

Committee Opinion
April 13, 1989

LEGAL ETHICS OPINION 1205

COUNTY/CITY ATTORNEY-
DISCLOSURE-ATTORNEY/CLIENT
RELATIONSHIP-CONFIDENCES AND
SECRETS: DUTY TO REVEAL A FALSE
CERTIFICATION IN AN EXECUTIVE
MEETING.

You wish to know the effect in three specific situations on city and county attorneys of a proposed amendment to the Virginia Freedom of Information Act which would require the presiding officer of any public body to certify that nothing improper was discussed in any executive or closed meeting. The response to your questions is predicated on a subsequent change to the proposed amendment which now requires that each member of the public body make such certification rather than only the presiding officer.

The first fact situation you pose assumes the presiding officer (now the members) is not an attorney, and you wish to know whether an attorney serving as counsel to the public body, in attendance at the meeting, may remain silent or is the attorney under an obligation to the public to disclose when a false certification is made by the presiding officer/members. Disciplinary Rule 4-101(C)(3) permits a lawyer to reveal a confidence or secret of his client when the lawyer has information which clearly establishes that his client has, in the course of the representation, perpetrated upon a third party a fraud related to the subject matter of the representation. Although DR:4-101(C)(3) is not mandatory in nature, the city or county attorney's permissive revelation of his client's fraud on its constituency should be balanced by the heightened standard for the government lawyer's application of discretion, in order to be fair to the city or county's residents. The Committee is of the view that absent a statute requiring the government attorney to reveal a false certification, a client's confidences and secrets must be preserved unless, in the government attorney's professional judgment, a fraud has been committed to dilute the citizenry's respect for the workings of government. (See EC:8-5)

With regard to your second question, any member of the body will be required by law to make a true certification to the matter. Under the Code of Professional Responsibility, it may be violative of DR:1-102(A)(4) for a lawyer-member to make a statement which is not truthful.

Under the third fact situation, the presiding officer (now, any member) is an attorney who has falsely certified that nothing improper has occurred and you wish to know whether the county attorney has an obligation to report that a violation has occurred. In addition to the revelation under DR:4-101(C)(3) (see discussion supra), DR:1-102 provides that a lawyer shall not engage in conduct "involving dishonesty, fraud, deceit or misrepresentation which reflects adversely on the lawyer's fitness to practice law." Disciplinary Rule 1-103 [DR:1-103] provides that a lawyer having information indicating that another lawyer has committed a violation of the disciplinary rules that raises a substantial question as to that lawyer's fitness to practice law in other respects shall report such information to the appropriate professional authority. The Committee

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opines that it is rebuttably presumptive that a false certification by a presiding officer-member/attorney would reflect adversely on that lawyer's fitness to practice law. However, if the county attorney believes that misconduct, as defined above, has occurred and the county attorney believes that the information clearly establishes that the presiding officer-member/attorney has perpetrated upon a third party a fraud related to the subject matter of the representation as provided in DR:4-101(C)(3), then the county attorney would have an obligation to report the violation "to the appropriate professional authority" as provided in DR:1-103. (See also LE Op. 761 and LE Op. 833)

Your fourth inquiry requests the State Bar to "take a position on this proposed change in the act." As an arm of the Supreme Court, the Virginia State Bar does not take positions with respect to legislative matters; however, the Committee would refer you to the Virginia Bar Association, which is actively engaged in legislative matters and may provide assistance to you.

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Legal Ethics Committee Notes. – If information about the ethics violation is a client confidence, a lawyer may report the other lawyer's misconduct only if the client consents under Rule 1.6(c)(3); the lawyer considering whether to report must consult with the client under that Rule.