

The Supreme Court of Ohio

BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE

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OPINION 91-15

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[Withdrawn- by Opinion 2016-10 on December 9, 2016]

[CPR Opinion-provides advice under the Ohio Code of Professional Responsibility which is superseded by the Ohio Rules of Professional Conduct, eff. 2/1/2007.]

[Not current-subsequent amendments to O.R.C. § 2317.02, eff. Oct. 29, 1996.]

SYLLABUS: Confidences and secrets of a person who consults with an attorney regarding legal representation are protected by DR 4-101 (B) of the Code of Professional Responsibility even though the attorney is not hired to represent the person. However, if that person voluntarily testifies concerning a communication made by him to the attorney in that relation or the attorney's advice to him, and the attorney is compelled to testify as to the same subject under Section 2317.02 of the Ohio Revised Code, the attorney may reveal confidences and secrets under DR 4-101 (C).

OPINION: We have before us a request for an advisory opinion regarding an attorney's ethical obligation to preserve client confidences and secrets when called to testify as an impeachment witness. The facts presented are as follows: an attorney discusses possible representation in a criminal matter with X in the presence of Y and Z, during which time the entire facts of the case are discussed; X does not retain that attorney but retains another attorney; X is convicted; Y is subsequently indicted on a similar charge arising out of the same facts as X's case; X's story is now different from that told to the attorney he did not hire. The question is whether the attorney whom X consulted but did not hire can testify as an impeachment witness regarding their conversation which took place in the presence of Y and Z, assuming that at Y's trial X denies telling the attorney a different story than X now tells.

The broad mandate of Canon 4 of the Code of Professional Responsibility (Code) is that "[a] lawyer should preserve the confidences and secrets of a client." The rule of confidentiality is set forth in DR 4-101. DR 4-101 (B) provides that

- (B) Except when permitted under DR 4-101(C), a lawyer shall not knowingly:
 - (1) Reveal a confidence or secret of his client.
 - (2) Use a confidence or secret of his client to the disadvantage of the client.
 - (3) Use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure.

DR 4-101 (A) defines confidence as "information protected by the attorney-client privilege under applicable law" and secret as "other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client." As acknowledged by DR 4-101 (A) of the Code, certain communications between a client and attorney are protected by the attorney-client privilege. This privilege began as a common law rule but has been codified by Section 2317.02 (A) of the Ohio Revised Code.

[An attorney shall not testify] concerning a communication made to him by his client in that relation or his advice to his client, except that the attorney may testify by express consent of the client or, if the client is deceased, by the express consent of the surviving spouse or the executor or administrator of the estate of the deceased client and except that, if the client voluntarily testifies or is deemed by section 2151.421 of the Revised Code to have waived any testimonial privilege under this division, the attorney may be compelled to testify on the same subject.

OHIO REV. CODE ANN. § 2317.02 (A) (Baldwin Supp. 1990).

Thus, both the attorney client privilege and the confidentiality and secrets rule of the Code protect from disclosure the confidential communications between a client and attorney. These rules are exceptions to the traditional policy of the law that favors disclosure of all information so that truth and justice prevail, but serve an important function of promoting freedom of disclosure between an attorney and client. However, these rules prohibiting disclosure are not absolute. The exceptions to the confidentiality rule of the Code are set forth in DR 4-101 (C) as stated below.

- (C) A lawyer may reveal:
 - (1) Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them.
 - (2) Confidences or secrets when permitted under Disciplinary Rules or required by law or court order.
 - (3) The intention of his client to commit a crime and the information necessary to prevent the crime.

- (4) Confidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct.

Code of Professional Responsibility DR 4-101 (C) (1) (2) (3) (4) (emphasis added).

The exceptions which waive the attorney-client privilege are clearly stated within Section 2317.02 (A) of the Revised Code. For example, the attorney may be compelled to testify if the client expressly consents or if the client voluntarily testifies. Exceptions which waive the privilege are also created at common law. For example, the Supreme Court of Ohio has set forth the general rule that "a client's disclosure to a third party of communications made pursuant to the attorney-client privilege breaches the confidentiality underlying the privilege, and constitutes a waiver thereof." State v. Post, 32 Ohio St 3d. 380, 386, 513 NE 2d. 754, 761 (1987). However, the general rule "does not apply when such third person is the agent of either the client or the attorney." Foley v. Poschke, 137 Ohio St. 593, 595, 31 N.E. 2d 845, 846 (1941). Also at common law, when the same attorney acts for two parties having a common interest and each party communicates with the attorney, the communications are not privileged in a controversy between the two original parties. Emley v. Selepchak, 76 Ohio App. 257, 262, 63 N.E. 2d 919, 922 (1945).

The threshold question to be addressed in this opinion is whether the protection of the confidentiality and secrets rule and the attorney client privilege even extend to communications in a preliminary conference between a prospective client and an attorney. The Code suggests that the duty to preserve confidences and secrets does extend not only to clients but to prospective clients: "Both the fiduciary relationship existing between lawyer and client and the proper functioning of the legal system require the preservation by the lawyer of confidences and secrets of one who has employed or sought to employ him." EC 4-1 (emphasis added). See also, ABA, Formal Op. 90-358 (1990) (Information shared with a lawyer by a would-be client seeking legal representation is protected under Model Rule 1.6 even though the lawyer does not work for the would-be client.). Similarly, at common law the attorney-client privilege is extended to a person's communication with an attorney made during a preliminary conference prior to the actual acceptance or rejection by the attorney of the employment. Taylor v. Sheldon., 172 Ohio St. 118, 173 NE 2d 892

(1961). "In other words, communications made by a person to an attorney with the view of retaining the attorney to act on his behalf constitute privileged communications. It might well be said that a tentative attorney-client relationship exists during such period." Taylor, 172 Ohio St. at 121. Further, the statutory definition of client includes a person who consults an attorney for the purpose of retaining the attorney or securing legal service or advice from him in his professional capacity . . . and who communicates . . . with such attorney." OHIO REV. CODE ANN. § 2317.021 (Baldwin 1990). Accordingly, this committee is of the opinion that the protection of the Code's confidentiality and secrets rule and the attorney-client privilege extends to a person who consults with an attorney regarding legal representation even though the attorney is not hired to represent the person.

Thus, in answering the questions raised, the attorney would be bound by the Code to protect the confidences and secrets of X and could not reveal them unless an exception or waiver applied. However, the Board acknowledges that it is not within the Board's authority to answer the evidentiary question of whether or not the presence of Y and Z constitute a waiver of the statutory and common law attorney client privilege – that is a question of law for the court to answer. Nor, does the Board need to resolve this issue in order to reach a conclusion. Under DR 4-101 (C) (2), a lawyer may reveal "[c]onfidences or secrets when permitted under Disciplinary Rules or required by law or court order." Under the exception created within Section 2317.02 (A) of the Ohio Revised Code, if a client voluntarily testifies concerning a communication made by him to his attorney in that relation or the attorney's advice to him, then the attorney may be compelled to testify on the same subject. Thus, if X voluntarily testifies concerning a communication made by him to his attorney in that relation or the attorney's advice to him and the attorney is compelled to testify on the same subject under Section 2317.02 of the Revised Code, the attorney may reveal confidences and secrets under DR 4-101 (C).

Advisory Opinions of the Board of Commissioners on Grievances and Discipline are informal, non-binding opinions in response to prospective or hypothetical questions regarding the application of the Supreme Court Rules for the Government of the Bar of Ohio, the Supreme Court Rules for the Government of the Judiciary, the Code of Professional Responsibility, the Code of Judicial Conduct, and the Attorney's Oath of Office.