

The Devil's Advocate

Two recent decisions by New York's Court of Appeals discuss the rules and exceptions which apply to the priest-penitent and attorney-client privileges and which *a fortiori* also apply to the doctor-patient privilege. In both cases the social or public interest in compelling disclosure outweighed the interest of confidentiality.

In *Keenan v. Gigante* (N.Y.L.J. pp. 1,30, May 23, 1979), a priest who also was a city councilman was summoned before a grand jury which was investigating alleged corruption within the Department of Corrections, including the granting of special favors to certain prisoners. The priest was asked about his efforts to secure a Christmas furlough and entrance into a work-release program for a prisoner who was allegedly connected with organized crime. The priest refused to answer on the basis of the priest-penitent privilege and the free religious exercise provision of the First Amendment to the Constitution. A unanimous court held that the priest-penitent privilege was inapplicable and that no colorable First Amendment right had been violated.

The Court pointed out that there was no common law priest-penitent privilege and that the statutory privilege (N.Y. CPLR 4505) was intended to cover only confessions or matters of confidence communicated to a clergyman in his professional capacity. The Court said:

The priest-penitent privilege arises not because statements are made to a clergyman. Rather, something more is needed. There must be 'reason to believe that the information sought required the disclosure of information under the cloak of the confessional or was in any way confidential' for it is only confidential communications *made to a clergyman in his spiritual capacity* which the law endeavors to protect. [Emphasis supplied.]

The decision then noted that the inquiries directed to this priest were to elicit from him the efforts he had taken, independent of any communications between him and the prisoner, to secure for the latter special privileges. Accordingly, the Court concluded, "compelling disclosure as to these matters would not do violence to the social policies underlying the priest-penitent privilege." Finally, the court rejected as without merit the contention that the priest had a constitutional right to practice his ministry unhampered by the "chilling effect" which compelled disclosure might breed, saying that

His right to practice his ministry cannot serve as to shield him from shedding light upon whether or not any unlawful efforts were

undertaken to assist those confined in New York City penal institutions to obtain special privileges and entrance into work release programs or to obtain a transfer to less secure institutions.

The result in *Keenan v. Gigante* illustrates the fact that confidentiality and privilege may depend upon what hat, or collar, is being worn at the time of the communication in question. The communication must have been made in a confidential situation and it must have been received or made professionally. For example, if a golf foursome composed of an attorney, a psychiatrist, a clergyman, and their client-patient-penitent discuss the misdeeds of the latter, the situation is not a confidential one, nor are the former operating in a professional capacity. The "professional" on a golf course is of a different order, and regardless of rank, enjoys no privileges *de jure*.

The second recent New York decision was that in *Matter of Jacqueline F.* (N.Y.L.J. May 25, 1979, pp. 1, 4, 5), involving the lawyer-client privilege. The attorney who had represented a client in a protracted guardianship-custody dispute refused to divulge the address of his client after the case had terminated in favor of his opponent. The client had disappeared with the child, their whereabouts were unknown, and when the attorney was threatened with a contempt citation he argued that his client's address was confidential information. A divided court rejected the claim that the client's address was confidential information, with one justice concurring and one dissenting.

The majority opinion states that only those communications made in confidence for the purpose of seeking professional advice are privileged and that since the client's identity is not relevant to advice proffered by an attorney, such communication is not privileged. At least pending determination of this case, the identity (and address) of the client must be disclosed to ensure that there exists an attorney-client relationship during the course of which privileged communications may be made. Moreover, the New York rules (CPLR 3118) express the common law principle that an attorney may be ordered to disclose the client's address during the pendency of an action to which the client is a party, although such disclosure may not be required if the client is not a party to a pending action. The premise behind this common law and statutory rule is that every litigant has a right to know who his opponent is during the pendency of the litigation. Once litigation has been concluded, however, there must be special circumstances in order to compel such disclosure. In the present case, the trial of the case had been concluded but the decision and order regarding child custody would be ineffective unless and until the whereabouts of the child were determined.

The majority concluded that where there exists a lawful purpose for confidential communication between attorney and client, even the client's identity may be privileged where litigation is not pending, but that under the facts before it, disclosure was necessary for the proper administration of justice. The cloak of privilege ought to depend upon the circumstances of each case. This case involved:

... the welfare of a young child caught in an intrafamilial legal battle in

which the victor stands to gain an uncommon reward — custody of a child. The ordeal suffered by the child during a custody proceeding is unfortunate but often necessary. It is, however, quite another matter to put a child through such an ordeal only to permit the unsuccessful litigant to frustrate the court's judgment rendered in the best interests of the child. . . . Deliberate attempts to avoid a court mandate concerning custody of a child cannot be permitted where, as in this case, a potential vehicle for the enforcement of the court's order lies at hand. . . . it matters little whether his or her attorney acted for a legitimate purpose.

The majority also distinguished the present case from those situations in which a communication by a client to an attorney is made with the expectation that this information will be kept confidential *for a legitimate purpose*. For example, where disclosure of a client's address is sought for purposes of reprisal or harassment, disclosure may not be required. But here the only purpose for concealment of the client's and child's whereabouts was to thwart the mandate of the court. The client should not be permitted to have her cake and eat it too by taking advantage of the appellate process in the hope of a reversal of the trial court's order and at the same time remaining in hiding with the expectation that she could lose her appeal but preclude the court from enforcing its mandate.

The concurring opinion agreed with the result reached by the majority but held that the privilege against disclosure of confidential communications had no application to the facts of the instant case. Disclosure of the client's address was unrelated to the substantive issues raised by the litigation, it does not properly come within the classification of evidence or evidentiary proof, and the attorney had no independent interest in nondisclosure. Here the disclosure had a bearing only on the remedial stage of the litigation and was only incidental to the custody proceeding. This was not a case where an attorney on the witness stand refused to divulge the address under the claim of privilege and the authority to ask the question was associated with the right to interrogate a witness. Rather this was a case where the attorney was ordered by the court to divulge the client's address as an aid to the enforcement of its decision and order, and since this was a custody case involving the welfare of a child, the court had greater interest in enforcing prompt and full obedience to its directives than in any other class of case.

The lone dissenter took the position that the majority's opinion was a classic example of "hard cases making bad law." Since the client's address was imparted to the attorney during the course of the professional relationship, and this client had expressly enjoined her counsel to secrecy, the information as to her address should be regarded as privileged.

It follows that arrangements between the two, if proper in other respects, are not subject to intrusion because their invasion might, as here, make easier the execution of the judgment of a court, or, by way of further example, even the apprehension of a fugitive from justice. . . . The result of such a narrowing of the privilege . . . would in all likelihood not be to open up a source of information but to close

down the channel of communication by which, for instance, a lawyer may now be able to negotiate the surrender of a client to the authorities.

The dissenting opinion concludes that there was no reason "to place the appellant attorney in the draconian dilemma of either violating his trust or being held in contempt. Above all, his client and all clients must know that in seeking the protection of their rights under law, they may freely confide in members of the Bar."

The two cases under discussion demonstrate the limitations on the privilege of confidentiality. A unanimous court in the priest-penitent case held that the matter communicated, to be privileged, must have been stated in confidence and received in a professional capacity. The attorney-client case shows that there are also limitations on subject matter and the purposes of nondisclosure and that the mere existence of a confidential relationship alone does not seal the professional's lips. Other social or public interests may override the social and public interest in confidentiality, depending on the facts of the particular case. Thus, the concern over child-snatching and protecting the best interests of a child joins prior exceptions such as those where the client discloses that he is about to commit a serious crime or intends to perpetrate a fraud; therefore the shield of confidentiality is removed and there is a duty to disclose to proper persons or authorities. It follows that these principles also apply to the doctor-patient or psychiatrist-patient relationships and that the matter communicated must have been disclosed in confidence to one who received it in a professional capacity and that in the event confidentiality is not absolute but is subject to overriding social and public interests.

HENRY H. FOSTER, ESQ.