

No. 6736-1

IN THE WASHINGTON STATE COURT OF APPEALS

DIVISION 1

FRANCES M. HAWKINS, and LOUISE MARKERT
as Guardians ad litem for MICHAEL J. HAWKINS,
Appellants,

vs.

King County: COMMUNITY PSYCHIATRIC CLINIC,
INC., SEATTLE; ALEXANDER (LEX) MCGRAW and
"JANE DOE" MCGRAW, husband and wife, and the
marital community composed thereof; and
RICHARD SANDERS and "JANE DOE" SANDERS,
husband and wife, and the marital community
composed thereof,
Respondents.

5/16

FILED

APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

The Honorable Norman Quinn, Judge

BRIEF OF AMICUS CURIAE

Robert Aronson
University of Washington
School of Law
Attorney for Amicus Curiae

Office and Address:
University of Washington
School of Law
712 Condon Hall JB-20
Seattle, Washington 98105

On the Brief:
Charles K. Douthwaite

Telephone: (206) 543-7423

TABLE OF CONTENTS

TABLE OF AUTHORITIES..... ii

STATEMENT OF THE CASE..... 1

STATEMENT OF THE INTEREST OF AMICUS CURIAE..... 1

ARGUMENT..... 2

 I. ATTORNEY-CLIENT COMMUNICATIONS MUST BE CONFIDENTIAL
 TO INSURE VIGOROUS ADVOCACY OF THE CLIENT'S CAUSE
 AND AN IMPARTIAL JUDGMENT IN THE ADVERSARY SYSTEM..... 2

 II. THE CODE OF PROFESSIONAL RESPONSIBILITY PROVIDES
 THAT LAWYERS MUST NOT DISCLOSE CONFIDENTIAL COM-
 MUNICATIONS, EXCEPT IN CERTAIN LIMITED SITUATIONS..... 3

 III. SUBJECTING ATTORNEY SANDERS TO CIVIL LIABILITY FOR
 BREACH OF DUTY TO WARN IS NOT JUSTIFIED BY PUBLIC
 POLICY AND WOULD REQUIRE AN EXTENSION OF THE COMMON
 LAW THAT IS NOT WARRANTED IN THIS CASE..... 6

 A. An attorney should not be required to warn a
 third person of a possible assault by the
 attorney's client when confidentiality would
 be compromised unless the third person is ob-
 viously in danger of sustaining serious per-
 sonal injuries and is unaware of such danger..... 6

 B. The present case is not analogous to authority
 extending the common law duty to warn..... 9

 IV. CRIMINAL RULE FOR SUPERIOR COURT 3.2(b) DOES NOT
 EXPRESSLY REQUIRE THAT ATTORNEYS DISCLOSE CONFIDENTIAL
 INFORMATION DAMAGING TO THEIR CLIENTS' INTERESTS AND
 AUTHORITIES CONSIDERING ANALOGOUS PRETRIAL RELEASE
 PROCEDURES HAVE NOT STATED THAT SUCH DAMAGING DIS-
 CLOSURES ARE MANDATORY..... 11

CONCLUSION..... 14

TABLE OF AUTHORITIES

Table of Cases

Dike v. Dike, 75 Wn. 2d 1, 448 P.2d 490 (1968)..... 2,6

State ex rel. Sowers v. Olwell, 64 Wn. 2d 828,
394 P.2d 681 (1964)..... 3,6

State v. Cory, 62 Wn. 2d 371, 374 P.2d 1019 (1963)..... 2

State v. Emmanuel, 42 Wn. 2d 799, 259 P.2d 845 (1953)..... 4

State v. James, 70 Wn. 2d 624, 424 P.2d 1005 (1967)..... 12

Tarasoff v. Regents of University of California, 17 Cal. 3d 425,
551 P.2d 334, 131 Cal. Rptr. 14 (1976)..... 6,7,9,10

Statutes

R.C.W. 5.60.060(2)..... 4

18 U.S.C. § 3146(b) (Bail Reform Act of 1966)..... 12

Washington Court Rules

Code of Professional Responsibility:

Preliminary Statement..... 3

DR 4-101(A)..... 3

DR 4-101(B)..... 3,4,13

DR 4-101(C)..... 4,5,14

DR 5-107..... 13

DR 7-101(A)..... 13

DR 7-101(A)(1)..... 2

DR 7-102(A)(3)..... 5,6,13,14

DR 7-102(B).....

DR 7-102(B)(1)..... 5,9

EC 4-1..... 3

EC 4-4..... 3

EC 7-1..... 14

EC 7-19..... 2,14

Criminal Rules:

CrR 3.2.....	5,12,14
CrR 3.2(a).....	11
CrR 3.2(b).....	11,13,14

American Bar Association Opinions

Formal Opinion 23 (1930).....	3
Formal Opinion 91 (1933).....	3
Formal Opinion 314 (1965).....	9

Other Authority

American Bar Association/American Association of Law Schools, Report of the Joint Conference on Professional Responsibility, 44 A.B.A.J. 1159, 1160 (1958).....	2
Callan and David, <u>Professional Responsibility and the Duty of Confidentiality: Disclosure of Client Misconduct in an Adversary System</u> , 29 Rutgers L. Rev. 332 (1976).....	4,7,8
Comment, <u>The Lawyer-Client Privilege: Its Application to Cor- porations, the Role of Ethics, and Its Possible Curtailment</u> , 56 Nw. L. Rev. 235, 249 (1967).....	4
Ennis and Litwack, <u>Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom</u> , 62 Cal. L. Rev. 693 (1974).....	10
M. Freedman, <u>Lawyers Ethics in an Adversary System</u> (1975).....	3
Note, <u>Tarasoff v. Regents of University of California: The Psychotherapist's Peril</u> , 37 U. Pitt. L. Rev. 155 (1975).....	8
Thode, <u>Cannons 6 and 7: The Lawyer-Client Relationship</u> , 48 Tex. L. Rev. 367, 371 (1970).....	13
Wald and Freed, <u>The Bail Reform Act of 1966: A Practitioner's Primer</u> , 52 A.B.A.J. 940, 943 (1966).....	13
C. Wright and A. Miller, <u>Federal Practice and Procedure: Criminal § 764</u> (1969).....	11,13

STATEMENT OF THE CASE

Amicus Curiae adopts the statements of the case set forth in the briefs of the parties.

STATEMENT OF THE INTEREST OF AMICUS CURIAE

Amicus Curiae, Professor Robert H. Aronson, representing the University of Washington Appellate Advocacy program, submits this brief pursuant to permission of the Washington Court of Appeals, Division 1, under RAP 10.6(a) and (b). Amicus is familiar with the briefs of the parties and the issues involved in the case. Amicus will address only the following issue:

Does an attorney have an ethical or legal duty to warn a third party of a possible assault by the attorney's client when the attorney's knowledge results from confidential communications and the third party is already aware of the potential danger?

In treating the above issue, all efforts have been made to avoid repetition of matters covered in the briefs of the parties.

ARGUMENT

1. ATTORNEY-CLIENT COMMUNICATIONS MUST BE CONFIDENTIAL TO INSURE VIGOROUS ADVOCACY OF THE CLIENT'S CAUSE AND AN IMPARTIAL JUDGMENT IN THE ADVERSARY SYSTEM.

A lawyer is ethically bound to advocate zealously his client's interest to the fullest extent permitted by law and disciplinary rule, DR 7-101(A)(1). The attorney's role as partisan advocate is critical to the adversary system's purpose of securing impartial judgment.

An adversary presentation counters the natural human tendency to judge too swiftly in terms of the familiar that which is not yet fully known; the advocate by his zealous preparation and presentation of facts and law, enables the tribunal to come to the hearing with an open and natural mind and to render impartial judgments.
EC 7-19.

The American Bar Association/American Association of Law Schools Joint Conference on Professional Responsibility stated:

... The integrity of the adjudicative process itself depends upon the participation of the advocate ... the institution of advocacy is an expression of human insight in the design of a social framework within which man's capacity for impartial judgment can attain its fullest realization. 44 A.B.A.J. 1159, 1160 (1958).

The advocate's effectiveness is, in part, a function of the confidential character of lawyer-client communications. "It is essential for the proper presentation of the client's cause that he should be able to talk freely with his counsel without fear of disclosure." Dike v. Dike, 75 Wn. 2d 1, 11, 448 P.2d 490 (1968). The Washington Supreme Court stated the principle in State v. Cory, 62 Wn. 2d 371, 374, 382 P.2d 1019 (1963): "[A]n attorney cannot make a 'full and complete investigation of both the facts and the law' unless he has the full and complete confidence of his client and such confidence cannot exist if the client cannot have the assurance that his disclosures to his counsel are strictly confidential."

See State ex rel. Sowers v. Olwell, 64 Wn. 2d 828, 394 P.2d 681 (1964); EC 4-1; ABA Formal Opinion 23 (1930) and 91 (1933) ("It is essential to the administration of justice that there should be perfect freedom of consultation by client with attorney."). To destroy confidentiality is to destroy the adversary system itself, M. Freedman, Lawyer's Ethics in an Adversary System 5 (1975). Therefore, every lawyer has an ethical obligation to preserve his client's confidential communications.

II. THE CODE OF PROFESSIONAL RESPONSIBILITY PROVIDES THAT LAWYERS MUST NOT DISCLOSE CONFIDENTIAL COMMUNICATIONS, EXCEPT IN CERTAIN LIMITED SITUATIONS.

Disciplinary Rules of the Code of Professional Responsibility prescribe the minimum level of ethical conduct the public has a right to expect from attorneys, Preliminary Statement to Code of Professional Responsibility. DR 4-101(B) provides that a lawyer shall not reveal a "confidence or secret" of his client, without authorization from the client; DR 4-101(B) also provides that a lawyer shall not use a "confidence or secret" to his client's disadvantage, or the advantage of a third person, without the client's permission.

"Confidence" includes information protected by the applicable law of attorney-client privilege. DR 4-101(A). "Secret" is a more general term, referring to information that is gained in the professional relationship and the disclosure of which would be embarrassing or detrimental to the client. DR 4-101(A).

The definition of "secret" makes it plain that the attorney's ethical duty to preserve confidential communications goes beyond the attorney-client privilege, see EC 4-4. Therefore, this ethical duty cannot be analyzed

strictly in terms of attorney-client privilege.¹

The duty to preserve confidences and secrets is limited by four exceptions. DR 4-101(C) provides:

A lawyer may reveal:

- (1) Confidences or secrets with the consent of the client or clients affected, but only after full disclosure to them.
- (2) Confidences or secrets when permitted under Disciplinary Rules or required by law or court order.
- (3) The intention of his client to commit a crime and the information necessary to prevent the crime.
- (4) Confidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct.

We are not here concerned with consensual disclosure, fee disputes or the client's expressed intent to commit a crime. Only subsection (C)(2) requires further discussion.

¹Attorney-client privilege is codified at R.C.W. 5.60.060(2). That statute restates the common law privilege, State v. Emmanuel, 42 Wn. 2d 799, 259 P.2d 845 (1953). The attorney-client privilege is not strictly relevant to the issues raised on appeal; respondent Sanders is not alleged to have been under compulsion to testify in court as to privileged communications. Thus, the evidentiary privilege will not operate. See Comment, The Lawyer-Client Privilege: Its Application to Corporations, the Role of Ethics, and Its Possible Curtailment, 56 Nw. L. Rev. 235, 249 (1967).

There would be no duty to volunteer client confidences in the manner suggested by appellants even assuming the relevant communications would not be privileged, unless such an affirmative duty is imposed by law or disciplinary rule. See Callan and David, Professional Responsibility and the Duty of Confidentiality: Disclosure of Client Misconduct in an Adversary System, 29 Rutgers L. Rev. 332 (1976) (hereinafter referred to as Callan and David).

An attorney normally cannot reveal confidential communications without his client's permission, DR 4-101(B) and (C). That rule applies equally to privileged and non-privileged communications, i.e., "confidences" and "secrets"; thus, the evidentiary privilege is not a controlling factor.

Subsection (C)(2) does not, in itself, raise a duty of disclosure. Rather, it provides that a lawyer may choose to reveal client secrets where the Rules so permit. The only disciplinary rule permitting release of client secrets is DR 4-101(C). Disclosure of a client's perpetration of fraud is required by DR 7-102(B)(1),² and disclosure is, of course, ethically required when specifically required by law. DR 7-102(A)(3).³ It is alleged that respondent Sanders knowingly failed to disclose matters that he was required by law to reveal, thus violating DR 7-102(A)(3). Brief of Appellant, p. 25.⁴

²DR 7-102(B)(1) provides:

A lawyer who receives information clearly establishing that:
(1) His client has, in the course of the representation perpetrated a fraud upon a person or tribunal, shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected tribunal and may reveal the fraud to the affected person.

³DR 7-102(A)(3) provides:

In his representation of a client, a lawyer shall not:
(3) Conceal or knowingly fail to disclose that which he is required by law to reveal.

⁴DR 4-101(C)(2) also permits release of "confidences and secrets" when "required by court order". This provision is irrelevant here as appellants do not allege that Sanders was directed by subpoena, or any other court order, to reveal confidential information. It could be argued that the drafters of DR 4-101(C)(2) intended to include court rules under the term "court order". Appellants suggest that Criminal Rule for Superior Court 3.2 required that Sanders reveal information detrimental to his client; we need not resolve this issue as it is our view that CrR 3.2 does not compel disclosure in this situation. See Argument IV, infra.

III. SUBJECTING ATTORNEY SANDERS TO CIVIL LIABILITY FOR BREACH OF A DUTY TO WARN IS NOT JUSTIFIED BY PUBLIC POLICY AND WOULD REQUIRE AN EXTENSION OF THE COMMON LAW THAT IS NOT WARRANTED IN THIS CASE.

Appellants suggest two theories in search of a legal mandate operating to require disclosure of information detrimental to Sanders' client, Michael Hawkins.

1. Appellants argue that Sanders' ethical duty not to reveal "secrets" was superceded by a common law duty to volunteer damaging information upon learning that Michael Hawkins could be dangerous to himself and others; that Sanders thus had to warn foreseeable victims; and that he should have warned the prosecutor and the superior court as well. Brief of Appellants, pp. 37-39. See Tarasoff v. Regents of University of California, 17 Cal., 3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976).

2. Appellants also argue that CrR 3.2 required Sanders to inform the prosecutor and the superior court of Dr. Elwood Jones' opinion; that his failure to do so violated DR 7-102(A)(3); and that failure to comply with that disciplinary rule subjects Sanders to malpractice liability. Brief of Appellants pp. 25-36.

- A. An attorney should not be required to warn a third person of a possible assault by the attorney's client when confidentiality would be compromised unless the third person is obviously in danger of sustaining serious personal injuries and is unaware of such danger.

Turning first to the common law duty-to-warn theory, we concede that there is a foundation in the common law and social policy to hold that attorneys must, upon learning that a client is bent on violent assault, warn foreseeable victims. Tarasoff v. Regents of University of California, supra; State ex rel. Sowers v. Olwell, supra; Dike v. Dike, supra. Olwell and Dike demonstrate the Washington Supreme Court's willingness to limit the

attorney's duty of confidentiality when the values protected by that duty are outweighed by other interests necessary to the administration of justice. It is far more difficult, however, to discern or to articulate a rule that will properly balance "the public interest in safety from violent attack" against the public interest in securing fair and impartial resolution of legal disputes. It is the position of Amicus that the obligation to warn, when confidentiality would be compromised to the client's detriment, must be permissive at most, unless it appears beyond a reasonable doubt that the client has formed a firm intention to inflict serious personal injuries on an unknowing third person. See Callan and David, supra, at 354-56.

The suggested rule is limited in favor of nondisclosure: When in doubt, the attorney should remain silent. This limitation is essential to attorneys who take their obligation of confidentiality seriously. The threat of civil liability for failing to warn, when confidentiality would be compromised to the client's detriment, would otherwise provoke an excess of caution and a breakdown in the attorney-client relationship.

Civil liability for failing to warn would substantially impair attorney-client relations. An attorney would avoid knowing his client is threatening to a third person. If the client tells too much, the attorney has to expose him as dangerous or risk civil liability. If he tells too little for fear that he might reveal incriminating information, his defense will be greatly impaired. To date, the Washington Supreme Court has consistently held that the need for free and full disclosure between attorney and client outweighs the small gain obtained by requiring the attorney to reveal damaging client statements.

The Tarasoff decision does not require a different result. That

decision did not establish a new duty to warn. Rather, the California Supreme Court simply held that psychotherapists must exercise such reasonable skill, knowledge and care possessed and exercised by members of their profession under similar circumstances, 551 P.2d at 345. The opinion does not indicate how the "reasonable psychotherapist" is supposed to avoid civil liability and still take his duty of confidentiality seriously. See Note Tarasoff v. Regents of University of California: The Psychotherapist's Peril, 37 U. Pitt. L. Rev. 155 (1975). The "reasonable lawyer" will have the same conflicts, unless his duty to warn only arises when serious danger to an unknowing third person is beyond question.

Callan and David suggest several advantages to providing that lawyers should expose a client's criminal intentions in their own discretion, except in extreme cases of serious danger:

Such a rule is fully consistent with the strong ethical mandate of confidentiality. ... [A]n attorney remains free to evaluate the propriety of disclosure in light of the attorney-client privilege and the client's privilege against self-incrimination. Furthermore, it allows the attorney the flexibility necessary to weight the competing interests of society and his client. Such factors as the firmness of the client's intention, the seriousness of the intended criminal conduct, the potential danger to person or property if the intended crime is committed, and the effect of disclosure upon the attorney-client relationship can be considered. This type of individualized evaluation is necessary and desirable, since the circumstances involving the client's disclosed intention will vary from case to case. Yet another benefit of a permissive disclosure rule is that the attorney retains the ability to attempt to dissuade the client from engaging in the proposed illegal activity. Indeed, were the disclosure duty mandatory, the attorney would not learn of the client's criminal intention in the first instance. 29 Rutgers L. Rev. 355, 356.

A narrow duty to warn of a client's intention to assault a third person would be consistent with the attorney's narrow duty to expose past fraud by his client on a tribunal (only when the lawyer has information

"clearly" establishing fraud) under DR 7-102(B)(1). It is also persuasive that an attorney has no option to disclose criminal intentions of his client until any such intentions are apparent beyond a reasonable doubt. ABA Formal Opinion 314 (1965). Society's interest in preventing violent assault is surely as significant as the interest in rectifying past fraud and preventing crime (assault, of course, is usually a crime). Since the attorney has only a limited mandate to reveal fraud and limited authority to expose criminal intentions, it follows that a client's intent to assault a third person should not be revealed at the expense of confidentiality, except where there is an unquestioned danger of serious harm to an unknowing third person.

B. The present case is not analogous to authority extending the common law duty to warn.

The justification for imposing civil liability generally is further weakened by considering the particular facts of the present case, especially in comparison with Tarasoff. First, Michael Hawkins' potential victims (apparently his mother and sister, Brief of Appellants, pp. 3-5) knew that he might be dangerous and knew that he had been released from confinement. Their injury can thus be traced to their own negligence or risk-taking in failing to avoid him. This fact is a crucial distinction between Tarasoff and the present case. Tatiana Tarasoff was wholly unaware of her danger. 551 P.2d at 340-41. Tarasoff does not require that the professional absolutely prevent all foreseeable harm; rather that case established a duty to warn, leaving potential victims to take precautions as they see fit. The nature of the required warning was also held to be limited by the nature of the risk; i.e., client confidentiality must be breached, when necessary, in as restricted a manner possible. 551 P.2d at 347. This "least offensive

warning" principle suggests that attorney Sanders should have avoided making Michael Hawkins' condition public knowledge once it appeared that foreseeable victims were on notice, even assuming appellants are correct as to the existence of any duty to warn.

Second, it has not been alleged that Sanders thought Michael Hawkins was dangerous or that Hawkins did or said anything that should have caused Sanders to believe he was dangerous or would become dangerous upon release from jail. Sanders was told by Palmer Smith, an attorney, and Doctor Elwood Jones, a psychiatrist, that, in their opinion, Michael Hawkins was dangerously mentally ill and ought to remain confined. Brief of Appellants, pp. 3-5.

Tarasoff is not analogous. There, the defendant psychiatrists had first-hand knowledge of Prosenjit Poddar's homicidal intention; that knowledge came from statements he made to the psychiatrists in the course of treatment, not from the observations and conclusions of strangers transmitted to defendants.

Appellants have not suggested any reason why Sanders should have given particular weight to Smith and Jones' conclusions about Michael Hawkins' mental condition. Psychiatric predictions of dangerousness are notoriously inaccurate. See Ennis and Litwack, Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom, 62 Cal. L. Rev. 693 (1974). Attorney Smith was in no better position to observe Hawkins' mental state than was Sanders. Furthermore, Smith's duty to his client (Frances Hawkins) forced him to argue that Michael Hawkins should remain confined.⁵

⁵Palmer Smith had been retained by Frances Hawkins to assist in an unsuccessful attempt to have Michael Hawkins civilly committed. Brief of Respondents, p. 3.

Finally, appellants have not explained why Smith and Jones did not go to the prosecutor themselves to express their concern about Hawkins' sanity. It seems that they should have to carry out the supposed duty to warn. It would also seem proper for Sanders to rely on them to do so, since Sanders' duty of fidelity to his client justified non-disclosure, and because Jones, and particularly attorney Smith, must have known Sanders could properly withhold the information they gave him.

Sanders had an ethical duty not to reveal information damaging to Michael Hawkins. He should not be exposed to civil liability for carrying out that duty since Hawkins did not appear to be an obvious threat to an unknowing third person, despite warnings of Smith and Jones.

IV. CRIMINAL RULE FOR SUPERIOR COURT 3.2(b) DOES NOT EXPRESSLY REQUIRE THAT ATTORNEYS DISCLOSE CONFIDENTIAL INFORMATION DAMAGING TO THEIR CLIENTS' INTERESTS AND AUTHORITIES CONSIDERING ANALOGOUS PRETRIAL RELEASE PROCEDURES HAVE NOT STATED THAT SUCH DAMAGING DISCLOSURES ARE MANDATORY.

Criminal Rule for Superior Court 3.2(a) provides that a defendant charged with an offense shall be released on his personal recognizance, unless the court finds that such release will not reasonably assure the defendant's later appearance in court, in which case the court is authorized to impose conditions on release. CrR 3.2(b) provides: "In determining which conditions of release will reasonably assure the defendant's appearance, the court shall, on available information, consider the relevant facts"

The Rule does not specify who has to provide facts for the court's consideration. CrR 3.2 clearly requires facts in addition to defendant's financial condition be taken into account before a pretrial release decision is made. That defense counsel should help generate relevant facts for the court's examination also seems to have been assumed, C. Wright and A. Miller,

Federal Practice and Procedure: Criminal § 764 (1969), without being clearly stated. These considerations leave unanswered the question of what defendant's counsel should do with confidential information that would be extremely damaging to his client's chances for release. Amicus submits that counsel is not required to bring such information to the court's attention.

There is no clear authority supporting a mandatory duty to disclose damaging information. The criminal rules do not state that counsel should divulge damaging information, and there is no allegation that the court specifically requested disclosure. There are no cases interpreting CrR 3.2(b), although in State v. James, 70 Wn. 2d 624, 424 P.2d 1005 (1967), the court held that the Superior Court must be advised of defendant's criminal record before setting the amount of bail. James did not specify who was to provide the information.

Federal practice under 18 U.S.C. § 3146(b)(1976) may be considered as persuasive authority. 18 U.S.C. § 3146(b)(1976) was enacted as part of the Bail Reform Act of 1966, PL 89-465. (CrR 3.2 made effective July 1, 1973.) 18 U.S.C. § 3146(b)(1976) provides that, when deciding conditions on release, " ... the judicial officer shall, on the basis of available information, take into account" relevant facts. The purpose of both acts is to assure that defendants awaiting trial need not remain confined because they lack the cash to post bail, when they may have strong ties to the community and, in all likelihood, would show up for trial or could be induced to remain in the jurisdiction if release was permitted under imaginative conditions.

Pretrial release practice varies widely across federal judicial districts, 8B Moore's Federal Practice ¶ 46.06 (1972). Outside the District of

Columbia, the judicial officer will be dependent on information furnished him by the U.S. attorney, defense counsel, and possibly supplementation by a probation officer's report, in no fixed order. C. Wright and A. Miller, supra, § 764. Legislative history suggests that backers of the Bail Reform Act believed defense counsel would perform his officer of the court role during his client's pretrial release appearance. Wald and Freed, The Bail Reform Act of 1966: A Practitioner's Primer, 52 A.B.A.J. 940, 943 (1966). How far defense counsel should go in terms of revealing damaging information is not stated in the history, however. Id.

Nothing in the limited authority interpreting the state and federal acts supports the proposition that counsel must tell everything he knows about the defendant in order for the court to make a more informed decision. Defense counsel has an ethical duty to disclose that which he is required by law to reveal, DR 7-102(A)(3), but the law apparently leaves the extent of disclosure to counsel's discretion; i.e., the criminal rules do not establish a basis for overriding counsel's judgment.

As a matter of policy and construction, we submit that the clear, strongly-stated duties of counsel to be loyal to his client, DR 5-107; to zealously represent his client's interests, DR 7-101(A); and to avoid disclosing his client's secrets, DR 4-101(B), override the nebulous and unstated notion that CrR 3.2(b) mandates disclosure of secrets counsel has decided to withhold in the best interests of his client. This position is not an affront to counsel's duties as an officer of the court as long as his position is lawful. "Under the code, there is no inconsistency between the lawyer's duty to his client and to the legal system. If the lawyer is fulfilling his duty to his client 'within the bounds of the law', then without question he is fulfilling his duty to the legal system" Thode, Canons

6 and 7: The Lawyer-Client Relationship, 48 Tex. L. Rev. 367, 371 (1970) (commenting on EC 7-1 and 7-19). Given the limited authority set out above, we submit that counsel acts within the "bounds of the law" when he exercises his discretion as to pretrial release disclosures in the best interests of his client, absent obvious and serious danger to unknowing third parties.

The preceding analysis, that disclosure is not "required by law" (assuming court rules were intended by the draftsmen of the Code of Professional Responsibility to be included under DR 4-101(C)(2)), completely undermines appellants' theory of liability. Ethical and legal requirements to disclose secrets are coextensive, according to their argument and DR 7-102(A)(3). There is no mandatory disclosure provision in CrR 3.2; thus, there is no violation of DR 7-102(A)(3) and no basis for civil liability.

CONCLUSION

Appellants have argued that Sanders breached an obligation, imposed by common law and court rule, that would have forced him to volunteer confidential information damaging to his client. The alleged common law duty should be limited to cases where it appears beyond reasonable doubt that the client has formed a firm intention to inflict serious personal injuries on an unknowing third person. Because these factors are not present in this case, civil liability should not be imposed. CrR 3.2(b) and DR 7-102(A)(3), the supposed bases in court rules for finding a duty to disclose damaging and confidential information, do not require disclosure. It follows that an attorney cannot be faulted for deciding not to disclose, when that course is in the best interests of his client.

The decision of the Superior Court granting respondent Sanders' motion

for summary judgment should be affirmed.

Respectfully submitted,

Robert H. Aronson
University of Washington
School of Law
Attorney for Amicus Curiae

Dated this 14th day of May, 1979.