Disclosure of a Client's Identity: The Ethical Dilemma

When is it permissible for an attorney to withhold his client's identity from a Court? Neither the Model Code of Professional Responsibility nor the "new" Model Rules specifically address the ethical considerations concerning disclosure of a client's identity. Canon 4 of the Model Code of Professional Responsibility states, "A Lawyer Should Preserve the Confidences and Secrets of a Client."[1] "Confidence" is defined in the disciplinary rules as information protected under the attorney-client privilege.[2] The ethical duty of confidentiality, though, is much broader than simply including information protected under the attorney-client privilege; it also includes any "secret" a client may reveal to his attorney. "Secret" is defined as information requested by the client to be held inviolate, or is such that disclosure would be embarrassing or detrimental to the client.[3] If an attorney receives information that can be classified under one of the above definitions, he has a duty to preserve such information in accordance with the disciplinary rules under Canon 4.[4]

The problem presented by information concerning a client's identity is trying to classify such as either a "confidence" or a "secret." Very few cases exist in which the court commented on the ethical considerations of disclosure. Many cases cited in this article involve only the evidentiary aspect of the attorney-client privilege.[5] These cases will be useful, however, because the privilege is included as part of the definition of a "confidence" in Canon 4. Although these cases deal with the evidentiary aspect of the privilege, the attorney's ethical duty to preserve his client's confidences is usually the basis for his decision to withhold his client's identity.

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1. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 4 (1981).
2. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(A) (1981).
3. *Id.*
4. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(B)-(D) (1981).
5. This article is not intended to be an in-depth study of the evidentiary aspect of a client's identity under the attorney-client privilege. For a comprehensive study of the attorney-client privilege see, Note, *The Attorney-Client Privilege: Fixed Rules, Balancing, and Constitutional Entitlement*, 91 HARV. L. REV. 464 (1977).

Generally, a client's identity is not protected under the attorney-client privilege.[6] Jurisdictions use various rationales as a basis for this rule. Some courts simply don't consider a client's identity as privileged information.[7] Other courts hold that a client must be named when invoking the privilege in order to establish the attorney-client relationship.[8] Regardless of the rationale, most jurisdictions adhere to the general rule.[9] However, the rule is not without exceptions. For instance, if so much information regarding an attorney-client relationship has been revealed that disclosure of the client's identity would expose the entire communication, an attorney may refuse to disclose his client's identity.[10] It has been held that if disclosure would subject the client to civil liability, such identity could be withheld.[11] The same rule applies to disclosure that would subject the client to criminal liability for past crimes.[12] Of course, if the client's identity is expressed to the attorney as part of a confidential communication, it will be protected under the privilege.[13] Thus, a client's identity must fall under one of the above rules in order for it to be privileged. The courts applying these rules are only concerned with the evidentiary privilege and do not consider the broader ethical aspects of the privilege, namely "secrets." However, one court has held that if disclosure of a client's identity would be embarrassing or detrimental to the client,

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6. *E.g.*, *In re* Grand Jury Proceedings, 600 F.2d 215 (9th Cir. 1979); *In re* Senel, 411 F.2d 195 (3rd Cir.), *cert. denied*, 396 U.S. 905 (1969); Matter of Grand Jury Subpoenas Served Upon Field, 408 F. Supp. 1169 (S.D.N.Y. 1976); United States v. Dickinson, 308 F. Supp. 900 (Ariz. 1969), *aff'd*, 421 F.2d 702 (9th Cir. 1970); Arris v. State, 281 Ala. 622, 206 So. 2d 868 (1968); People v. Sullivan, 271 Cal. App. 2d 531, 77 Cal. Rptr. 25, *cert. denied*, 396 U.S. 973 (1969); Matter of Jacqueline F., 47 N.Y.2d 215, 391 N.E.2d 967, 417 N.Y.S.2d 884 (1979).

7. *See* Behrens v. Hironimous, 170 F.2d 627 (4th Cir. 1948).

8. People *ex rel* Vogelstein v. Warden of County Jail, 150 Misc. 714, 270 N.Y.S. 362 (N.Y. Sup. Ct. 1934).

9. *See, supra* note 6.

10. *E.g.*, NLRB v. Harvey, 349 F.2d 900 (4th Cir. 1964); *see* Baird v. Koevner, 279 F.2d 623 (9th Cir. 1960); Morris v. State, 4 Md. App. 252, 242 A.2d 559 (1968).

11. *See* Neugass v. Terminal Cab Corp., 139 Misc. 699, 249 N.Y.S. 631 (N.Y. Sup. Ct. 1931).

12. *In re* Grand Jury Proceedings, 600 F.2d 215 (9th Cir. 1979); People v. Sullivan, 271 Cal. App. 2d 531, 77 Cal. Rptr. 25 (1969).

13. NLRB v. Harvey, 264 F. Supp. 770 (W.D. Va. 1966); Matter of Kozlov, 29 N.J. 232, 398 A.2d 882 (1979); Potamkin Cadillac Corp. v. Karmgard, 100 Misc. 2d 627, 420 N.Y.S.2d 104 (N.Y. Civ. Ct. 1979) (address of client).

the attorney should refuse to disclose it.[14]

Once a client's identity is determined to fall under the protection of the privilege, the protection is not absolute. An attorney is obligated to disclose his client's identity, regardless of whether it is privileged if his client is a party to a pending litigation.[15] The client's identity must also be disclosed if the privilege is invoked to cloak illegal activity.[16] In some cases, the court will use a balancing test in making its determination regarding disclosure.[17] The test usually involves a balancing of the interests of the court in the administration of justice against the right of freedom of communication between a client and his attorney.

The question of whether information concerning a client's identity is privileged is one of fact.[18] Thus, every case will be decided based on its own particular set of circumstances.[19]

In *Matter of Kozlov*,[20] a client, while consulting Kozlov on an unrelated legal matter, revealed that a juror in a highly publicized criminal trial, in which the defendant was convicted, boasted of his prejudice towards the defendant. The juror had stated to the client that he purposefully remained silent during *voir dire* in order to get even with the defendant. Kozlov's client instructed him to reveal the information, but to hold his name in confidence. Kozlov followed his client's instructions, and was cited for contempt. The Supreme Court of New Jersey reversed the trial court stating that the privilege of confidentiality enjoyed by Kozlov and his client

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14. Colman v. Heidenreich, 269 Ind. 419, 381 N.E.2d 866 (1978).

15. *See, e.g.*, Matter of Jacqueline F., 47 N.Y.2d 215, 391 N.E.2d 967, 417 N.Y.S.2d 884 (1979).

16. *In re* Grand Jury Proceedings, 600 F.2d 215 (9th Cir. 1979); Brennan v. Brennan, 281 Pa. Super. 362, 422 A.2d 510 (1980); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 4-101(C)(3) (1981).

17. Matter of Kozlov, 29 N.J. at ___, 398 A.2d at 886; *see* Taylor v. Taylor, 45 Ill. App. 2d 352, 359 N.E.2d 820 (1977); *See also*, Note, *Evidence—Client's identity protected by attorney-client privilege when, as a distinguished informer, client reveals to attorney facts showing a juror's possible bias in the criminal trial of convicted defendant. In re Kozlov, 79 N.J. 232, 398 A.2d 882 (1979)*, 11 RUTCAM. L.J. 485 (1980).

18. Harris v. State, 281 Ala. 622, 206 So. 2d 868 (1968); Matter of Jacqueline F., 47 N.Y.2d 215, 391 N.E.2d 967, 417 N.Y.S.2d 884 (1979).

19. Matter of Kozlov, 29 N.J. 232, 398 A.2d 882 (1979); Potamkin Cadillac Corp. v. Karmgard, 100 Misc. 2d 627, 420 N.Y.S.2d 104 (N.Y. Civ. Ct. 1979).

20. 29 N.J. 232, 398 A.2d 882 (1979).

outweighed the court's need to search for the truth.[21] One important point which influenced the court's holding was the fact that Kozlov's client provided the information to prevent the commission of a crime.[22] The court hinted that the outcome may have been different if the information concerned the perpetration of a crime.

In *People v. Sullivan*,[23] an attorney retrieved a box for his client containing three handguns used in a previous robbery. The attorney used his client's claim check to obtain the box. He testified in the trial of the robbery concerning the identity of the guns, but refused to disclose his client's identity. The California Court of Appeals upheld his right of privilege noting that any information that might subject an attorney's client to criminal liability for a previous crime was privileged.[24]

In *Colman v. Heidenreich*,[25] an attorney was informed by his client, while counselling him on an unrelated matter, that a female friend of his was the hit-and-run driver who had injured an Indiana track star. Michael Tabereaux was currently being tried for that crime. The attorney's client asked that neither name be disclosed to the authorities. Colman, the attorney, revealed this information to the prosecutor, who in turn told the defendant. The defendant was granted a hearing on this matter and called Colman as a witness. Colman refused to disclose either name claiming that such was protected under the attorney-client privilege.[26] The court upheld the privilege stating that disclosure of the client's identity would be highly embarrassing or detrimental to the client.[27] This is the only reported case that uses the ethical definition of "secret" in making a determination regarding privilege.

Child custody cases often involve a lawyer trying to withhold his client's address. For example, *Matter of Jacqueline F.*[28] in-

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21. 29 N.J. at ___, 398 A.2d at 886.

22. 29 N.J. at ___, 398 A.2d at 887.

23. 271 Cal. App. 2d 531, 77 Cal. Rptr. 25 (1969).

24. 271 Cal. App. 2d at ___, 77 Cal. Rptr. at 33.

25. 269 Ind. 419, 381 N.E.2d 866 (1978).

26. The girl had previously been a client of Colman. However she had not talked with Colman concerning this matter. Thus, the court held that she was not a client, and could not invoke the attorney-client privilege. 269 Ind. at ___, 381 N.E.2d at 871.

27. *Id.*

28. 47 N.Y.2d 215, 391 N.E.2d 967, 417 N.Y.S.2d 884 (1979).

volved an attempt of a child's natural parents to regain custody of their child. The child's aunt was its current legal guardian. When the natural parents instituted custody proceedings, the aunt took the child out of the country. The aunt instructed her attorney not to reveal her whereabouts to the court. When questioned about his client's whereabouts, the attorney respected her wishes. In affirming the trial court's order for disclosure of the aunt's whereabouts, the court held that the interest in the welfare of the child was paramount to any claim of privilege.[29] This outcome is common in cases of this type.[30] However instead of using the "welfare of the child" rationale, some courts simply hold that the attorney's refusal to disclose his client's name is within the privilege unless clearly shown to frustrate the legal process.[31]

The ABA basically adheres to the same rules as the above judicial decisions.[32] However, there is a conflict concerning an attorney's duty to disclose the whereabouts of his fugitive client. In Formal Opinion 23,[33] the attorney's client disappeared, forfeiting his bail. The client's relatives asked the attorney to find him and gave him confidential information concerning his possible whereabouts. The committee held that in this situation the attorney should not disclose his client's whereabouts. The committee held "[T]o hold that an attorney should reveal confidential information which he has attained, by virtue of his professional employment, from members of the family of the criminal would prevent the frank disclosure that is necessary or proper protection of the client's interest."[34]

A similar situation arose in Formal Opinion 155.[35] However, here the committee held that the attorney had an obligation to disclose the whereabouts of his fugitive client, and if the client should refuse to surrender, the attorney should withdraw from the case.

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29. 47 N.Y.2d at ___, 391 N.E.2d at 971, 417 N.Y.S.2d at ___.

30. *See, e.g.*, Jafarian-Kerman v. Jafarian-Kerman, 424 S.W.2d 333 (Mo. App. 1967); Dike v. Dike, 75 Wash. 2d 1, 448 P.2d 490 (1968).

31. *E.g.*, Brennan v. Brennan, 281 Pa. Super. 362, 422 A.2d 510 (1980).

32. ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1267 (1976); ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1188 (1971); ABA Comm. on Professional Ethics, Informal Op. 1002 (1968).

33. ABA Comm. on Ethics and Professional Responsibility, Formal Op. 23 (1980).

34. *Id.*

35. ABA Comm. on Professional Ethics and Grievances, Formal Op. 155 (1936).

The committee recognized Formal Opinion 23, and held that the two opinions were not in conflict.[36] No reason was given for this statement. The only distinction between the two opinions is that in one case the attorney received the information from the client's relatives, whereas in the other he received the information directly from the client. There is no evidence that the committee noted this distinction. Regardless of that fact, other opinions have followed Formal Opinion 155, but have neglected to overrule Formal Opinion 23.[37] Thus, the conflict still exists. These opinions only concerned the narrow issue of a client's identity, and did not involve the broader concept of confidentiality.

A major problem concerning disclosure is the risks an attorney must endure in order to obtain a ruling. In most cases the attorney must go so far as to be cited for contempt before the court rules on whether the client's identity is privileged.[38] An adverse ruling can be very detrimental to an attorney. The judiciary and the bar should attempt to remedy this situation, and reduce the risks involved in nondisclosure. One suggestion is that a specific rule regarding disclosure should be developed. Another proposal is that the courts should decide this issue early in the proceeding without the threat of contempt charges. These remedies would reduce the risks an attorney must face in this situation, and thereby ease the burden of upholding his ethical duty of confidentiality to his client.

This article has attempted to establish some guidelines for the attorney to follow when faced with this ethical dilemma. There is no "safe" choice for one to make in a disclosure situation. Whether the attorney is right or wrong, the chances are that he will be cited for contempt. Hopefully, something will be done in the near future to remedy this problem. Until then however, the attorney must continue to endure these unfair risks in order to maintain his duty to his client.

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36. *Id.*

37. ABA Comm. on Professional Ethics and Grievances, Formal Op. 287 (1953)(involving the attorneys disclosure of his client's perjury); ABA Comm. on Professional Ethics and Grievances, Formal Op. 202 (1940)(disclosure of wrongdoing in corporate structure).

38. *E.g.* Harris v. State, 281 Ala. 622, 206 So. 2d 868 (1968); Matter of Kozlov, 29 N.J. 232, 398 A.2d 882 (1979); Brennan v. Brennan, 281 Pa. Super. 362, 422 A.2d 510 (1980); Dike v. Dike, 75 Wash. 2d 1, 448 P.2d 490 (1968).