contact with father.

There are three situations where an attorney may report knowledge about a client's possible criminal acts to third persons. In two of these situations, a report is mandatory.

Two of the three situations are set out in Rule 16-106B and C: that is where client intends to commit a crime likely to result in imminent death or substantial bodily harm; or where the client intends to commit a crime likely to result in substantial injury to finances or property. In the matter of death or bodily harm the disclosure is a mandatory one; while in the matter of finances and property it is merely optional.

The third situation arises pursuant to Rule 16-401, in regard to the lawyer's duty to third persons. While 16-106(C) does not obligate an attorney to make disclosures when the harm is to a financial or property interest, where the attorney has become an unwilling participant in the criminal scheme of the client by being caused to mislead or fail to disclose, duty to the third person mandates the disclosure.

In this particular case, the subject matter is financial, substantially all of client's father's assets. Attorney believes the client has converted assets by getting the father to believe that his interest would be protected; and the attorney has communicated this to the father. While an analysis of the problem using only Rule 16-106C would leave the attorney with a choice, we believe that under this set of facts that because the attorney has actually communicated with the third person in such a way as to cause the third person to rely on a false statement (that client would execute the mortgage), disclosure is mandatory.

Where the harm is to a property right, pursuant to § 16-116 attorney should advise the client prior to making the disclosure in an attempt to gain client's compliance.