
E-89-11 Confidences of a deceased client

Question

To what extent may a lawyer reveal information relating to the representation of a deceased client to prevent unjust harm to a third person?

Opinion

“The duty of an attorney to his or her client to preserve secrets and confidences does not end with the client’s death, but continues indefinitely unless disclosure is consented to, ordered by the court, or the attorney-client privilege is waived.” Professional Ethics Committee Formal Opinion E-82-14. *See also* Professional Ethics Committee Formal Opinion E-77-5; SCR 20:1.6, Comment, “Former Client”; Annot., 67 A.L.R.2d 1268; and Wis. Stats. § 905.03(3) and (4)(b). It should be noted that SCR 20:1.6 includes all information relating to representation which includes but is not limited to secrets and confidences.

Exceptions to the rules of confidentiality and to the law of privilege exist, of course, which may permit or require a lawyer to reveal such confidences. *See, e.g.*, SCR 20:1.6(b) and (c); and Wis. Stats. § 905.03(4). However, these exceptions may not include circumstances that could present a lawyer with a serious moral dilemma. For example, what if the lawyer possessed confidential and privileged information from a deceased client which, if revealed, would prevent an innocent person from being imprisoned? Would it make a difference if the guilty party was the deceased client or someone else? If the deceased client’s reputation would be adversely affected by the revelation, would it make any difference if the deceased client had no living relatives? What if the term of imprisonment was for one month or for life?

We raise these questions to suggest that circumstances may exist in which a lawyer may be precluded by disciplinary rules and other law from revealing information that would prevent harm to another person; and that whether a lawyer would decide to risk disciplinary sanctions and possible civil liability in an action brought by the estate or descendants of a deceased client would depend upon the lawyer’s assessment of a number of factors and the strength of the lawyer’s moral

conviction that disclosure was necessary, regardless of the potential personal consequences to the lawyer.

Whether the courts would read “a ‘moral compulsion’ exception to the letter of Rule [20:]1.6” is uncertain. Hazard and Hodes, *The Law of Lawyering* 117 (1985, 1988 Supp.). Unfortunately “(m)aking subtle judgment calls in the law of lawyering . . . is an inescapable element of a lawyer’s professional responsibility.” *Hazard, supra*, at 564. And moral dilemmas of the kind just described must be resolved by individual lawyers based upon the specific circumstances confronting them.

This committee can only express its view and hope that disciplinary agencies and courts will react to these kinds of situations in a manner which encourages lawyers to exercise sound discretion in taking action to prevent serious harm to innocent persons.