BY DAVID D. DODGE

Privilege Is Only Part of the Picture

Keeping Client Confidences Under Wraps

David D. Dodge is a partner in the Phoenix law firm Lieberman, Dodge, Gerding, Kothe & Anderson, Ltd. He is a former Chair of the Disciplinary Commission of the Arizona Supreme Court.

OUR DUTY TO KEEP CONFIDENTIAL all matters relating to clients is well known. That principle comes from two sources: First, there is the attorney–client privilege and the work product doctrine, found in the law of evidence and the discovery rules. Second, there is the obligation of confidentiality established in our rules of professional ethics. The attorney–client privilege applies in proceedings in which a lawyer may be called as a witness or required to produce evidence concerning the client; the ethical requirement applies in situations other than those in which evidence is sought from the lawyer by legal means. The confidentiality rule applies not merely to matters communicated in confidence but also to information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized by the client, unless required by the Arizona Rules of Professional Conduct[1] or unless allowed by statute.[2]

An ethics opinion from New York indicates how extensive a lawyer's duty of confidentiality can be. In Opinion 98-6, released on October 8, 1998, the Nassau County Bar Association Committee on Professional Ethics advised that a lawyer who learns during the course of representation that another attorney had embezzled the client's funds must not disclose this information if the client directs the new lawyer to keep it secret.

The lawyer making the inquiry to the committee learned, in the course of representing his client, that another attorney had embezzled the client's funds. The embezzling lawyer had agreed to confess judgment, which the new lawyer was hired to collect. The committee noted that the inquiry illustrated the "prevailing confusion among attorneys" with respect to the distinction between a "confidence" and a "secret," a distinction found in the old disciplinary rules but not articulated in the Model Rules of Professional Conduct adopted in Arizona in 1983.

The committee stated that a "confidence" refers to information protected by the attorney–client privilege, whereas "secret" refers to other information gained in a professional relationship that the client has requested be held confidential. Absent client consent, "secrets" may be revealed only under certain circumstances, such as when the lawyer reasonably believes revealing the information would be necessary to prevent the client from committing a criminal act that is likely to result in death or substantial bodily harm.[3]

The committee acknowledged that "lawyers of probity" may feel uncomfortable about the client's ability to withhold such information from others and stated that the lawyer may withdraw from representation subject to the ethical requirements of court approval where necessary and subject to advance notice to the client and the return of client papers and any unearned fees.

The Arizona Bar Ethics Committee came to a similar conclusion in Opinion No. 91-02 (January 15, 1991). There, the inquiring attorney discovered that, as a result of a mistake by the Industrial Commission in calculating the amount of the award, his client had been receiving monthly checks from the commission that were larger than those to which he was entitled. The lawyer also was concerned because he had been taking 25 percent of each check as his fee in accordance with a written fee agreement.

Holding that the matter of overpayment as well as the fee was "information relating to representation of a client," the Ethics Committee stated that the information could not be disclosed to anybody by the inquiring attorney unless the client agreed or unless the situation fell within one of the other exceptions as set forth in ER 1.6(b) or ER 3.3(a)(2). Because the matter did not involve a decision of whether to disclose information to a tribunal, ER 3.3(a)(2) did not apply. Moreover, because disclosure of the information would have disclosed his client's past transgressions (assuming the client was aware that he was getting more than he was entitled to), the lawyer was not authorized by any provision of the Rules of Professional Conduct to disclose it.[4]

The Ethics Committee concluded that the inquiring lawyer could not allow future monthly compensation checks to continue to pass through his trust account while collecting his fee from them. The Committee suggested that the lawyer withdraw from future representation and that any fees owing by the client to the lawyer in the future should be collected by the attorney directly from the client. All fees based on excessive payments were to be refunded to the Industrial Commission through an intermediary.

Whenever you are asked by a client to keep secret the fact of a criminal or fraudulent act, the rule of thumb to apply is that you must honor that request unless you are confronted with one of two situations: (1) You reasonably believe it is necessary to reveal such information to prevent the client from committing a criminal act that is likely to result in death or substantial bodily harm, or (2) you are in litigation and the failure to disclose the secret to the tribunal would implicate you in assisting the client in a fraudulent or criminal act.[5]

ENDNOTES

1. Rule 42, ARIZ.R.S.CT.
2. See A.R.S. § 46-454 and Opinion No. 2001-02, Arizona Bar Ethics Committee (lawyer may ethically disclose information required to be reported concerning statutorily protected person).
3. See ER 1.6(b), Arizona Rules of Professional Conduct.
4. Disclosure of a client's *past* crimes, except for frauds on a tribunal in some circumstances (see ER 3.3(a)), is not authorized by any provision of the Rules of Professional Conduct.
5. For guidance in these situations, see STUART, THE ETHICAL TRIAL LAWYER § 14.1 *et seq*. (1994).

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