

ADVISORY ETHICS OPINION 85-07

SYNOPSIS:

It is not an attorney's duty to protect the confidential communications of a client so extensively that it requires the lawyer to purge the file of notes of those communications.

OPINION:

A divorce client has changed attorney during the pendency of her action. Her former attorney has given the new attorney everything in the divorce file except his notes of his interviews with the client. The notes contain information related to the attorney by the client, the attorney's impressions of the case, and his strategies for representing the client. The client now wants those notes destroyed and has demanded that the former attorney turn them over to her without making copies for his own file. The former attorney wants to retain the notes because they document what he did for the client and his thoroughness in preparing her case. Accordingly, the discharged attorney asks us whether he must comply with the former client's demand.

The facts suggest no fee dispute nor attorney's lien issue is present.¹ Nor is there any suggestion the discharged attorney failed to disclose to the client all legal alternatives he believed were available to her, based on his impressions of the case and the strategies he developed.² We therefore premise our opinion on the assumption that the attorney's impressions and strategies are his work product and therefore his property, rather than property of the client to which she would be entitled under EC 2-32 and DR2-110(A)(2) (requiring a withdrawing lawyer to avoid prejudice to the client by delivering to the client all papers and property to which the client is entitled).

With those preliminary considerations in mind, we see the ethical issue as being: Is an attorney's duty to protect the confidential communications of a client so extensive that it requires him to purge his own file of his own notes of those communications? In our opinion, the answer is no.

Confidentiality encourages people to seek legal assistance and permits lawyers to obtain all information necessary to protect their clients.³ A lawyer therefore must "hold inviolate the confidences and secrets of his client," EC 4-1, and he subjects himself to severe discipline if he reveals them or uses them to his client's disadvantage or his own advantage.⁴

By definition, however, attorney/client confidentiality involves one disclosure of a client's confidences or secrets, and that is the client's disclosure to his attorney. Only after that disclosure does the ethical precept of confidentiality come into play. At that point, absent specific circumstances, the lawyer's obligation to guard the client's confidences and secrets is absolute.

A lawyer cannot be compelled to forget a shared confidence or secret. Analogously, the law acknowledges the evidentiary attorney/client privilege may be waived. A client disclosing confidences and secrets to his attorney can expect the attorney will not reveal them, but he waives any right to object to the attorney knowing them.

DR4-101(C) contemplates a lawyer's right to retain his client's confidences and secrets, for it permits disclosure of them: (1) with the client's consent; (2) when otherwise permitted under the Disciplinary Rules or when required by court order; (3) to prevent a crime; and (4) to collect his fee or protect himself against accusations of wrongful conduct. Here the lawyer wishes to preserve his notes to document the extent and thoroughness of his efforts in behalf of his client; without stretching the imagination that purpose could fit within all of the categories of permitted disclosure, except the first.

If a lawyer must learn his client's confidences and secrets to represent his client competently, and if the Code permits the lawyer to retain and reveal those confidences and secrets for various purposes which may arise in the future and over which the lawyer may have no control, it stands to reason that a lawyer may keep his own record of his communications with his clients for so long as he practices. The Code adequately protects against unauthorized disclosure while a lawyer practices, DR4-101(B), and provides for ultimate disposition of the lawyer's papers upon the lawyer's termination of his practice.⁵ Here no Code violation is threatened, the client is free to disclose her confidences and secrets to her new attorney, and the inquiring attorney need not comply with his former client's demand that the attorney's personal notes be destroyed with no copies preserved.

¹ See Opinion No. 82-9.

² See EC 7-8.

³ See EC 4-1.

⁴ DR4-101(B)(1-3).

⁵ EC 4-6.