

Committee Opinion
May 8, 1989

LEGAL ETHICS OPINION 1233

COMMUNICATION WITH ADVERSE
PARTY – DISCLOSURE –
REPRESENTING CLIENT WITHIN THE
BOUNDS OF THE LAW: ATTORNEY
THREATENING SUIT FOR PUNITIVE
DAMAGES; DUTY TO REVEAL
KNOWLEDGE OF CRIME TO
APPROPRIATE AUTHORITIES.

You have advised that an attorney has been employed by a condominium unit owners' association to recover condominium dues improperly retained by the developer. The attorney discovered that the checks for the condominium dues, most of which were payable to the association, were delivered to the developer who deposited the same in the developer/declarant's account, which account was apparently commingled with other funds of the developer. The funds were then apparently remitted to the construction lender and applied against the construction loan indebtedness of the developer/declarant. Upon being informed that the funds should not have been remitted to the lender, the developer has attempted without success to have the funds returned.

The attorney intends to file suit in behalf of the client unit owners for fraudulent conversion of funds. In an attempt to resolve the matter expeditiously and avoid the filing of a lawsuit which would include a claim for punitive damages, the attorney confronted the developer with these findings and urged him to remit the claimed sums plus interest thereon.

You wish to know whether it is ethically permissible for the attorney to give the developer a deadline for payment in order to avoid a claim for punitive damages, or does this constitute a threat or a form of extortion since the monies are properly due. In addition, you ask to what extent the attorney may discuss with the developer the potential criminal aspect of his actions.

With regard to the first part of your question, the Committee opines that proposing a deadline as a means to negotiate a settlement is ethically permissible in the zealous representation of a client. Disciplinary Rule 7- 101(A) [DR:7-101] states that a lawyer shall not intentionally fail to seek the lawful objectives of his client through reasonably available means permitted by law and the disciplinary rules, unless in the professional judgment of the attorney the client's objective may be limited, waived or denied and unless the conduct or claim which the client wishes to pursue is unlawful, repugnant or imprudent. As long as the attorney believes or is convinced after making a reasonable investigation, that the action taken on behalf of his client would not merely serve to harass or maliciously injure another and that such action is warranted under existing law or can be supported by good faith argument for an extension, modification, or reversal of existing law, then it is not violative of any disciplinary rule or ethical consideration under the Virginia Code of Professional Responsibility. (See DR:7-102(A)(1) and (2))

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As to the second part of the first question regarding communicating to the developer the potential criminal aspects of his actions, the committee directs your attention to DR:7-103(A)(2), which states that during the course of the representation of a client, a lawyer shall not give advice to a person who is not represented by a lawyer other than the advice to secure counsel if the interests of such person are, or have a reasonable possibility of being, in conflict with the interest of his client. He may, however, through service of process, communicate his client's position, allegations or claims; but, DR:7-104 proscribes the use of threats to present criminal or disciplinary charges solely to obtain an advantage in a civil matter. Therefore, such conduct would be unethical.

Your second question concerns the funds which may have been illegally diverted and later applied for the developer/declarant's own use, thereby constituting embezzlement. You inquire as to what duties the attorney would have, if any, to notify the Commonwealth's Attorney's Office of the likelihood of such criminal activity, or is the attorney's duty fulfilled by reporting the same to his client unit owners and leaving with them the decision of whether or not to prosecute.

In the view of the Committee, the Code of Professional Responsibility requires an attorney to represent his client zealously, within the bounds of the law, and to keep the client reasonably informed about matters in which the lawyer's services are being rendered. (See DR:7-101, DR:7-102 and DR:6-101) Thus, the attorney must inform the client of any knowledge he has gained through his investigation that a felony or crime has been committed which is the cause of the subject representation. Accordingly, he must also advise the client what course of action to follow which would be in his best interest. However, the attorney's ethical obligation to notify the Commonwealth's Attorney's Office of the likelihood of any criminal activity being committed, if the client should choose not to prosecute, is controlled by DR:7-102(3), which provides that in the course of representing a client, a lawyer shall not conceal or knowingly fail to disclose that which he is required by law to reveal. Although the Committee is unaware of any specific Virginia statutory requirement to report the matter, the Committee directs your attention to the possibility of the common law crime of misprision of a felony or the statutory prohibition against compounding or concealing an offense. Thus, whether a lawyer has a legal obligation to reveal any knowledge he may have of any felonious criminal activity affecting the laws of this Commonwealth raises a legal issue beyond the purview of the Committee.

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