

CONFIDENCES AND SECRETS;  
ATTORNEY SUSPECTS THE CLIENT  
COMMITTED FRAUD PRIOR TO  
HIRING ATTORNEY IN MATTER  
RELATED TO ATTORNEY'S  
REPRESENTATION; MUST ATTORNEY  
REVEAL HIS SUSPICION TO  
GOVERNMENT AGENCY INVOLVED.

You have presented a hypothetical situation in which Attorney suspects that his client committed a fraud, before he retained the services of an attorney, to obtain a benefit from the Immigration and Naturalization Service ("INS"). The client has not confirmed Attorney's suspicions which, if true, would likely harm the client's chances for a favorable resolution of a pending request for permanent residence in the United States.

Under the facts you have presented, you have asked the committee to opine as to whether Attorney has an obligation to: (1) obtain the truth from the client; (2) reveal his suspicions to the INS; or (3) continue the representation if Attorney reasonably believes the client will lie to the INS in the future to conceal his or her prior fraud.

The appropriate and controlling disciplinary rules relative to your inquiry are DR:4-101(D)(2), DR:7-102(A)(4), DR:7-102(A)(6) & (7), and DR:2-108. DR:4-101(D)(2) requires an attorney to reveal "information which clearly establishes that his client has, in the course of the representation, perpetrated a fraud related to the subject matter of the representation upon a tribunal. Before revealing such information, however, the lawyer shall request that his client advise the tribunal of the fraud. Information is clearly established when the client acknowledges to the attorney that he has perpetrated a fraud upon a tribunal."

DR:7-102(A)(4) states that in his representation of a client, a lawyer shall not knowingly use perjured testimony or false evidence. DR:7-102(A)(6) & (7) state that in his representation of a client a lawyer shall not participate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false nor may he counsel or assist his client in conduct that he knows to be illegal or fraudulent. DR:2-108 addresses the circumstances under which an attorney may withdraw from representation of a client.

The committee has previously opined that the duty to disclose a client's confidence or secret to prevent fraud upon a tribunal exists only if the fraud occurred during the course of the attorney/client relationship (See LE Op. 693 and LE Op. 1643). It is not improper for an attorney to accept at face value that the representation of an alien client is bona fide unless the attorney knows or, in the exercise of due diligence upon reasonable inquiry during the attorney/client relationship, the attorney should know of information to the contrary (See LE Op. 691).

In the facts you present, the committee believes that if the information Attorney has received does not clearly establish the client's fraud on the tribunal, the attorney must maintain the client's confidences and secrets unless required by court order to reveal the information. Since the suspicious activity which raises the specter of fraud occurred before the attorney/client relationship was established, and not "in the course of the relationship" as contemplated by the rule, it is not incumbent upon Attorney to confront the client and inquire directly about the client's prior conduct in the current case or a substantially related previous matter. However, there is also nothing which prohibits Attorney from investigating the matter further, should he or she desire to do so.

Moreover, if Attorney never receives an "admission" or "confession" from his client which would clearly establish the fraud suspected, but nevertheless believes that the fraud is obvious, Attorney should move to voluntarily withdraw from further representation in accordance with the provisions of DR:2-108. A withdrawal under these circumstances must occur at a time that does not materially prejudice the client. The committee declines to address whether Attorney should answer specific questions on INS forms, since this is a question of law for a finder of fact and beyond the purview of this committee.

Committee Opinion  
September 23, 1996