

# ADVISORY ETHICS OPINION 81-01

## SYNOPSIS:

An attorney must maintain his client's confidences if he finds out from his client that his client made false representations to him which resulted in an agreement disposing of a criminal case. If, however, the attorney receives information from someone other than his client that clearly establishes his client intentionally committed a fraud upon a person or tribunal, the attorney must call upon his client to rectify the same. If his client refuses or is unable to do so, the attorney must himself reveal the fraud to the affected person or tribunal.

## QUESTION PRESENTED:

What responsibility does an attorney have upon learning that certain representations he has made to a prosecutor's office based upon representations made to him by his client, which have resulted in an agreement disposing of a criminal case, are not true?

## CANONS INTERPRETED:

Canons IV and VII of the Vermont Rules of Professional Responsibility.

## DISCUSSION:

Canon IV of the Vermont Rules of Professional requires that an attorney maintain the confidences and preserve inviolate the secrets of his clients. Canon VII of the Vermont Rules of Professional Responsibility, on the other hand, requires that an attorney not knowingly make a false statement of law or fact and that he takes steps to rectify a fraud perpetrated by his client during the course of his representation upon a person or tribunal.

The pertinent disciplinary rules under each of these Canons state as follows:

Canon IV, Disciplinary Rule 4-101:

- (A) "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to 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.
- (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.  
\* \* \*
- (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.

Canon VII, Disciplinary Rule 7-102:

- (A) In his representation of a client, a lawyer shall not:
  - (3) Conceal or knowingly fail to disclose that which he is required by law to reveal.
  - (4) Knowingly use perjured testimony or false evidence.
  - (5) Knowingly make a false statement of law or fact.  
\* \* \*
  - (7) Counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent.
- (B) A lawyer who receives information clearly establishing that:
  - (1) His client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal, except when the information is protected as a privileged communication.
  - (2) A person other than his client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal.

On the surface, DR 4-101 and DR 7-102(B)(1) seem to impose conflicting duties and responsibilities upon an attorney: maintain client secrets and confidences but reveal client fraud. The American Bar Association's Committee on Ethics and Professional Responsibility in its formal Opinion 341, issued on September 30, 1975, discussed this conflict and concluded that it is "unthinkable...that a lawyer should be subject to disciplinary action for failing to reveal information which by law is not to be revealed without the consent of the client" and suggested that DR 7-102(B)(1) be interpreted so as not to place an attorney in that untenable position of "either breaching his client's privilege at law or breaching disciplinary rules."

Noting that there has been a long history of accommodation in favor of preserving client confidences either through practice or by the continuous carving out of significant exceptions to the general duty to reveal fraud, the ABA Committee on Professional Responsibility in Opinion 341 specifically recommends giving more weight to the non-disclosure requirements of DR 4-101 than to disclosure requirements of DR 7-102(B)(1). It suggests that a balance between these two provisions can best be made by placing heavy emphasis on the three express exceptions to DR 7-102(B) which require that:

- (1) The fraud must have been perpetrated in the course of the representation of the client.
- (2) The information received by the attorney must "clearly establish" that a fraud has been perpetrated upon a person or tribunal. (ABA Formal Opinion 341 requires that the perpetrated fraud under DR 7-102(B) be "active fraud, with the requirement of scienter or intent to deceive.")
- (3) The information clearly establishing fraud cannot be protected as a privileged communication. (The ABA Committee on Ethics and Professional Responsibility has advised that the term "privileged communication" refers "to those confidences and secrets that are required to be preserved by DR 4-101.")<sup>1</sup>

Thus, in short, the duty to reveal past client fraud under DR 7-101(B) is generally limited to those narrow circumstances when an attorney receives information from someone other than his client, which information clearly establishes that during the course of his representation his client intentionally committed a fraud upon a person or tribunal.<sup>2</sup>

In applying the applicable standards to the instant facts, it is clear that if the attorney learns that the representations he made to the prosecutor's office, based upon representations made to him by his client, were untrue and were received in the course of confidential communications with his client, then he has the duty to maintain the secrets and confidences of his client and is not permitted or required to divulge the fraud under DR 7-102(B)(1). If the attorney learns of this information from someone other than his client, he must determine whether or not the information clearly establishes that these representations were false, were made with scienter or an intent to deceive, and resulted in fraud being perpetrated upon the prosecutor's office or the tribunal. If "active" fraud existed, he must promptly call upon his client to rectify the same. If his client refuses or is unable to do so, the attorney must himself reveal the fraud to the affected person or tribunal.

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<sup>1</sup> Canon IV, Disciplinary Rule 4-101 is set forth in pertinent part on page 2 of this Memorandum. This ABA recommended interpretation of DR 7-102(B) goes beyond limiting the scope of privileged communications to the scope of the attorney-client privilege as it exists in each jurisdiction and under the Federal Rules of Evidence. To limit the scope of privileged communications to the scope of the attorney-client privilege would create "significant problems" because the scope of the attorney-client privilege varies widely among jurisdictions.

<sup>2</sup> In addition, DR 4-101(C) sets out several specific circumstances under which revelation of a secret or confidence or other than the disclosure of the past client fraud is permissible. For example, when disclosure is required by a law or court order, the "privileged communication" exception of DR 7-102(B) is not applicable and disclosure may be required. Also, DR 4-101(C)(3) and ABA Formal Opinion 156 clearly indicate that information from any source received by an attorney advising him that his client will commit a crime or is participating in a continuing wrong is not privileged information and must be disclosed.