



## Committee on Professional Ethics

Opinion #528 - 2/17/81 (33-80)

Topic: Client's confidences and secrets; client's whereabouts

Digest: Law of evidentiary privilege governs obligation to preserve client confidences and secrets when lawyer is required to testify, but lawyer may postpone testifying until validity of adverse ruling is determined on appeal.

Code: Canon 4;  
EC 4-1, 4-2, 4-4;  
DR 2-109(A)(2), 4-101(A),  
(B) and (C), 7-102(A)(2),  
7-102(A)(3).

### QUESTION

May a lawyer, testifying before a grand jury pursuant to subpoena, properly refuse to reveal a client's whereabouts when such information was received from the client in confidence?

### OPINION

A lawyer's obligation to preserve client confidences against disclosure when called upon to give testimony under compulsion of law is somewhat more limited than the broad ethical obligation mandated by DR 4-101(A) and (B). Cf. Canon 4 with former Canon 37. The rules applicable to testimonial disclosure are primarily legal and predicated on the law of evidentiary privilege. While the lawyer continues to have important ethical obligations, these matters are largely determined by the governing legal requirements.

The basic ethical rule relating to the preservation of client confidences in non-testimonial situations is considerably broader than the attorney-client privilege. It applies to substantially all information gained in the professional relationship. See, EC 4-4; see also Hazard, Ethics in the Practice of Law, 21-33 (1978) and Drinker, Legal Ethics, 131-139 (1953). This rule is subject to a few limited, but well recognized, exceptions. See e.g., EC 4-2 and DR 4-101(C); cf. DR 7-102(A)(3). As to matters falling within the attorney-client or other evidentiary privilege, the general ethical obligation to preserve confidences may also take the form of a duty imposed by law. See, e.g., CPLR §4503.

Although information may be confidential, and thus protected from normal disclosure, it is only protected from testimonial

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disclosure if it falls within the attorney-client or other applicable evidentiary privilege. Where an evidentiary privilege protects information from compelled disclosure, the lawyer has an ethical obligation under the Code "to act in a manner which preserves the...privilege" and "to assert [it] unless it is waived by the client." EC 4-4. The same ethical obligation would exist where the lawyer is in doubt as to whether an evidentiary privilege is applicable. If a lawyer has a good faith belief that testimony which he is asked to give may be protected from testimonial disclosure by law, he should assert the privilege.

Information respecting a client's whereabouts "gained in the professional relationship that the client has requested be held inviolate" squarely falls within the general ethical obligation of preserving the confidentiality of client secrets. DR 4-101(A) and (B). Hence, on the facts of the question posed, the lawyer clearly may refuse to divulge his client's whereabouts when initially asked to reveal that information without judicial compulsion.

A problem arises, however, when the lawyer's claim of privilege is rejected by a court ruling or order. At this point, the information falls within one of the limited exceptions to the normal rule of confidentiality. DR 4-101(C) expressly provides that the "lawyer may reveal [c]onfidences or secrets when required by law or court order." In addition, DR 7-102(A)(3) provides that "[i]n his representation of a client, a lawyer shall not...knowingly fail to disclose that which he is required by law to reveal. While there is a possible ambiguity in the term "required by law to reveal," we interpret it as applying only to court orders which are not subject to further review. We do not believe it should mandate immediate compliance with orders which are subject to reversal or modification on appeal or other review, even though the lawyer may be faced with running the risk of being held in contempt of court. Where the order is subject to good faith challenge, the lawyer should be free to postpone giving the court ordered testimony pending appropriate review. Whether such further review should be sought depends, inter alia, on the client's wishes and on whether the good faith standards of DR 2-109(A)(2) and DR 7-102(A)(2) can be met.

Our conclusion that a lawyer may under certain circumstances ethically postpone giving court ordered testimony pend-

ing the timely exhaustion of available further review appears to be consistent with the position articulated by the Supreme Court in Maness v. Meyers, 419 U.S. 449, 460-461 (1975), where the Court stated:

When a court during trial orders a witness to reveal information, however, a different situation may be presented. Compliance could cause irreparable injury because appellate courts cannot always "unring the bell" once the information has been released. Subsequent appellate vindication does not necessarily have its ordinary consequence of totally repairing the error. In those situations we have indicated the person to whom such an order is directed has an alternative [of seeking "precompliance review"].

For the reasons stated, the question posed is answered in the affirmative, provided a good faith claim of privilege is raised, and pending timely exhaustion of available further review of any court order rejecting the claim of privilege.

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