Committee Opinion
October 19, 1992

LEGAL ETHICS OPINION 1482   CONFIDENCES AND SECRETS: LAWYER SERVING AS ESCROW AGENT FOR COMPUTER SOFTWARE CLIENT.

You have presented a hypothetical situation in which Lawyer represents Client, a small company that develops custom software. Bigco hires Client at a substantial fee to modify software owned by Client to meet Bigco's specific needs. The software will be licensed to Bigco only in machine-readable "object code" format. Concerned over Client's financial stability, Bigco demands immediate access to the human-readable "source code" which would be necessary to maintain the software if Client ever goes out of business. Client refuses to divulge its source code because it contains valuable trade secrets. Bigco then proposes that Client place the source code with a third party escrow agent who will safeguard and release the source code to Bigco if Client ever goes out of business. Client agrees on the condition that Lawyer is appointed as the escrow agent.

You have asked the Committee to opine whether, under the facts of the inquiry, Lawyer may accept appointment by both parties as Technology Escrow Agent and also continue to represent Client.

In the facts you provide, the Committee is of the opinion that appointment as escrow agent and representation of Client is not per se violative of the Code of Professional Responsibility since the role of escrow agent does not rise to the level of an attorney/client relationship. Therefore, Lawyer will not be representing multiple clients. However, since there are potential future conflicts between Client and Bigco as to the material bei ng held in escrow, the Committee is of the view that full disclosure as to Lawyer's continued representation of Client and continued service as escrow agent must be made as to the resulting impact on the parties should such a conflict arise. The Committee is of the further view that, should the potential conflicts mature into actual adverse interests, it would then become necessary for Lawyer to withdraw either as escrow agent or as counsel to Client. In the latter circumstance, it would obviously be necessary for Client to obtain separate counsel for the issues giving rise to a conflict. See LE Op. 332.

The Committee cautions also that the situation wherein Lawyer serves as escrow agent for the source code containing valuable trade secrets of client may cause additional ethical improprieties as to the preservation of Client confidences and secrets. DR:4-101 defines "confidence" as relating to information protected by the attorney-client privilege and "secret" as other information gained in the professional relationship that the Client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the Client. The question of whether or not the trade secrets contained in the source code are to be considered confidences or secrets, then, is a question of law.

If, however, the source code is determined to be a confidence or secret of Client, Lawyer may not reveal the code unless the Client consents or until a court orders

disclosure. See DRs 4-101(C)(1) and (2). Since, however, the escrow agreement specifically provides that the source code will be released to Bigco in the event of Client's dissolution, the Committee is of the opinion that, under those limited circumstances, it would not be violative of DR:4-101(C)(1) for Lawyer to reveal Client's source code to Bigco.