

ADVISORY ETHICS OPINION 82-07

SYNOPSIS:

A lawyer who subsequent to settling a personal injury action learns from the client additional information that might have reduced the settlement may not disclose this information to the opposing party to rectify any deception that might have been caused.

OPINION:

This request arises out of a personal injury insurance settlement negotiated by a lawyer bases on information supplied by his client. All of the information supplied to the insurance carrier was confirmed by medical records. After the lawyer received the settlement check, but before he cashed it, he received new information that might have reduced the amount of the insurance settlement had it been known by the carrier.

The lawyer indicates that he would not characterize his client's conduct as a fraud upon the insurance carrier and he is sure the information would have reduced the client's recovery. However, he also believes he would have disclosed the information if he knew of it before the settlement was consummated. He asks what his obligations are now.

There is no Code provision that deals directly with the facts indicated in the request. DR 7-102(A) generally prohibits a lawyer from using false evidence or knowingly assisting in fraudulent conduct. It does not state what the lawyer must do if he has unknowingly assisted in a client deception and a result favorable to the client has been achieved. The only specific direction in the Code is in DR 7-102(B)(1) which governs if the lawyer has information "clearly establishing" that the client has perpetrated a fraud. In such a case, the lawyer must call on the client to rectify the fraud and, if the client refuses, disclose the fraud to the affected person unless the information is protected as a privileged communication.

DR 7-102(B)(1) doesn't appear to apply in this instance for two reasons. First, the lawyer is unable to say that the client perpetrated a fraud and on the limited facts given us we can not second guess that determination. Second, the rule has been interpreted in ABA Formal Opinion 341 (1975) as not applying if the information came from the client. That opinion construes the term "privileged communication" in the rule to mean any information covered by the confidentiality requirements of Canon 4 – in essence, any information that came from the client in the course of the representation.

In the absence of a disclosure requirement in DR 7-102(B), the information conveyed to the lawyer is a confidence or secret that may not be disclosed by DR 4-101(B). None of the exceptions to the disclosure prohibition apply.

Based on the above discussion, the lawyer has no obligation under the Code to disclose the additional information received from the client. The lawyer may want to encourage the client to reopen the settlement in the light of the client's possible liability but this obligation is not imposed by the Code.