ADVISORY ETHICS OPINION 96-11

SYNOPSIS:

An attorney who has secured information from an individual in the context of a free initial office conference, in which legal advice has been sought and given in circumstances reasonably likely to create an expectation of confidentiality, is required to treat such information as if it had been received in the course of representation, even if the conference does not result in the individual engaging the attorney for further services. Any confidences or secrets obtained as a result of the conference continue to be protected thereafter, and the attorney may not disclose such information, even if the attorney determines that the individual has presented information to a tribunal that is contradicted by the information previously given to the attorney.

FACTS:

An attorney with an active bankruptcy law practice offers free initial office conferences which frequently result in the disclosure, by prospective clients, of significant assets which, if disclosed in the bankruptcy petition, would either be applied to pay off creditors or would potentially preclude a bankruptcy determination. The potential clients will sometimes ask whether they can convey the asset to another prior to filing, or simply not disclose the asset in their bankruptcy petitions, in which event the attorney typically counsels the prospective client as to the law relating to preferential transfers, fraudulent conveyances, and potential perjury penalties, explaining that, under the circumstances, the attorney is unable to assist in the furtherance of non-disclosure of such assets or transfers. In at least some cases, no further services are rendered beyond the initial office conference.

The attorney regularly becomes aware of the existence of bankruptcy filings in the geographic area, and therefore anticipates an encountering of a filing by an individual described as a "non-client" initially seen during a free office conference, who disclosed facts which would preclude a finding of bankruptcy. In such a case, the attorney believes it would strongly suggest that the individual has committed perjury by failing to disclose an asset or transfers which he or she was required by law to disclose. Perhaps the clearest example of such a situation would be one in which the individual discloses the existence of substantial non-exempt assets of a magnitude clearly sufficient to preclude the issuance of a discharge in bankruptcy, resulting in the attorney advising the client that he or she is not eligible for bankruptcy. Subsequently, within a matter of weeks or months later, the attorney learns that the individual has in fact filed for bankruptcy, filing a sworn petition which fails to disclose the assets that had been disclosed to the attorney in an initial conference.

QUESTION:

We are asked whether the lawyer may or must disclose to the bankruptcy court information obtained in an initial client conference in the event the above-described situation arises.

DISCUSSION:

On the facts stated, the initial question presented is one of whether, in circumstances in which an attorney has not accepted employment, but has initially conferred with a potential client and gained access to facts within the personal knowledge of the potential client, an obligation of confidentiality arises with respect to such communications. Ethical Consideration 4-1 of Canon 4 specifically states that "[b]oth the fiduciary relationship existing between lawyer and client and the proper functioning of the legal system require the preservation by the lawyer of confidences and secrets of one who has employed or sought to employ him." (Emphasis supplied).

The attorney's duty of confidentiality is derived from both the law of evidence and the law of agency, and the limitations on disclosure of client confidences and secrets set forth in DR 4-101 clearly extend beyond termination of representation.[1] Because the attorney-client privilege is more limited than the ethical obligation of a lawyer to guard the confidences and secrets of his client (see EC 4-4), it seems reasonably clear that if the evidentiary attorney-client privilege, which prohibits unauthorized disclosure of client communications in judicial proceedings, attaches to communications made in the context of a free initial office conference, the broader prohibition on disclosure encompassed by DR 4-101 would also apply to such communications.

Wigmore has set forth the well-accepted elements of privilege:

[1] See, generally, Opinion 95-16.

> (1) Where legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such (3) the communications relating to that purpose (4) made in confidence (5) by the client (6) are at his instance permanently protected (7) from disclosure by himself or by the legal advisor (8) except that the protection be waived.[2]

It is noteworthy that nothing in the law of privilege imposes a requirement of compensation or of formal engagement of the attorney as a prerequisite to attachment of the privilege, and the rule would seem to apply, without question, to the communications at issue. This conclusion is also consistent with the probable expectations of individuals seeking the advice of attorneys. Certainly the mere fact that the initial consultation is offered at no charge would hardly prompt such individuals to believe that their discussions would not be considered confidential.

The ethical issues presented by situations involving potential client perjury have been the source of considerable scholarly discussion, which typically recognizes the uncomfortable lack of consensus on many of the questions which can arise in this context.[3] Under the Vermont Code of Professional Responsibility, however, the answer to the question presented here appears to be clear. If information obtained from a client is covered by the law of privilege or is requested by the client to be kept secret or its disclosure would be embarrassing or detrimental to the client (DR4-101(A)) the lawyer may not knowingly reveal it or use it to the disadvantage of the client. DR4-101(B)(1) and (2).

Disciplinary Rule 4-101(C) provides, in pertinent part, that confidences or secrets may be disclosed "when permitted under Disciplinary Rules or required by law or court order." The Committee is unaware of any law or court order which would, on the facts stated, require the attorney to disclose the existence of the assets divulged by the potential client. Consequently, one must look to the remaining Disciplinary Rules to find such authority, if it exists. Subsection (D) provides that a lawyer may reveal "[t]he intention of his client to commit a crime and the information necessary to prevent the crime." Notably, however, this Subsection does not authorize the disclosure of "confidences or secrets," but speaks only to revealing a stated intention, by an existing client, to commit a crime. Moreover, it does not appear from the provision that information which is a confidence or a secret may be disclosed if it constitutes the very "information necessary to prevent the crime."

Such a reading of DR 4-101(C)(4) is also supported by the language which appears in Disciplinary Rule 7-102(B), which is also similarly protective of privileged information:

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.

DR 7-102(B)(1) creates an affirmative obligation on the part of an attorney to reveal fraud by a client upon the court, made "during the course of the representation, "except when the information is protected as a privileged communication." (Emphasis supplied). Although DR 7-102(B)(1) is not directly in point, inasmuch as it anticipates a situation in which the attorney would potentially be implicated in the fraud by reason of it occurring during his representative capacity, the intent of the Rule is clearly to shelter privileged communications, even in the face of actual fraud upon the tribunal having occurred. Given the Committee's conclusion that the conversations with the potential client continue to be privileged, even after the initial free office conference, DR 7-102(B)(2), revealing fraud upon a tribunal by "persons other than clients" is not applicable, since this provision clearly requires disclosure only because no privilege issue would arise in such a context.

CONCLUSION:

Therefore, the Committee believes that unless the individual knowingly consents, the attorney may not reveal the information obtained during a free initial consultation, even if the lawyer later believes that the individual has presented false information to a tribunal. Neither the law nor the Code of Professional Responsibility require the attorney to act as a "police officer" or "informant" who may reveal information that was given to the attorney in his or her capacity as an attorney with the expectation of confidentiality. The situation presented is different than one in which the prospective client clearly states an intent to commit a crime, which would be covered by DR 4-101(C)(3).

[2] (J.H. Wigmore, *A Treatise on the Anglo-American System of Evidence. . .,* 3d ed., Vol. 8, p. 550.) See, also, V.R.E. 502.
[3] See, generally, Wolfram, Client Perjury, 50 So. Calif. L. Rev 809 (1977).