Committee Opinion
October 3, 1989

LEGAL ETHICS OPINION 1272

CONFIDENTIALITY – DISCLOSURE – FRAUD: ATTORNEY MUST DETERMINE IF FRAUD HAS BEEN COMMITTED BEFORE REVEALING CLIENT'S CONFIDENCES.

You have advised that your client, an attorney who served as in-house counsel and ethics officer for a company which sought contracts from a public contracting agency, believes that a certificate filed by the company with the agency was misleading. In order to obtain uninhibited access to business, the company was required to prepare a procurement integrity certification apparently indicating that the company did not have contact with consultants whose activities were in question. Although your client was not directly involved in the certificate's creation, he is aware that the certificate was limited only to contact the company may have had with consultant A but made no mention of the company's two-year relationship with consultant B. You indicate that the contracting agency did not ask about consultant B directly. You further advise that the activities of both consultants are currently being investigated for fraud. During the pendency of the investigation, the company has provided the investigation agency with a list of all consultants. It appears that the information has not been shared with the contracting agency since the contracting agency has not revived the certificate requirements for the company, which would inhibit its access to business.

You indicate that your client is of the opinion that the certificate filed with the contracting agency was misleading since management ignored the relationship with consultant B because of a belief that it would not be able to sign an integrity certification regarding B. You have asked the Committee to consider your client's ethical responsibilities to either protect the confidentiality of the information or to reveal the information to the appropriate authorities.

The appropriate and controlling disciplinary rules to the circumstances you have described are DR:4-101(B)(1) and (2), DR:4-101(C)(3) and DR:7-102(A)(7). Canon 4 requires that a lawyer generally should preserve the confidences and secrets of a client and specifically may not knowingly reveal or use a confidence or secret to the disadvantage of the client. (DR:4-101(B)(1) and (2)) However, a lawyer may reveal confidences or secrets when required by law or court order (DR:4-101(C)(2)) and may also reveal 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. (DR:4-101(C)(3)) (emphasis added) Furthermore, a lawyer may not counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent. (DR:7-102(A)(7)) (emphasis added)

The question of whether the failure of the company to certify as to the integrity of consultant B was an illegal act without having specifically been asked about consultant B is beyond the purview of this Committee since it raises a legal question for a finder of fact.

Assuming that there was no illegality involved, the attorney is mandated to protect the client's confidentiality since the disclosure of the information would be likely to be detrimental to the client. The Committee has earlier opined that absent fraud or a statute requiring a government attorney who serves as counsel to a public body, which is required under the Virginia Freedom of Information Act to certify that nothing improper was discussed In an executive or closed meeting, to reveal a false certification, the attorney must preserve the client's confidences and secrets. (See LE Op. 1205)

The Committee is of the view that in order for the attorney to disclose a client's secrets and confidences, as permitted under DR:4-101(C)(3) which does not, however, include a definition of "clearly established," the attorney must abide by the definition of that term as found in DR:4-101(D)(2): information is clearly established when the client acknowledges to the attorney that he has perpetrated a fraud (upon a tribunal). The question of the client's acknowledgment is similarly a factual one which must be resolved by the attorney's judgment of whether, in this case, such an admission was made by the parent company's corporate counsel. If the information does not clearly establish the client's fraud, the lawyer must maintain the client's confidentiality unless required by court order to reveal the information. (See Maryland Ethics Opinion 87-8 (10/23/86))

Furthermore, the Committee would direct your attention to the Ohio Bar's Opinion 87-10 (9/17/87), which found that a lawyer serving as corporate counsel, who learned that the corporation has failed to report certain facts to the Internal Revenue Service and as a result received a favorable ruling from the IRS, was ethically required to withdraw from the representation if the corporation would not consent to disclosure of the fraud. Again, however, whether your client's corporation's omission of information was clearly established as fraud is a question of fact. The Ohio Opinion, in addition, required the lawyer to determine whether the IRS (in your client's situation, the contracting agency) would be considered a "tribunal" to whom disclosure was mandatory rather than permissive.

Thus, the Committee opines that unless the former company counsel/ethics officer determines that a fraud has been perpetrated, information he possesses regarding the company's failure to voluntarily disclose information about consultant B must be maintained as confidential.