

ADVISORY ETHICS OPINION 83-01

SYNOPSIS:

A lawyer who is retained by a client to return money allegedly stolen by the client may not disclose the name of the client or any other information by the client relative to the taking of the money.

OPINION:

This opinion was requested by a prosecutor and a lawyer. At the outset, the request is difficult because it involves fact finding by the committee where there are facts in dispute. The purpose of this committee is to give opinions on the ethical propriety of proposed or ongoing conduct of lawyers who request the opinions. In doing so, we accept the facts given us by the lawyer requesting the opinion and base the opinion on those facts. The committee is not equipped to find facts.

Since it is the private attorney's conduct that is in issue, we will use his version of the facts. This does not mean we find these facts to be correct. It means only that the opinion is based on these facts. The facts are as follows.

Certain funds were taken from a town office. The town attorney let it be known that he was prepared to represent anyone who might be responsible for the purpose of returning the money and that the identity of the person would be protected by the attorney/client privilege. Thereafter, the lawyer was approached by "x" for representation in the matter. "X" retained the lawyer for representation and through him delivered the missing money to the town.

A series of questions are asked based on these facts. Basically, they are whether a privilege exists and whether it covers the identity of "x" as well as anything "x" may have told the lawyer relative to the taking of the money.

The first question asked is whether an attorney-client relationship exists with "x." Because we have accepted the lawyers version of the facts and he states that he was employed as the attorney of "x," we have to say that an attorney-client relationship was present. We note in passing that an attorney-client relationship is created by law not ethics. Since this committee gives opinions only on ethics, we would not have been able to answer this question had the answer not been supplied in the factual statement.

The remaining questions deal with the ethical obligations of the lawyer with regard to the identity of "x" and information supplied by "x" to the lawyer. DR 4-101 of the Code of Professional Responsibility provides that a lawyer may not disclose confidences and secrets of the client. The question then is whether the identity of the client, and the information supplied by the client are confidences or secrets.

It is important to put this question in context. There are actually two restrictions on disclosure. The first is the evidence privilege which arises under evidence law.¹ The second is the Code provision which is an ethical standard. The Code provision is a less comprehensive protection for the client since it disappears in the face of a court order.² It covers both the information covered by the evidence privilege – "confidences" – and information not covered that would be detrimental to the client if disclosed – "secrets."

Generally, the law has been that the name of the client is not a "confidence" – that is, it is not protected by the evidence privilege or that part of DR 4-101 that embodies the evidence privilege.³ On the other hand, the ABA Ethics Committee has indicated that the name of the client is a "secret" where disclosure would be detrimental to the client.⁴ There is no question that the disclosure of the name would be detrimental to the client in this case. Therefore, the name is a "secret" and the lawyer is prohibited by the Code from disclosing it.

While the above answers the question with respect to the Code, it is appropriate to go further. The situation presented here fits within a commonly recognized exception to the rule that the evidentiary privilege doesn't cover the name of the client. Where the purpose of the representation is to give up property anonymously, the courts have held the privilege also covers the name.⁵

¹ See Vermont Rules of Evidence Rule 502.

² See DR 4-101(C)(2).

³ See, e.g., Comment, Assertion of the Attorney-Client Privilege to Protect the Client's Identity, 28 U. Chi. L. Rev. 533 (1961).

⁴ See Informal Opinion 1286 (1974).

⁵ See Baird v. Koerner, 279 F.2d 623 (9th Cir. 1960).

DR 4-101 also covers any other information the lawyer received from the client with respect to the money. The fact that this information may disclose criminal conduct is irrelevant unless it is future criminal conduct.⁶

For the reasons stated above, the lawyer may not ethically disclose the name of his client or the circumstances surrounding the taking of the money as related by his client.

⁶ See DR 4-101(C)(3).