

NO. 6736-I

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IN THE COURT OF APPEALS  
OF THE STATE OF WASHINGTON  
DIVISION I

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

Appellants, ~14

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.

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APPEAL FROM THE SUPERIOR COURT FOR KING COUNTY

---

THE HONORABLE NORMAN QUINN, JUDGE

---

REPLY TO BRIEF OF AMICUS CURIAE

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ARGUMENT IN REPLY

I. NO BREACH OF THE ATTORNEY-CLIENT PRIVILEGE OF  
CONFIDENTIAL COMMUNICATIONS IS PROPOSED IN  
THIS ACTION.

Although 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) points out the following exception:

. . . A lawyer does not violate this disciplinary rule, however, by acceding to reasonable requests of opposing counsel which do not prejudice the rights of his client, by being punctual in fulfilling all professional commitments, by avoiding offensive tactics, or by treating with courtesy and consideration all persons involved in the legal process.

It cannot be stated, as a matter of law, that respondent did not fail to fulfill "all professional commitments" by withholding from consideration of the court at a hearing on pretrial release that available information which was necessary for the court to take into consideration, and which was not privileged, but, on the contrary, provided to the attorney for the express purpose of having it considered by the court.

The attorney-client privilege, as defined in Canon 37, is not absolute; but rather is subject to recognized exceptions. (Citation omitted)

The exceptions which have arisen are the result of a balancing process in which the courts have had to weigh the benefits of the privilege against the public interest in the criminal investigation process as discussed in Sowers, supra.

As the privilege may result in the exclusion of evidence which is otherwise relevant and material, contrary to the philosophy that justice can be achieved only with the

fullest disclosure of the facts, the privilege cannot be treated as absolute; but rather, must be strictly limited to the purpose for which it exists.

Dike v. Dike, 75 Wn.2d 1, 11, 448 P.2d 490 (1968).

The purpose of the rule is to protect communications between a client and his attorney. In the instant case, the relevant facts which required disclosure, that Hawkins was incompetent and dangerous, did not reach the attorney by a communication from his client. The information was publicly available, and was transmitted to the attorney from Mrs. Hawkins, from Psychiatrist Jones, from Attorney Palmer Smith, who notified Sanders both by telephone and in writing. The information was further available in the Department of Involuntary Commitment as well as records being maintained at the jail.

The issue presented is whether, as a matter of law, this defense attorney had no professional duty to the court to disclose such "available information", as is required, by necessary implication, by CrR 3.2(b).

Under the facts of this case, the attorney's duty was amplified by EC 7-12 which casts additional responsibilities upon the attorney of a client that suffers the mental condition presented by Sanders.

The failure to disclose this information raises a question of fact whether the attorney negligently performed services for his client. Such question, as any question of professional malpractice, should be determined by the trier of fact, upon consideration of the opinions of experts in the field.

II. NO DISCLOSURE OF CONFIDENTIAL COMMUNICATION WAS REQUIRED; THE INSTANT SITUATION IMPOSED A DUTY TO PASS ALONG PUBLICLY AVAILABLE INFORMATION.

The information that Michael Hawkins was seriously mentally ill and dangerous was neither a confidential communication nor a secret. It was conveyed to Hawkins' attorney from Hawkins' mother, her lawyer, and her doctor. The information that Hawkins was dangerous clearly implied that Hawkins might commit the crime of assault, and particularly upon Mrs. Hawkins. Even if such information could be considered a "secret", DR 4-101(C)(3) would authorize its disclosure as an intention to commit a crime. The information was not provided in confidence, and was not a secret, and a significant question of fact remains whether Sanders breached a duty to his client by failing to transmit this to the court so as the court could make an informed decision

at the bail hearing.

The facts of this case further raise a question whether or not a fraud was perpetrated upon the court in violation of DR 7-102(B)(1), where a bail hearing was held and affirmative statements were required to be made to the court regarding Hawkins' ties to the community, the character of his residence in the community, his family ties and relationships, and Hawkins' reputation and character. Omitted were the most relevant factors of his bizarre mental condition, the true character of Hawkins' residence, where his immediate family lived in fear of him, and the unwillingness of responsible members of the community to vouch for Hawkins' reliability, required to be considered under CrR 3.2(b). It cannot be stated as a matter of law that CrR 3.2 and DR 7-102(B)(1) have not been violated in the instant case. In the opinion of one prominent criminal attorney, George Dixon, such action violated Sanders' duty of reasonable care to his client.

III. WHETHER ATTORNEY SANDERS SHOULD HAVE  
CONVEYED INFORMATION RAISES A QUESTION  
OF FACT.

Amicus proposes the rule that 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 ..." Appellants take no issue with this proposal, as in the instant case, there is no confidential information involved. This case provides a stronger duty to disclose than existed in State ex rel. Sowers v. Olwell, 64 Wn.2d 828, 394 P.2d 681 (1964), where the court stated:

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... 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.

64 Wn.2d at 833-4. Here, Sanders was explicitly requested by different parties to take action on the information provided to him that his client was both dangerous and in need of protection. It cannot be stated as a matter of law, that a duty was not imposed upon Sanders to make that disclosure, pursuant to the requests of the third parties, as an officer of the court, and pursuant to CrR 3.2(b), requiring the court at a bail hearing to base conditions of release upon "the available information".

As in Tarasoff v. Regents of Univ. of California, 131 Cal. Rptr. 14, 551 P.2d 334 (1976), Sanders is required in the instant case to exercise such reasonable skill, knowledge and care possessed and exercised by members of his profession under similar circumstances. Whether this duty was met in the instant case is the issue for determination by the trier of fact.

Whether or not Sanders thought that Michael Hawkins was dangerous, or whether or not he should have given particular weight to Smith's and Jones' conclusions about Michael Hawkins' mental condition are not material to the issue in question. Sanders was made aware of these factors. He could have continued to advocate that Hawkins should be released notwithstanding his allegedly dangerous propensities. However, his function as advocate was a sham where the critical available information was wholly withheld from the hearing. Sanders was not required to judge whether Hawkins was dangerous or not, or whether the psychiatric predictions of dangerousness were valid or not. Rather, Sanders made the judgment that his client was not dangerous, and that the information conveyed to him was not to

be considered by the judge as one of the relevant factors in the bail hearing. Whether this was a failure in the duty imposed upon Sanders under these circumstances remains a question of fact.

IV. THE DUTY IMPOSED BY CRIMINAL RULE FOR SUPERIOR COURT 3.2(b) RAISES A MATERIAL QUESTION OF FACT REGARDING SANDERS' DUTY TO DISCLOSE TO THE COURT PUBLICLY AVAILABLE INFORMATION.

Appellants concur with Amicus' observation that CrR 3.2 clearly requires facts to be considered by the court in addition to defendant's financial condition before a pretrial release decision is made by the judge. One of the most relevant factors in this case was the "character and mental condition" of Hawkins. Amicus cites C. Wright and A. Miller, Federal Practice and Procedure: Criminal § 764 (1969), for the proposition that defense counsel should help generate relevant facts for the court's examination. This appears evident from the requirement of the court to base its decision "on the available information", and to apply the decision to conditions of release, such as the requirement to "detain him until his physical condition permits his release", CrR 3.2(c)(5); or "require him to report

regularly to and remain under the supervision of an officer of the court or other person or agency." CrR 3.2(c)(4).

State v. James, 70 Wn.2d 624, 424 P.2d 1005 (1967), holds that at the time of the bail hearing "it is necessary" for the trial judge to be advised of a defendant's criminal record, if any, in order to properly determine the amount of bail. In like manner, it is necessary that the trial judge be advised of the defendant's condition of health and propensities for harm in order to properly determine the conditions of release. Amicus points out that James did not specify who was to provide the information. According to C. Wright and A. Miller, supra, § 764, the court is dependent on information furnished by the U.S. Attorney, defense counsel, and possibly a probation report, in no fixed order. Citing Wald & Freed, The Bail Reform Act of 1966: A Practitioner's Primer, 52 A.B.A.J. 940, 943 (1966), amicus points out that defense counsel would perform a role of "officer of the court" during the pretrial release appearance. The Washington Supreme Court places strong emphasis on the lawyer's duty as an officer of the court:

As an officer of the court, his duties are both private and public. Where the duties to his client to afford zealous representation conflict with his duties as an officer of the court to further the administration of justice, the private duty must yield to the public duty. He therefore occupies what might be termed a "quasi-judicial office." (Citing authority)

Fite v. Lee, 11 Wn. App. 21, 28, 521 P.2d 964 (1974). How far defense counsel should go in fulfilling this duty must necessarily depend upon the facts of each case. It should not be stated as a matter of law that there was no duty in the instant action for defense counsel to reveal non-privileged, relevant and available information concerning the mental condition of his client. Withholding the information served neither the court nor the best interests of the client.

Where Sanders was advised of an obvious and serious danger to both the client and to third parties, a question of fact was raised whether, under the provisions of CrR 3.2, the failure to disclose constituted the negligent performance of services for Hawkins.

#### CONCLUSION

Sanders was not obligated to volunteer

confidential information damaging to his client. The information was neither confidential nor privileged, but provided with the express purpose of it being acted upon at the bail hearing for the client's benefit. Whether Sanders failed to perform his duty to his client by withholding this necessary information raises a question of fact as to his liability for the damages which resulted therefrom. The failure to disclose was not in the best interests of the client and violated the attorney's public duty as an officer of the court. Whether this action met the requisite skill required of an attorney in his position is a question for the trier of fact. The decision of the Superior Court granting respondent Sanders' motion for summary judgment should be reversed.

Respectfully submitted,

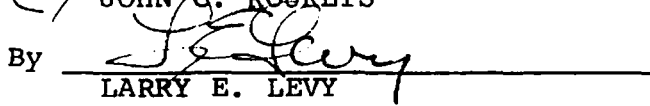
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