

Advisory Opinion 1985-6

DISTRICT I SUBGROUP

SUMMARY OF SUBGROUP OPINION

A lawyer has no obligation to report the attempted fraud of a former client to the district attorney when the intended victim of the fraud has learned of the attempted fraud. The lawyer may not cooperate with the intended victim in prosecuting the former client, since doing so would entail disclosing secrets of the former client.

A. FACTS SET FORTH IN THE REQUEST FOR ADVISORY OPINION

1. The law firm which requests the advisory opinion accepted representation of a client seeking damages for a tooth he claimed to have chipped when biting into a candy bar.
2. The attorneys requested that the client obtain a narrative regarding the incident from his dentist and provided the client with a list of items the dentist should include in the report. The client stated that the dentist was a friend of his.
3. The client returned with a narrative signed by the dentist, which the attorneys sent to the insurance carrier with a settlement demand.
4. The insurance adjuster reported that he had checked with the dentist and that the report was a fraud. The attorneys confirmed with the dentist that the report had been obtained under false pretenses and that it had probably been altered after the dentist signed it.
5. The representation has been terminated.

B. ADVISORY OPINION REQUESTED

1. Whether or not the law firm has any obligation to report the attempted insurance fraud to the district attorney.
2. To what extent the law firm may cooperate with the insurance company if the company decides to prosecute the client.

C. OPINION

1. Under the stated circumstances, the law firm has no obligation to report the attempted fraud to the district attorney.

DISCUSSION

Disciplinary Rule 4-101(C) (Preservation of Confidences and Secrets of a Client) provides that:

(C) A lawyer may reveal:

(1) . . . ;

(2) confidences or secrets when permitted under disciplinary rules or required by law or court order;

(3) the intention of his client to commit a crime and the information necessary to prevent the crime; . . . ;

Assuming for purposes of this part of the opinion that the information about the client's attempted fraud on the insurance company is a "confidence" or a "secret" as defined in DR 4-101(A), the attorneys would be allowed by DR 4-101(C)(2) to reveal the confidence or secret if a disciplinary rule required them to do so. DR 7-102(B)(1) states:

(B) A lawyer who receives information clearly establishing that:

- (1) his client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses to do so or is unable to do so, he shall reveal the fraud to the affected person or tribunal;.....

The attempted fraud in this instance occurred during the course of the firm's representation of the client, as required by DR 7-102(B)(1). The rule, however, provides that the client must have "perpetrated" a fraud. Here, the client attempted a fraud, but did not succeed in "perpetrating" it because his scheme was discovered before anyone suffered any loss or harm. In addition, the rule provides that the fraud is to be revealed by the attorney (if the client will not do so) to "the affected person or tribunal." The insurance company, the intended victim of the fraud, would have been the "affected person" in this fact situation; but the insurance company was the discoverer of the attempted fraud, so there is no obligation to report the incident to anyone. A report to law enforcement authorities might be necessary in some cases under DR 4-101(C)(3) in order to prevent commission of a crime, but this is not such a case.

Under the Model Rules of Professional Conduct, the attorneys are even more clearly prohibited from reporting the attempted fraud. Rule 4.1 requires,

In the course of representing a client, a lawyer shall not knowingly:

- (a).....

- (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, *unless disclosure is prohibited by Rule 1.6.* (Emphasis added.)

Rule 1.6, in turn, provided in pertinent part:

- (a) A lawyer shall not reveal information relating to representation of a client..... except as stated in paragraph (b).

- (b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary;

- (1) to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm;.....

Under the Model Rules, all "information relating to representation of a client" must be kept confidential, not only "confidences" and "secrets"; and the exception allowing disclosure is only for serious crimes against the person, not for fraud. No disclosure of the client's acts is allowed by the Model Rules in the case under discussion.

The thrust of both the Code of Professional Responsibility now in effect in New Mexico and the proposed Model Rules is to limit disclosure of a client's confidences or secrets to situations where the disclosure could prevent certain defined illegal acts. In this case, disclosure would not further the aim of preventing a specific fraud or crime. Since the insurance company is aware of the attempted fraud, there is no likelihood that the fraud will be carried out.

2. The law firm may not cooperate with the insurance company if the company decides to prosecute the case.

DISCUSSION

If the attorneys, knowledge of the former client's attempted fraud constitutes a "confidence" or a "secret," then the general rule stated by the ABA Committee on Ethics and Professional Responsibility is applicable:

Clearly, it is the duty of a lawyer not to divulge confidential communications, information and secrets imparted to him by his client or acquired by the lawyer during their professional relations, and such duty continues after the relation of a lawyer and client has ceased..... DR 4-101 embodies this precept and sets forth the limited exceptions . . . ABA Informal opinion 1301, March 25, 1975.

The Comment to Model Rule 1.6 states succinctly, "the duty of confidentiality continues after the lawyer-client relationship has terminated."

The necessary relationship of confidentiality between attorneys and clients would be shattered if a client knew that his attorney was free to divulge information about him as soon as the attorney ceased to represent him. The question here is whether the information obtained by the attorneys who requested this opinion is of the type that DR 4-101 requires attorneys to keep confidential.

Disciplinary Rule 4-101(A) states:

(A) "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested to be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

What constitutes a "confidence" is a question of law and therefore, strictly speaking, outside the province of this Committee. A mere glance at Rule 503 of the New Mexico Rules of Evidence, however, should make it clear that the information obtained by the attorneys concerning the client's attempted fraud is not protected by the attorney-client privilege and does not constitute a "confidence" under DR 4-101(A), however, since its disclosure would be both embarrassing and potentially detrimental to the former client. DR 4-101(B) prohibits attorneys from revealing confidences or secrets of their clients and from using a confidence or secret of the client to the disadvantage of the client. The law firm is, therefore, prohibited from cooperating with the insurance company in a prosecution of the law firm's former client.

One exception to the prohibition on disclosure of the former client's secrets might become applicable in this case. The law firm expressed concern that "the client standing accused, might attempt to implicate us so as to receive some favorable treatment." This concern alone would not justify revealing the former client's secrets, but if the former client actually accused the law firm of wrongdoing, the law firm could avail itself of the final exception to the prohibition on disclosing a client's secrets, as stated in DR 4-101(C):

(C) A lawyer may reveal:

(4) confidences or secrets necessary . . . to defend himself or his employees or associates against an accusation of wrongful conduct.

Model Rule 1.6(b)(2) would also allow disclosure if the client actually brings a legal claim or disciplinary charge against the attorneys, and the Comment to Rule 1.6 indicates that "[t]he same is true with respect to a claim involving the conduct or representation of a former client."