

The following is a summary of the pertinent facts as stated in your inquiry upon which the Committee will base its opinion. An attorney represents a firm/client which exports materials overseas under United States government programs which require that the exported materials be made in this country. In 1984, client exported certain materials overseas which were subsequently returned in 1987, and initially held by United States Customs for payment of duties imposed on items of foreign origin. You indicate that the client advised the customs service that the items were American-manufactured and, as a result, the duty was thereupon waived.

You have also advised that in late 1989, client contacted attorney to represent him on a penalty imposed by the customs service in the amount of \$10,000 as a result of the shipping agent having failed to file proper forms upon the re-entry of the items into the United States. You indicate that the attorney then advised the shipping agent that it would have to take care of the problem caused by its failure to file the necessary forms. Subsequently, counsel to the shipping agent sought to nullify or reduce the proposed penalty on the grounds that the items were manufactured in the United States which representation had been made by the attorney's client. You also have stated that recently the attorney met with United States government officials regarding potential charges made against the client for allegedly selling foreign-made items as American-made. The attorney learned at that meeting that, according to the government, the items in question, which are the subject of the penalty imposed on his client, were not of American manufacture as the client had represented.

You wish to know whether, under the facts of your inquiry, the attorney is under an obligation to the shipping agent's counsel or the United States customs service to alert them to the recent charges or investigation made by other United States government officials and that the representations made by the client may be incorrect. Secondly, if the client continues to insist that the goods are American-made and, if customs requires a sworn statement by the client stating the same, you ask if the attorney may forward such an affidavit by his client to the shipping agent's counsel without advising them that, according to other government sources, that information is incorrect.

The appropriate and controlling disciplinary rules relative to your inquiry are DR:4-101(C)(3) and DR:4-101(D)(1) and (2). The rules provide that a lawyer may 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. (See DR:4-101(C)(3)) Disciplinary Rule 4-101(D)(1) also provides that a lawyer shall reveal the intention of his client, as stated by his client, to commit a crime and the information necessary to prevent the crime. The attorney will where feasible

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advise his client of possible legal consequences, urge the client not to commit the crime and advise the client that the attorney must reveal such information unless thereupon abandoned. Furthermore, if the crime involves perjury, the attorney must seek to withdraw. Likewise, under DR:4-101(D)(2), an attorney 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 a tribunal. The attorney must first request that his client advise the tribunal of the fraud. The pertinent Rule indicates that information is clearly established when the client acknowledges to the attorney that he has perpetrated a fraud upon a tribunal.

The Committee has previously interpreted the limits of "clearly established," in any Disciplinary Rule in which the term appears, to mean only when the client has acknowledged or stated to his attorney that he/she perpetrated a fraud. (See LE Op. 1347) The Committee believes the application of this definition is necessary to permit consistency since 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))

In addition, the Committee is of the view that an attorney's obligation to preserve the confidences and secrets of his client is paramount to the basic principles on which the attorney-client relationship is established. 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) Furthermore, the responsibility to preserve a client's confidences and secrets survives beyond the termination of the professional relationship or the demise of a client. (See EC:4-6, LE Op. 1207, LE Op. 1307)

The Committee opines that, absent an actual statement or acknowledgment by the client that the goods (which are the subject of the penalty imposed by the United States Customs Service, as well as the subject of an investigation by U.S. government officials) are not of American manufacture, an attorney may not assume that any criminal charges brought against his client contrary to his client's statement present a clear indication of fraudulent activity on the part of his client. Therefore, it would be improper for the attorney to alert either the shipping agent's counsel or the customs service of the potential charges against his client for allegedly selling foreign-made items as American manufactured. Likewise, if the attorney knows, by statements made by the client, that his client will commit perjury by executing a sworn affidavit that the items in question are American-manufactured, the attorney must advise his client of the legal consequences of such action and advise him that unless thereupon abandoned, he will have to reveal the client's criminal intention to the appropriate tribunal to which it is directed. In addition, the attorney would have to seek to withdraw from the representation. (See DR:4-01(D)(1) and DR:7-102(A)(3) through (8))