

Committee Opinion
October 23, 1989

LEGAL ETHICS OPINION 1289

CONFIDENCES AND SECRETS: DUTY
TO REVEAL MUTUAL MISTAKE UPON
WHICH PERSONAL INJURY
SETTLEMENT WAS NEGOTIATED.

You have asked the Committee to opine as to whether an attorney is required to reveal a mutual mistake, made by both the plaintiff's attorney in a personal injury case and by the insurance company representing the defendant, when a settlement, negotiated on behalf of the personal injury client, has been reached based upon a bill which was later determined to have been not actually incurred by the client but by an individual with the same name as the client and provided in error by the treating hospital. You have further asked whether the attorney has a higher duty to the client who becomes aware of the settlement and of the mutual mistake and who wishes to consummate the settlement.

The appropriate and controlling rules relative to the issue you have raised are DR:4-101(B), which prohibits a lawyer from knowingly revealing a confidence or secret of his client, and from knowingly using his client's confidence or secret to the disadvantage of the client or for the advantage of himself or a third person unless the client consents after full disclosure; and DR:4-101(C)(1) and (3), which permits a lawyer to reveal a client's confidences or secrets either with the client's consent or 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.

The Committee has previously opined that when, in preparing a decree for the court's entry on a matter, an attorney had inadvertently provided for the release of the entire claim instead of the more narrow aspect of the claim on which the court had actually ruled, the attorney was not later precluded from asserting a defense of res judicata when the opposing party brought an action based on the assumption that only the more narrow aspect of the claim had been released. LE Op. 561 found that where there had been no intentional misrepresentation or misstatement, there was no impropriety in later acting on the actual, rather than the intended, provisions of the decree, unless the client is willing for the lawyer to waive the affirmative defense. The opinion further states, however, that should the adversary later raise the issue of the inadvertent nature of the provisions, the lawyer would need to concede the factual circumstances leading to the broad decree.

Based upon the facts you have provided, the Committee is of the view that the mutual mistake of fact does not constitute any form of fraud perpetrated on the insurance company. Therefore, it is the opinion of Committee that the lawyer's duty is to his client, with the result that information regarding the mistake is a secret of the client which can only be revealed with his or her consent and only after a full disclosure to the client of the possible consequences of any such revelation. However, based upon the Committee's earlier opinion cited above, should the insurance company later raise the issue of the mutual mistake, the lawyer would need to concede the factual circumstances. Such a concession would not rest on any secret or confidence of the client and thus it would not

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be necessary to obtain the client's consent to the lawyer's forthright acknowledgment of the facts. Furthermore, the Committee is of the opinion that it is incumbent upon the lawyer to advise the client that the insurance company may later claim that the settlement sum was based in part upon the mutual mistaken assumption that the large bill was in fact attributable to the client. The Committee believes that the lawyer should inform the client of the possibility of a potential claim by the insurance company against the client as a result of this unjust enrichment.

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