

Committee Opinion
June 28, 1990

LEGAL ETHICS OPINION 1347

CONFIDENCES AND SECRETS –
FRAUD: INFORMATION CLEARLY
ESTABLISHING FRAUD; ATTORNEY
REPRESENTING CORPORATION AND
SUBSIDIARY CORPORATE OFFICERS
AND LATER LEARNING OF POSSIBLE
RELATED CRIMINAL INVESTIGATION
AGAINST CORPORATE OFFICERS.

You have asked the Committee to consider any duty a lawyer may have under the Code of Professional Responsibility to reveal a criminal investigation into a client's activities upon which an insurance settlement was based. The following contains a summary of the pertinent facts of the inquiry upon which the Committee will base its opinion.

An attorney ("Attorney") is corporate counsel for a District of Columbia corporation ("Corporation") for which he has incorporated subsidiary corporations. Subsidiary A was incorporated according to the laws of State X and a retail facility is located in State X, but the principal office of the subsidiary is within the Commonwealth of Virginia.

Subsequent to the formation of Subsidiary A, the retail facility within State X was burglarized resulting in a loss of property. The burglary was reported to local police by a corporate officer of the subsidiary and an insurance claim was filed by the same corporate officer together with a sworn proof of loss statement and certain other information about the burglary. Approximately one month after the burglary, the same corporate officer of Subsidiary A retained Attorney to settle the claim with the insurance company.

After several months of insurance company not responding to Attorney's telephone calls and fax letters regarding the claim, Attorney filed a complaint against the insurance company alleging breach of contract and bad faith and negligence in the processing of its claim. Insurance company filed an answer denying Subsidiary A's claims, together with a motion to transfer venue to and, in its answer, made reference to "suspicious circumstances surrounding the loss." Nevertheless, Attorney and the insurance company counsel ultimately agreed to a settlement which was subsequently approved by the court and the action was dismissed.

Several months after the claim was dismissed, Attorney, through his continued representation of Subsidiary A, learned of a police investigation within State X involving certain corporate officers of Subsidiary A, including the corporate officer who had retained Attorney, and their possible connection with the burglary. Furthermore, during his continued representation of Subsidiary A, Attorney learned of other facts that may implicate officers of Subsidiary A in the burglary or that indicated the insurance claim may have constituted fraud. The Committee has interpreted the facts you have set out as showing that you initially started out representing the corporation and then Subsidiary A and finally you represented "certain of the corporate officers and directors" of the Corporation and/or Subsidiary A.

Committee Opinion
June 28, 1990

You have asked a series of questions concerning the Attorney's obligations in this situation. The most central Disciplinary Rules relative to your inquiry are DR:4-101(C)(3) and DR:4-101(D)(2).

Disciplinary Rule 4-101(D)(2) mandates that a lawyer must reveal information which "clearly establishes" that his client has, during the course of the representation, perpetrated a fraud related to the subject matter of the representation upon the tribunal. The rule defines and limits the meaning of "clearly establishes" to when, and only when, "the client acknowledges to the attorney that he has perpetrated a fraud."

Disciplinary Rule 4-101(C)(3) provides that a lawyer may reveal information which "clearly establishes" that his client has, in the course of his representation, perpetrated a fraud related to the subject matter of the representation on a third party. The Committee interprets the meaning of "clearly establishes" in this Disciplinary Rule as the same as defined in DR:4-101(D)(2), as to be only when "the client acknowledges to the attorney that he has perpetrated a fraud." To subscribe to a less stringent determination would create the anomalous situation where the attorney would be allowed to tell the third party of the fraud but, in the same situation, the attorney would be proscribed from revealing the same to the court. (See *Doe v. Federal Grievance Committee*, 847 F.2d 57, 62 (2d Cir. 1988))

The Committee has previously opined that even information which may be public or known to third parties may be construed as a "secret" if the client has specifically requested that it be held inviolate or if the attorney should know that disclosure would be embarrassing or would be likely to be detrimental to the client. (See LE Op. 1147, LE Op. 1207, LE Op. 1349) In addition, the Committee is of the opinion that the attorney's obligation to preserve a client's confidences and secrets survives beyond the conclusion of the professional relationship or the death of a client. (See EC:4-6 and LE Op. 1207, LE Op. 1307)

The Committee will address the specific questions you raised in the order in which they appeared in the inquiry.

Attorney's Duty to the Court in Which the Insurance Claim was Filed and Dismissed Pursuant to the Settlement.

If, during the course of the continued representation of his multiple clients, the attorney learns through actual acknowledgment by one of the corporate officers who has the authority to bind the corporation in this matter that the insurance proceeds were fraudulently obtained and the claim regarding the burglary constituted fraud, then the attorney must advise the client of the attorney's obligation to reveal such information to the court if the client does not first so advise the tribunal. However, absent the client/corporate officer acknowledging that a fraud has been perpetrated upon a tribunal by himself or other officers, it would be improper for the attorney to reveal a client's confidences or secrets. (See DR:4-101(A), (C) and LE Op. 1270 and LE Op. 1272)

Committee Opinion
June 28, 1990

Attorney's Duty Towards Insurance Company or its Attorneys.

If a corporate officer has acknowledged that the insurance claim was fraudulent, it would be permissible for the attorney to reveal the fraud to the insurance company's attorneys. (See DR:4-101(C)(3))

Privileged Nature of Communications Regarding the Burglary Between Attorney and Client/Corporate Officers.

You have asked whether communications solely between the Attorney and the individual officers are "privileged." Whether a communication between a lawyer and a client is covered by the attorney-client privilege is a legal question for a court and is, therefore, beyond the purview of the Committee to decide.

Ethical or Legal Action the Attorney is Required to Take.

The Committee believes that, depending on whether the client has admitted to the attorney that a fraud has been perpetrated, the attorney's ethical duties to the court and third parties have been adequately addressed in the foregoing sections of the opinion. As stated before, the Attorney's legal duties are beyond the purview of the Committee.

Obligation of Attorney to Withdraw from Representation of Subsidiary A, Corporation and Individual Corporate Officers.

The appropriate and controlling Disciplinary Rule relative to this issue is DR:7-101(A)(2) which provides that a lawyer shall not intentionally fail to carry out a contract of employment entered into with a client for professional services, but may withdraw as permitted under DR:2-108, DR: 5-102, and DR:5-105.

Disciplinary Rules 2-108(A)(1) and (B)(2) provide respectively that a lawyer shall withdraw from representing a client if continuing the representation will result in a course of conduct by the lawyer that is illegal or inconsistent with the Disciplinary Rules, or if the client persists in a course of conduct involving the lawyer's services that the lawyer reasonably believes is illegal or unjust.

Disciplinary Rules 5-105(C) [DR:5-105] and (D) provide that a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents after full disclosure of the possible effect of such representation on the exercise of the lawyer's independent professional judgment on behalf of each. Furthermore, a lawyer shall not represent another person in the same or substantially related matter if the interest of that person is adverse in any material respect to the interest of a former client unless the former client consents.

Under the specific facts of the inquiry, the Committee is of the view that Attorney should re-evaluate periodically whether he may continue to represent the subsidiary and simultaneously carry out his duties as counsel to Corporation and counsel to the

Committee Opinion

June 28, 1990

individual corporate officers. Furthermore, the Committee believes the Attorney should consider whether it is obvious that the interests of his multiple clients can be adequately represented or whether, in any specific matter, the interests of Subsidiary A are materially adverse to that of Corporation. (See DR:5-105(C) and (D))

Arrest of the Corporate Officers.

You have asked about the relevance of the arrest of corporate officers in connection with the burglary prior to the ultimate disposition of their criminal case. It is the opinion of the Committee that the arrest, conviction, or acquittal of these people (or for that matter the Corporation itself) would not be relevant to the attorney's ethical duty because, as stated above, the only way to "clearly establish" the fraud is by the acknowledgment of the client.

Committee Opinion

June 28, 1990