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Committee on Professional Ethics

Opinion #555 - 1/17/84 (23-83)

Topic: Confidential communications as between joint clients.

Digest: Lawyer may not disclose to one joint client confidential communications from other joint client relating to the subject matter of the representation, absent express or implied consent, except when testifying in a later litigation between the two, and must withdraw from the joint representation if confidential communication from one gives rise to a conflict with the other.

Code: Canon 4, DR 4-101, EC 4-2, EC 5-16.

QUESTION

Where a lawyer is jointly representing two clients in a matter and receives from one a confidential communication relating to the subject of the representation that, if disclosed to the other, would be disadvantageous to the first in his relationship with the second, is the lawyer required or permitted to disclose the communication to the other client?

OPINION

A and B formed a partnership and employed Lawyer L to represent them in connection with the partnership affairs. Subsequently, B, in a conversation with Lawyer L, advised Lawyer L that he was actively breaching the partnership agreement. B preceded this statement to Lawyer L with the statement that he proposed to tell Lawyer L something "in confidence." Lawyer L did not respond to that statement and did not understand that B intended to make a statement that would be of importance to A but was to be kept confidential from A. Lawyer L had not, prior thereto, advised A or B that he could not receive from one communications regarding the subject of the joint representation that would be confidential from the

other. B has subsequently declined to tell A what he has told Lawyer L. Lawyer L now asks what course he may or must take with respect to disclosure to A of what B has told him and with respect to continued representation of the partners.

It is the opinion of the Committee that (i) Lawyer L may not disclose to A what B has told him, and (ii) Lawyer L must withdraw from further representation of the partners with respect to the partnership affairs.

While a partnership may be of sufficient size and character to be deemed an entity of itself, in which case the partnership rather than the partners may be deemed to be the client, the Committee views the particular situation here presented as one where the partners are joint clients of the lawyer.

The situation here presented involves two basic, and here perhaps inconsistent, duties of a lawyer. One is the duty of loyalty and the other the duty to maintain client confidences. One generally recognized aspect of the duty of loyalty is the duty of a lawyer, as a fiduciary, to impart to the client information which the lawyer possesses that is relevant to the affairs as to which the lawyer is employed and that might reasonably affect the client's conduct with respect to such affairs. Spector v. Mermelstein, 361 F. Supp. 30 (S.D.N.Y. 1972). Indeed, this is a duty owed by any agent acting in a fiduciary capacity. Restatement (Second) Agency, Section 381 (1957). But a recognized agency exception is that the duty does not extend to matters the disclosure of which would violate a duty to a third person. Id., Comment e (which states this exception expressly as applying to lawyers). Thus, generally, the lawyer has no duty (and, indeed, no right) to disclose to one client confidential information learned from, or in the course of representing, another client, at least where the information does not relate to a subject matter as to which the clients are joint clients. The Restatement (Second) Agency in Section 392 deals with the situation where the agent is jointly employed by both parties to a transaction. It states in Comment b:

> "The agent, however, is under no duty to disclose, and has a duty not to disclose to one principal, confidential information given to him by the other, such as the price he is willing to pay. If the information is of such a nature that he cannot fairly give advice to one without disclosing it, he cannot properly continue to act as adviser."

Of course, a lawyer is frequently held to higher standards of ethical conduct, both as to loyalty and as to confidentiality, than other fiduciaries. Still, the Committee believes that the foregoing comment suggests the appropriate result when the two ethical duties come into direct conflict.

The duty of confidentiality is stated clearly in Canon 4, "A Lawyer Shall Preserve the Confidences and Secrets of a Client." There is, however, a widely accepted exception to this that must be examined. It is generally accepted that, when an attorney acts for two or more clients jointly, communications to the attorney from one of the clients on the subject of the joint representation are not privileged as between the clients in subsequent litigation between them. 8 Wigmore, Evidence, § 2312 (McNaughton rev. 1961); Annot. 4 ALR 4th 765 (1981); Wallace v. Wallace, 216 N.Y. 28, 36 (1915).

This exception, by its very terms, applies only to the evidentiary privilege and applies only in subsequent litigation between the clients. Without any examination of the question, it has occasionally been assumed that it is applicable as well at any time during the course of the representation and even absent any controversy or litigation between the clients. See, ABA Inf. 1476, n.2 (1981); Allegaert v. Perot, 434 F. Supp. 790, 799, n.12 (S.D.N.Y. 1977); Spector v. Mermelstein, supra (semble). ABA Committee opinions in the insurer-insured situation seem implicitly so to assume since, in order to prohibit disclosure to the insurer of matters learned from the insured by the attorney hired by the insurer to defend the insured, these opinions conclude that the insured is the client. See, ABA Inf. 1476 (1981); ABA Inf. 949 (1966). Indeed, as if to underscore the significance of identifying the client, earlier opinions of the ABA Committee which were premised on the assumption that the insurer and insured were joint clients had authorized disclosure to the insurer of facts supporting non-coverage learned while representing the insured. ABA Inf. 822 (1965).

On the other hand, there are also some authorities pointing in the opposite direction. In the Comment to Rule 2.2 of the Model Rules of Professional Conduct recently approved by the American Bar Association, it is stated:

> "In a common representation, the lawyer is still required both to keep each client adequately informed and to maintain confidentiality of information relating to the representation. See Rules 1.4 and 1.6. Complying with both requirements while acting as intermediary requires a delicate balance. If the balance cannot be maintained, the common representation is improper. With

> regard to the attorney-client privilege, the prevailing rule is that as between commonly represented clients the privilege does not attach. Hence, it must be assumed that if litigation eventuates between the clients, the privilege will not protect any such communications, and the clients should be so advised."

This Comment certainly suggests a view that, notwithstanding the lack of privilege in later litigation between joint clients, there may still be communications from one of the clients relating to the representation that must or may be kept confidential from the other during the representation. This seems also to be the assumption upon which N.Y. County 646 (1975) is grounded. In these instances, however, it is recognized that if the communication discloses a conflict between the clients with respect to the subject of the representation, or if keeping of the confidence hinders the representation, full withdrawal is mandated.

While, as noted, the Committee has found indications in both directions on the question, the committee has not found any reasoned consideration of whether, although communications on the subject of the representation from one joint client are conceded not to be privileged from the other in subsequent litigation between them, the attorney is nevertheless bound or entitled to maintain such communication from one in confidence from the other during (or even following) the representation and prior to any litigation between them. While the answer might be suggested by reviewing the underlying reasons for the litigation rule, it appears that the rare statements of those underlying reasons are themselves conflicting. Wigmore, § 2312, supra, says of communications from a joint client, "Yet they are not privileged in a controversy between the two original parties, inasmuch as the common interest and employment forbade concealment from the other." This brief rationale would suggest that the confidences from each other, even during the representation, should be forbidden. On the other hand, in Valente v. Pepsico, Inc., 68 F.R.D. 361, 368 (D. Dela. 1975), the court stated as respects the litigation rule:

> "The source of the rule is not clear, whether based on an assumption that where an attorney serves two different clients in relation to the same matter, neither anticipates that communications will have the same degree of confidence; or, as is more likely, the court will not allow the attorney to protect the interest of one client by refusing to disclose information received from that client, to the

> detriment of another client or former client. The fiduciary obligations of an attorney are not served by his later selection of the interests of one client over another."

If we accept the second of these posited rationales, the general rule should be limited to subsequent litigation and not extended to preclude communications from one joint client being kept confidential from the other during the representation. If we accept the first of these posited rationales, the matter is one of reasonable anticipation of the clients, which is another way of saying that, by virtue of the relationship, a consent to disclosure as between the clients may be implied.

While the Code of Professional Responsibility fails to afford a direct answer to the issue, it does make clear that the evidentiary privilege is more limited than the ethical obligation of the lawyer to guard confidences and secrets. EC 4-4. And there certainly are times when matters as to which the lawyer may be required to testify (i.e., that are non-privileged in litigation) still probably must be kept in confidence by the lawyer until he is required to testify (see DR 7-102(B)).

The Committee believes that the question ultimately is whether each of the clients, by virtue of jointly employing the lawyer, impliedly agrees or consents to the lawyer's disclosing to the other all communications of each on the subject of the representation. It is the opinion of the Committee that, at least in dealing with communications to the lawyer directly from one of the joint clients, the mere joint employment is not sufficient, without more, to justify implying such consent where disclosure of the communication to the other joint client would obviously be detrimental to the communicating client.* This is not to say that such consent is never to be found. The lawyer may, at the outset of the joint representation or even perhaps at some later stage if otherwise appropriate, condition his acceptance or continuation of the joint representation upon the clients' agreement that all communications from one on the subject of the joint representation shall or may be disclosed to the other. Where one joint client is a long-time client and the other is introduced to the lawyer to be represented solely in the one joint matter, it may be appropriate for the lawyer to obtain clear consent from the new client to dis-

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* The fact situation presented to the Committee does not involve communications to the lawyer (or knowledge gained by the lawyer) from third parties, and this opinion does not attempt to deal with that situation. It might be that in those circumstances, different relative weighting might be given to the duty of loyalty, and implied consent more readily found.

closure to the long-time client. Cf. Allegaert v. Perot, 434 F. Supp. 790 (1977). Whatever is done, the critical point is that the circumstances must clearly demonstrate that it is fair to conclude that the clients have knowingly consented to the limited non-confidentiality. Both EC 5-16 and Rule 2.2 of the Model Rules emphasize that, before undertaking a joint representation, the lawyer should explain fully to each the implications of the joint representation. Absent circumstances that indicate consent in fact, consent should not be implied.

Of course, the instant fact situation is a fortiori. Here, the client specifically in advance designated his communication as confidential, and the lawyer did not demur. Under the circumstances, the confidence must be kept.

For the reasons stated, the question posed is answered in the negative.

DISSENT

A minority of the Committee respectfully dissents. This case involves issues of far-reaching importance concerning the ethical responsibilities of an attorney representing joint clients, such as a partnership, and the rights of those joint clients to their attorney's undivided loyalty and disclosure of pertinent information.

On the fact pattern described in the first paragraph of its Opinion, the majority reaches two conclusions. The first, with which we disagree, is that notwithstanding partner B's refusal to inform partner A about the matter, the attorney for the partnership, Lawyer L, may not disclose to A what he was told "in confidence" by B concerning his continuing conduct in breach of the partnership agreement. The majority's second conclusion, with which we agree, is that Lawyer L must withdraw from further representation of the partners with respect to the partnership's affairs.

In consequence, as the majority sees it, partner A is not entitled to disclosure from Lawyer L concerning the facts and reasons requiring him to withdraw as the attorney for the partnership. Indeed, Lawyer L may not tell A in general terms that a conflict of interest has arisen, because even that would amount to a disclosure based on facts imparted to him by partner B. Nor may Lawyer L disclose any of these matters to a prospective or new attorney for the partnership or for A individually. Thus as the result of B's ongoing violation of his fiduciary duty as a partner to disclose the facts to A, compounded by Lawyer L's

compelled silence, partner A is left to fend for himself in a defenseless state. Without explanation, he has been deprived of the advice and experience of the partnership's attorney. He is ignorant of B's continuing breach of the partnership agreement. He and any new attorney are without the requisite knowledge to obtain and provide effective representation for himself or the partnership.

Although the majority concedes that the attorney-client privilege does not protect B's disclosure to Lawyer L, it nevertheless concludes that his lips must remain sealed until such time, if ever, he is called to testify about his conversation with B in a subsequent litigation between the parties. Testimony by L as a witness assumes A sues B after learning about B's breach from another source at some later time. But by that time it may be too late to avert irreparable harm to the partnership or to A. In any event, the passage of time may cause serious monetary damage that might have otherwise been avoided by prompt disclosure. In fact, A may never find out about B's wrongs or about B's conversation with Lawyer L.

What emerges is that partner A is the innocent and injured victim of the ethical rule announced today by the Committee, imposing silence on Lawyer L at the time of his withdrawal as attorney for the partnership. B, the wrongdoing partner, is that rule's sole beneficiary.

We do not believe that such results can be justified on the basis of the ethical responsibilities of an attorney. Rather, it is our view that proper analysis leads to the conclusion that the attorney must at least have the discretion, if not the duty in the circumstances presented, to disclose to one partner the facts imparted to him by the other partner, that gave rise to the conflict of interest necessitating the lawyer's withdrawal as attorney for the partnership.

1. We begin with the general rule of law and professional ethics that an attorney, as a fiduciary to his client, must disclose to that client all material facts known by the attorney from any source concerning the subject of the representation. In Spector v. Mermelstein, 361 F. Supp. 30 (S.D.N.Y. 1972), an attorney was held liable for his failure to disclose material information to his client. Speaking of the client's right to such disclosure, Judge Lumbard set forth the applicable principles:

> "A client is entitled to all the information helpful to his cause within his attorney's command. If an attorney negligently or willfully withholds from his client information material to the client's decision to pursue a given course

> of action, or to abstain thereform, then the attorney is liable for the client's losses suffered as a result of action taken without benefit of the undisclosed material facts. Material facts are those which, if known to the client, might well have caused him, acting as a reasonable man, to alter his proposed course of conduct." (361 F. Supp. at 39-40)

True, an exception to this rule exists when an attorney is not engaged in the common representation of multiple clients, but instead represents them separately. If he learns facts from one client detrimental to that client's interest and advantageous to the other client's interest, he may not disclose those facts to the other client. N.Y. State 525 (1980); N.Y. State 512 (1979); ABA 341 (1975); ABA Inf. 1476 (1981).[1] But in the absence of compelling reasons, this or any other exception to the general rule requiring disclosure to clients, should not be broadened or implied to preclude disclosure by the attorney to all his joint clients of material information he learned from one of them.

We do not find any compelling reasons here for deviating from that general rule of disclosure. To the contrary, the attorney should not be permitted to be relieved of his primary and preexisting duty of disclosure because of his subsequent agreement or unwitting acquiescence (as here) to hold information from one joint client in confidence from the other. We would do violence to the underpinnings of ethical concepts if any attorney's duty and his clients' rights could be nullified by the attorney's own acts of commission or omission, however well-intentioned or inadvertent.

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[1] But see, N.Y. County 270 (1929), cited approvingly in Drinker, Legal Ethics at 95 and n.10; 134 and n.35 (1953). In that case, a client introduced a woman to his lawyer for legal advice and service, who later indicated her intention to marry that client. It was decided the lawyer was bound to advise her of prior sexual offenses by the client which were a matter of public record in earlier judicial proceedings; and that he should withdraw as her attorney.

This decision typifies an unwillingness to impose silence on the attorney (as an exception to the general duty of disclosure), beyond the needs of justifiable policy.

Given the alternative of violating the lawyer's professional obligations of disclosure or violating his consensual agreement with one of his joint clients, the choice favoring disclosure to the other joint client seems clear. Certainly this is true in the partnership context.

2. The attorney's primary and overriding duty is to the partnership and not to any individual partner. Correlatively, the partnership entity has a right to its attorney's undivided loyalty. Such rights and duties are no different than those that exist in a corporate or similar setting. As EC 5-18 provides:

> "A lawyer employed or retained by a corporation or similar entity owes his allegiance to the entity and not to a stockholder, director, officer, employee, representative, or other person connected with the entity. In advising the entity, a lawyer should keep paramount its interests and his professional judgment should not be influenced by the personal desires of any person or organization."

These principles of an attorney's duty of undivided loyalty to the entity that employs him and of his duty to advise that entity uninfluenced by the desires of any person, were applied in ABA 202 (1940). In that case, it was decided that a lawyer for a trust company should disclose to its board of directors the information he learned from the executive officers of the company concerning their wrongdoing. The Committee reasoned that the trust company's board of directors was its governing body and that disclosure to them should be made "in order that they may take such action as they deem necessary to protect the trust company from the wrongful acts of its executive officers." That disclosure, the Committee added, "would be to the client itself and not to a third person."

Here, the partnership's governing body consists of both partners, and there is no basis for differentiating the duty of an attorney for a partnership from the duty of an attorney for a corporation or other business entity.[2] Whatever the form of the entity, its governing body is entitled to disclosure so that action may be taken to protect that entity's interests.

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[2] In this case, we are dealing with a partnership consisting of only general partners. We leave aside questions that may arise concerning an attorney's discretion or conduct to make disclosure to limited partners in a limited partnership setting or to stockholders in a corporate setting.

However, it may be argued that ABA 202, and the partnership analogy, are not dispositive because nothing in that opinion suggests any agreement or tacit acquiescence by the corporate attorney that he would keep any information received from the corporate officers in confidence from the board. Again we confront the issue whether the attorney's intentional or unwitting conduct in receiving information confidentially, can nullify his primary and preexisting duties of undivided loyalty and disclosure to the persons or entity employing him. Again, we conclude, for the same reasons previously discussed, that the attorney cannot be relieved or excused from fulfilling those duties by his own acts of commission or omission that are inconsistent with those duties, even if that results in his breach of an express or implied agreement with one of the partners to maintain confidentiality.

In addition, EC 5-16 cautions that "before a lawyer may represent multiple clients he should explain fully to each client the implications of a common representation and should accept or continue employment only if the clients consent." One of the implications of a common representation of a partnership is the attorney's discretion and duty to disclose to all partners, material facts concerning partnership affairs which he may learn from any one of the partners. Otherwise, he may find himself in a position of conflict such as the one arising here.

Whatever may be said retrospectively concerning Lawyer L's failure to advise and obtain the consent of the partners concerning this implication of the common representation and his later inadvertent receipt of B's communication in confidence, we believe that the Committee should be prospectively announcing a firm rule favoring disclosure by an attorney to all his joint clients. In this way, attorneys undertaking common representation of multiple clients shall be warned to advise their joint clients properly during all stages of that representation, and the rights of those clients shall be protected.

3. Unquestionably, as the majority opinion concedes, when an attorney acts for joint clients, communications to him from one of the clients on the subject of the common representation are not privileged as between the clients in subsequent litigation between them. Wallace v. Wallace, 216 N.Y. 28, 36 (1915); Matter of Friedman, 64 A.D.2d 70, 84 (2d Dep't 1978); Schaeffer

v. Utica Mutual Insurance Co., 248 A.D. 279, 289 (4th Dep't 1936); Liberty Mutual Insurance Company v. Engels, 41 M.2d 49, 51 (Sup. Ct. Kings Cty. 1963); Richard, Evidence § 413 (10th rev. ed., 1973); 8 Wigmore, Evidence § 2312 (McNaughton rev. 1961); Annot. 4 A.L.R. 4th 765 (1981).

The majority opinion goes on to label this as an "exception" to the evidentiary attorney-client privilege, contending that this exception, by its very terms, applies only in subsequent litigation between the clients. From this, it is concluded that, in the circumstances here, disclosure by the attorney is forbidden at any time before the attorney is called, if ever, to testify about the conversation in a subsequent litigation.

This anomalous result is based on the erroneous premise that the attorney's testimony is an exception to the attorney-client privilege which forbids the attorney's disclosure to third parties of confidential communications received from the client unless the client consents. Rather, as among joint clients, the attorney-client privilege simply does not exist with respect to communications from one of them to their common attorney. As Wigmore has explained the rationale of this rule, the common interest of the joint clients and their employment of a single attorney to represent them, "'forbade concealment by either from the other'" of any communication either of them made to the joint attorney. Hence, the attorney is free to testify. Wallace v. Wallace, 216 N.Y. 28, 36 (1915), quoting Wigmore with approval.

On the same rationale, the attorney should be free to disclose the information to all his joint clients as soon as he receives it from one of them. To conclude otherwise, that the attorney must maintain silence until such time as he is called upon to testify, is to require him, as a matter of professional ethics, to participate in a forbidden concealment from one of his joint clients for some indeterminate period of time.

Thus, in permitting disclosure by the attorney to all his joint clients, the attorney-client privilege and the attorney's ethical obligation to preserve the secrets and confidences of his clients are not being undermined in any way. Instead, a rule permitting disclosure to all joint clients reaffirms the rights of those clients to such disclosure and to their attorney's undivided loyalty.

CONCLUSION

For the reasons stated, while it is agreed that Lawyer L must withdraw from further representation of the partners with respect to the partnership affairs, it is the opinion of a minority of the Committee that Lawyer L has a duty, or at least the discretion, to disclose to partner A what partner B has told him.
