

Committee Opinion
June 13, 2003

LEGAL ETHICS OPINION 1777

ATTORNEY-CLIENT PRIVILEGE – IS
CONVERSATION PROTECTED WHERE
ATTORNEY DISCOVERS CLIENT’S MISTAKE
IN A BANKRUPTCY FILING.

I am writing in response to your letter dated November 25, 2002, requesting an informal advisory opinion from the Virginia State Bar Standing Committee on Legal Ethics (“committee”).

You have presented a hypothetical situation involving an attorney representing a debtor in bankruptcy proceedings. An order was entered discharging the client’s debts. The lawyer closed his file and terminated his relationship with this client at that time. The Bankruptcy Code requires a debtor to disclose acquisition of property occurring within 180 days of filing the bankruptcy petition. The client inherited valuable real estate 167 days after the filing of his petition. The inheritance occurred after the discharge date, but nevertheless within the 180 day disclosure period. The acquisition was not disclosed to the court or to the attorney. Over a year later, the court entered a final order closing the proceeding. A few weeks later, the attorney was informed by a third party of the real estate inheritance the prior year. The attorney called his former client and asked if he wanted to disclose the real estate ownership to the court; he did not. The attorney explained the risk of being charged with and convicted of bankruptcy fraud. This did not persuade the client to make the disclosure. The attorney asked the client whether he understood at the time he inherited the property his duty to disclose it to the court. The client said he did not definitely remember when he first learned of that duty, but that it may not have been until this most recent call from the attorney, well after the close of the 180 day disclosure period.

Your request asks whether the attorney should inform the Bankruptcy Court of the inheritance or must he keep this client information confidential.

The pertinent provisions in the Rules of Professional Conduct applicable to this situation are Rules 1.6 and 3.3(a)(4). Rule 1.6 establishes the basic parameters of an attorney’s duty to maintain the confidentiality of client information. Rule 3.3(a)(4) directs that an attorney may not, “offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.”

This hypothetical situation should be distinguished from a straightforward instance of client fraud. Rule 3.3(a)(2) prohibits an attorney from knowingly failing “to disclose a fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client, subject to Rule 1.6.” Rule 1.6 (c)(2) directs an attorney to disclose information “which clearly establishes that the client has, in the course of the representation, perpetrated fraud related to the subject matter of the representation upon a tribunal.” That provision further clarifies that information clearly establishes fraud when “the client acknowledges to the attorney that the client has perpetrated a fraud.”

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That is not the situation outlined in your hypothetical. The crux of the conundrum raised in your request is that the client in fact does not admit he knowingly failed to disclose the real estate. Thus, regardless of what hunch or assumption this attorney may have or wish to make, the attorney does not have information clearly establishing client fraud on the court. Therefore, this attorney must treat this failure to disclose as a client mistake. What is the attorney's duty when faced with information provided to a court that turns out to be false?

This attorney, in considering the repercussions of the former client's failure to disclose his change assets, is faced with competing duties: that of protecting client confidentiality and that of assuring candor to the court. The tension between those duties, established by Rules 1.6 and 3.3 respectively, is addressed in Comment 5 to Rule 3.3:

When false evidence is offered by the client, however, a conflict may arise between the lawyer's duty to keep the client's revelations confidential and the duty of candor to the court. Upon ascertaining that material evidence is false the lawyer should seek to persuade the client that the evidence should not be offered or, if it has been offered, that its false character should immediately be disclosed. If the persuasion is ineffective, the lawyer must take reasonable remedial measures.

If the failure to disclose had occurred during the course of the attorney/client relationship, then this attorney would need to pursue that duty analysis. However, this attorney closed his file upon the discharge of the client's bankruptcy. At that point, the attorney/client relationship terminated, transforming the current client into a former client. Subsequent to the conclusion of that relationship, the former client learned of his inheritance and failed to inform the court of the new property. Also, subsequent to the end of the relationship, the attorney learned of the inheritance and lack of disclosure. At both moments, that of the inheritance and that of the attorney's discovery of it, the client was a former, not a current, client. Accordingly, Rule 3.3's duty to disclose false evidence is not triggered. This attorney has no duty to disclose this new information regarding his former client to the court.

Not only is this attorney not required to make that disclosure, he is prohibited from doing so. This attorney only knows about this individual's bankruptcy matter and the significance of this inheritance because of confidential information learned as a result of the attorney/client relationship. The attorney's duty of confidentiality survives the termination of that relationship. See, LEOs 1207, 1305, 1307, 1347, 1407, 1613, 1643, and 1664. Neither Rule 1.6 nor Rule 3.3 provide an exception for that duty for mistakes made by former clients after termination of the attorney/client relationship, even where the mistake relates to the subject matter of the prior representation. Only consent from this former client would permit the disclosure. This attorney has already learned from his former client that he does not want the information disclosed. In such an instance, the duty of confidentiality prevails over a duty of candor to the court. This attorney is neither required nor permitted to reveal the information regarding the failure to disclose the inherited property to the court.

This opinion is advisory only, based only on the facts you presented and not binding on any court or tribunal.