

When Uninvited Disclosures Become Confidences

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Every lawyer knows the feelings of discomfiture which arise on those occasions when an individual who is not a present client insists on asking for advice or on disclosing facts which would be secrets or confidences if revealed by a client. The occasions usually occur outside the lawyer's office. The issue for the lawyer: do these disclosures create an obligation of confidentiality?

In a recent opinion, the California State Bar considered three specific circumstances in which the problem may arise. In one, a stranger approaches the lawyer in a courtroom corridor, blurts out an admission of complicity in an unsolved crime and asks the lawyer what to do. If the lawyer refuses to respond except to suggest that the individual contact the public defender, no obligation by the lawyer has arisen. But if the lawyer suggests that the individual go with him to a quiet corner of the corridor, the lawyer may have offered a consultation. In that case, the duty of confidentiality may arise with respect to any portion of the conversation which is not overheard by others.

In another common situation, another guest at a party attended by the lawyer overhears a conversation in which the lawyer is identified and approaches the lawyer with a question that calls for legal advice. The lawyer listens politely but tells the other guest that he cannot provide the advice. Under these facts, the California opinion advised that the other guest could not have formed a reasonable belief that he was approaching the lawyer in his professional capacity.

In the third situation, a relative of the lawyer calls him at home, recites a number of facts, and asks what he should do. The lawyer listens without comment, tells the relative he cannot represent him and suggests a lawyer referral service. In view of the existing relationship, this conversation did not put the lawyer on notice that this was a professional consultation. If the relative spoke without permitting the lawyer to interrupt, he cannot claim that the lawyer manifested his consent to a consultation.

The California panel made it clear that the critical factor in all these cases is the lawyer's conduct. If the lawyer's conduct implies a willingness to be consulted, then the other individual may have formed a reasonable belief that he was engaged in a professional consultation in which his confidences would be protected. To avoid this belief, the lawyer should "unequivocally explain to the speaker that he cannot or will not represent him, either before the speaker has an opportunity to divulge any information, or as soon as reasonably possible after it has become reasonably apparent that the speaker wants to consult with him."