NEW YORK STATE BAR ASSOCIATION

Committee on Professional Ethics

Opinion 645 - 5/3/93 (61-92)

Topic: Client confidences and secrets.

Digest: A lawyer whose appointment to a town board would require disclosure of client confidences or secrets must either (1) obtain client consent to the disclosure, (2) obtain a declaratory judgment that the disclosure law does not apply to the lawyer or (3) not accept appointment to the board.

Code: Canon 4
EC 1-5
DR 2-110, DR 4-101(A), (B), (C).

QUESTION

A lawyer expects to be appointed as a member of the Town Board of Assessment Review, at which time the lawyer will be subject to the town's Ethics and Disclosure Law. That law requires a member of the board annually to disclose certain interests held within the previous twelve months, including interests of the member's spouse, as well as any firm, partnership or association with which the member is involved. One question on the disclosure form requires the officer to list:

> all notes and accounts receivable in excess of one thousand dollars (1,000.00) held by you or your spouse due from any entity doing business with the Town … or any agency or board thereof.

The lawyer has several clients who do business with the Town, and the lawyer may have accounts receivable from such clients that exceed $1,000.

May or must the lawyer comply with the disclosure law?

OPINION

This opinion discusses the obligations of a lawyer who contemplates accepting a position that might involve the disclosure of certain information about

the lawyer's clients – the name of the client and, implicitly, the fact of the representation, and the amount of a legal fee.

An important professional obligation under the Code of Professional Responsibility is the preservation of the confidences and secrets of a client. Canon 4. The Code also provides that lawyers should avoid even minor violations of law. EC 1-5. Legally mandated disclosure requirements have created a great deal of controversy within the Bar because of the difficulty of complying with these two Code requirements.

DR 4-101(B) provides that a lawyer may not knowingly reveal a confidence or secret of the client unless one of the exceptions set forth in DR 4-101(C) applies. Thus, the first issue is whether the town's law would require disclosure of either a confidence or secret.

As used in DR 4-101(B), the term "confidence" refers to information protected by the attorney-client privilege under applicable law. This Committee does not answer questions of law. We note, however, that courts generally have held that the attorney-client privilege does not extend to the identity of the client or the fact of consultation, because the disclosure of these items does not reveal the content of any communications between the client and the lawyer, and such information usually has not been disclosed by the client for the purpose of obtaining legal advice. *See* 8 John H. Wigmore, *Evidence in Trials at Common Law*, §2313 (John T. McNaughton rev. ed. 1961); Charles W. Wolfram, *Legal Ethics*, §6.3.5 at 259-60 (1986); *Colton v. United States*, 306 F.2d 622 (2d Cir. 1962), *cert. denied* 371 U.S. 951 (1963) (fact of consultation); *see generally* Annot., *Disclosure of Name, Identity, Address, Occupation, or Business of Client as Violation of Attorney-Client Privilege*, 16 A.L.R.3d 1047 (1967); Steven Goode, *Identity, Fees, and the Attorney-Client Privilege*, 59 Geo. Wash. L. Rev. 307 (1991). The principal exception to this general rule applies where the fact of representation would implicate the client in unlawful activities and the client might thereby be subject to criminal or civil liability. *See generally* ABA/BNA Lawyers' Manual on Professional Conduct 55:307 [hereinafter ABA/BNA Manual].

The authorities are less uniform as to whether information about legal fees falls within the attorney-client privilege. Many courts have held that information about fee arrangements is not protected under the attorney-client privilege unless the fees constitute the last link between the client and criminal activity. *See In re Shargel*, 742 F.2d 61, 62 (2d Cir. 1984) (fees); *see generally* ABA/BNA Manual 55:309. At least one court has held that an ethics-in-government law requiring public officeholders to report the names of substantial fee-paying clients does not impinge upon the attorney-client privilege. *Hays v. Wood*, 25 Cal. 3d 772, 160 Cal. Rptr. 102, 603 P.2d 19 (1979).[1]

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[1] Like the statute at issue here, the statute in *Hays* did not require disclosure of the actual amount of the legal fee, but only the fact that it exceeded $1,000.

Even if the information is not protected as a confidence, it would be shielded from disclosure if it is a "secret." The term "secret," which is much broader in scope than the term "confidence," is defined as "other information gained in the professional relationship that the client has requested by held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client." DR 4-101(A).

A number of ethics committees have found that the name of a client may be a secret. *See, e.g.,* ABA Inf. Op. 1287 (1974) (name, address and telephone number of legal service office's client are secrets because revelation of representation may embarrass the client); North Carolina Ethics Op. 21 (1987) (indexed in ABA/BNA Manual at 901:6604) (client's identity must be kept confidential where disclosure would be physically or economically detrimental to the client). *See also* Md. Inf. Op. 78-4 (1977) (indexed in Maru's Digest at 11333) (legal aid attorney cannot reveal client identity to other agencies); Md. Inf. Op. 76-56 (1976) (indexed in Maru's Digest at 11285) (attorney should not comply with County Council's Bill and disclose client identity and fee information); Mo. Op. 111 (1974) (indexed in Maru's Digest at 8707) (lawyer cannot disclose client and fee information required by Campaign Spending Reform Act without client consent); Ohio Op. 90-4 (1990) (indexed in ABA/BNA Manual at 901:6865) (lawyer may not reveal cash fee to Internal Revenue Service, but must inform client about IRS requirement). *Contra* Alaska Op. 85-6 (1985) (indexed in ABA/BNA Manual at 801:1205) (client's name is not a secret even where client requested that it be kept confidential); Ill. Op. 414 (1973) (indexed in Maru's Digest at 8333).

Whether particular information constitutes a secret is a question of fact that the lawyer must determine. We agree, however, with those ethics committees that have found that a client's name and the fact of representation could constitute a secret in some circumstances. In many cases, the fact that a person has consulted counsel and has paid or owes more than $1,000 for legal services will be neither embarrassing nor detrimental to the client. In other cases, however, such information might be embarrassing or detrimental. For example, the fact that a client has consulted a divorce lawyer or a criminal defense lawyer or has an outstanding unpaid debt may be embarrassing. Even if not embarrassing or detrimental, the client may have requested that the information not be disclosed. In these cases, the information would be a secret that cannot be divulged without consent unless an exception in DR 4-101(C) applies.

If the lawyer accepts appointment to the town board, the lawyer must comply with the disclosure law. EC 1-5. The lawyer, however, may not ethically disclose on the annual disclosure form any information that constitutes a client confidence or secret. We do not think that the exception provided by DR 4-101(C)(2), which permits the lawyer to reveal a secret when required by law,

should apply in this situation since the lawyer can, by declining appointment to the Town Board, avoid having to comply with the disclosure law. Consequently, the lawyer cannot properly claim that disclosure of the requisite information is truly "required" by law.

One way the lawyer may comply with the disclosure law is to obtain consent from each client whose name it is reasonably foreseeable that the lawyer will be required to reveal, that is, any client who is doing business with the town and who may at any time during the applicable period owe more than $1,000 of legal fees to the lawyer. (A lawyer may reveal a confidence or secret with the consent of the client. DR 4-101[C][1].) The lawyer also must recognize that existing clients may, in the future, begin to do business with the town and refuse to consent to disclosure. The lawyer could not then disclose the client's name without violating the ethical obligation to the client; yet, failure to disclose could be a violation of law. Thus, prior to accepting appointment to the board, the lawyer should also obtain consent from any existing client who is doing business with the town.[2] This consent must be accompanied by full disclosure to the client of the pertinent facts and the implications of the consent.

If any client refuses to consent to the disclosure, the lawyer has three alternatives. If there is a continuing representation, the lawyer may seek to withdraw from the representation. DR 2-110(C) permits withdrawal from a representation in various specified circumstances and also where the withdrawal can be accomplished without material adverse effect on the interests of the client. In a matter pending before a tribunal, the permission of the tribunal must be obtained if required by the rules of the tribunal. DR 2-110(A)(1). If the representation has ended, withdrawal is not an option. Second, the lawyer can petition the appropriate court for a determination of the validity of the disclosure law as applied to the lawyer. If a court determines that the disclosure law is not to be applied to the lawyer, then service on the board would be permissible because disclosure would not be required. Absent such a determination, the lawyer should decline appointment to the board because service on the board is inconsistent with the lawyer's obligations to the client.

If the lawyer is able to accept appointment to the board, the lawyer has continuing obligations. If an existing client from whom consent was not obtained begins doing business with the town, the lawyer should make appropriate disclosure to the client and obtain the client's consent. If the client refuses to consent, the lawyer must withdraw from the representation if that is permissible. DR 2-110.

The lawyer also must disclose to and obtain consent from new clients who are doing or are reasonably likely to do business with the town prior to accepting

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[2] It also would be prudent for the lawyer to obtain consent from anyone the lawyer reasonably believes may begin doing business with the town in the future.

the engagement. If the client refuses to consent, the lawyer must decline the representation.

Thus, the lawyer is able to accept appointment to the board only if all the lawyer's clients, for whom information is mandated by the disclosure law, consent to disclosure or if the lawyer has a reasonable belief that, due to the nature of the lawyer's practice, the lawyer's clients are unlikely to do business with the town while the lawyer is a member of the board.

If, however, subsequent to joining the board, the lawyer is placed in the position of needing to disclose a client's name, the client refuses to consent, and withdrawal is not possible, the lawyer would be ethically obligated to resign from the board if, as a matter of law, that would avoid the lawyer's having to file the disclosure statement. If, however, resigning would not relieve the lawyer of the filing obligation, the lawyer has two options. The lawyer could file the disclosure statement with a notation that required information is protected under DR 4-101(C) as a confidence or secret,[3] thereby triggering, presumably, legal action on the part of the town to sanction the lawyer for noncompliance with the disclosure law. Alternatively, the lawyer can commence a declaratory judgment action or some other appropriate procedure designed to obtain a court determination on the disclosure law.[4] Under either alternative, if the court orders the lawyer to comply, the lawyer would be required to do so pursuant to DR 4-101(C)(2).

CONCLUSION

For the reasons stated above, we conclude that under Canon 4 of the Code, a lawyer would have an ethical obligation to decline a government position that would require disclosure of existing client secrets (absent valid client consent). For similar ethical reasons, a lawyer who takes a governmental position with a reasonable belief that no existing clients' secrets are, or would be, subject to an applicable disclosure law, would be ethically obligated to resign his or her position if that would avoid the necessity of filing the required disclosure statement. Subject to the qualifications set forth in this opinion, the question posed is answered in the affirmative.

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3 *See* Wisc. Formal Op. E-90-3 (1990) (lawyer whose client does not consent to disclosure of his fee to the Internal Revenue Service must file the required IRS form with a statement asserting confidentiality and evidentiary and constitutional privileges).

4 Any court proceeding should be conducted in a manner to preserve the confidences and secrets of the client such as conducting the proceeding in camera and/or under seal, and the client should be given notice of the proceeding.